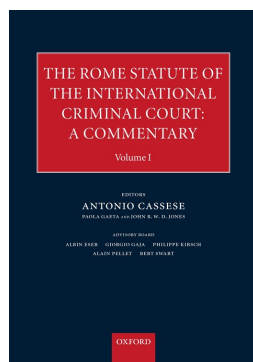


Annex A

Public



The Rome Statute of the International Criminal Court: A Commentary

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<https://doi.org/10.1093/law/9780198298625.001.0001>

Published: 25 July 2002

Online ISBN: 9780191773280

Print ISBN: 9780198298625

CHAPTER

23 Mental Elements—Mistake of Fact and Mistake of Law

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<https://doi.org/10.1093/law/9780199243129.003.0041>

Published: July 2002

Keywords: [International Law Commission](#), [International Criminal Court](#), [International Criminal Tribunal for Rwanda](#), [International Criminal Tribunal for the Former Yugoslavia](#), [Mens rea](#), [International criminal law](#), [victims](#), [Individual criminal responsibility](#), [War crimes](#), [Armed conflict](#), [international](#)

Subject: [Criminal Procedure](#), [Law of Treaties](#), [Human Rights](#), [International Humanitarian Law](#)

Collection: [Oxford Law Pro](#), [Oxford Scholarly Authorities on International Law](#)

I . Introduction: Progress on Misconceived Propositions

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

On the one hand, it cannot be stressed enough that the Rome Statute explicitly proclaims basic postulates of culpability by requiring a certain state of mind and also by recognizing that responsibility may be excluded by certain misperceptions of the perpetrator. Thus, the Rome Statute not only removes itself from older notions of 'result liability' which punished the wrongful deed without consideration of the actor's mind, but it also dissociates itself from notions of 'strict liability', as they are still practised in certain areas of common law. So perhaps for the first time in international legislation, the Rome Statute proclaims a principle which, if not necessarily traceable back to Roman law, was basically developed in the canon law and was finally expressed in the Latin maxim: *actus non facit reum nisi mens rea*.² This progress towards a conception of crime in which culpability is an essential element, is particularly remarkable considering that the *mens rea* principle used to be limited to the requirement of an intentional (or at least negligent) act which may be excluded by a mistake of fact, but not by a mistake of law, as is still the position in certain national penal codes.³ By now admitting mistake of law, though still under narrow conditions, as a ground for excluding criminal responsibility, Article 32(2) of the ICC Statute heralds a breakthrough to a more comprehensive understanding of culpability which doesn't fully equate to the psychological-mental elements of intent or knowledge but also requires some sort of normative blameworthiness. On these terms, the combined message of Articles 30 and 32 may be understood as laying the foundations for culpability as an independent subjective requirement of criminal responsibility in addition to the objective wrongdoing by the wilful act.

On the other hand, however, it cannot be overlooked that Articles 30 and 32 are, to say the least, not the best way of embedding essential issues into law. This is neither the place to question political shortcomings in the scope of certain requirements nor the place for denouncing the Statute's obvious disregard of certain conceptions to be dealt with later. What is at issue here are rather the inherent inconsistencies and presumably more or less unconscious implications and exclusions which make these two articles partially meaningless or, even worse, partially counterproductive. If, for instance, according to Article 32(1) a mistake of fact shall exclude criminal responsibility (only) 'if it negates the mental element', this paragraph simply repeats what is already stated in Article 30 (1) by requiring a certain mental element. Instead of this repetition which seems to have been acceptable to the Preparatory Committee as a mere clarification of a generally accepted principle,⁴ it would have been much more interesting to have clarified under which conditions a mistake of fact may negate the mental element. Even worse, as a mistake of fact shall be a ground for excluding criminal responsibility 'only' if it negates the mental element, an error on facts seems to be irrelevant if, instead of a 'material' element in terms of the definitional elements of the crime (such as the nature of the act or the harm caused to a certain victim), it merely concerns a ground of justification or excuse as in the case that the perpetrator mistakenly believes himself attacked by the victim and thus shoots in the subjective state of self-defence. Whereas quite a few national laws would simply not regulate this case of a mistaken assumption of a justifying situation and, thus, would leave room for excluding criminal responsibility by analogy to a mistake of fact, the drafters of the Rome Statute, perhaps not aware of this configuration—and perhaps due to a 'mistake' of their own—barred the exclusion of responsibility.⁵ Or just to give another example of an ill-conceived proposition, the limitation of mistake of law as a merely optional ground for excluding criminal responsibility to the case that it 'negates the mental element' (Article 32(2) sentence 2), is again, repetitious as it was with mistake of fact; even more so it is inconsistent with Article 30(1) which, in requiring the mental element, would be frustrated if, according to the optional clause of Article 32(2) sentence (2) an exclusion of responsibility might not be granted although the mistake of law negated the mental element. Or 'mental element' must be construed with regard to mistake of law in broader terms than merely comprising the 'material' elements of the crime, as proposed in Article 30(1); then, however, the regulation of both the 'mental element' and the various 'mistakes' lose their contours.

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

II . Development prior to the Rome Statute

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

A . Taking Notice of mens rea

Keeping in mind that it took quite some time to get general elements of responsibility for international crimes explicitly recognized at all,⁸ it is no wonder that the pronouncement of general rules for the mental element of the crime and its eventual negation by an error took even longer. So with regard to ‘official’ documents by international organs or inter-governmental commissions, it took until the *Report of the Preparatory Committee’s* 51st Session of 1996 to come out with general rules on ‘*Mens rea* Mental Elements of Crime’ (article K) and on ‘Mistake of Fact [or law]’ (article K)⁹ (the contents thereof will be dealt with later).

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

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

B . Propositions of the Mental Element

A second observation concerns the concept of *mens rea* which, though not explicitly mentioned in either the IMT Charter of Nuremberg nor in other conventions on international crimes, may be required by the very nature of the crimes concerned. Thus, when Article 6(a) of the IMT Charter speaks of planning or preparing crimes against peace, such acts can hardly be committed other than intentionally, as is true with regard to the 'taking of hostages' according to the Geneva Conventions of 1949¹² or with 'systematically oppressing' according to the Apartheid Convention of 1973.¹³ Other documents were more outspoken by explicitly requiring a certain state of mind for certain crimes. This is the case with the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind of 1954 requiring for genocidal acts the 'intent to destroy' in whole or in part a protected group or that 'inflictions on the group conditions of life' must be carried out 'deliberately'.¹⁴ In a more general form, the Protocol I to the Geneva Conventions of 1977 requires grave breaches of this Protocol to have been committed 'wilfully'.¹⁵ The ILC Draft Code of 1991 merely enlarges the catalogue of provisions requiring a certain state of mind such as, in addition to those already contained in the Draft of 1954, 'wilful' attacks on property of exceptional value and 'wilful' damage to the environment.¹⁶ The same line of merely specifying a certain state of mind was followed by the ICTY and ICTR Statutes by requiring for grave breaches of the Geneva Conventions that killing, causing great suffering, and depriving a prisoner of war of the rights of fair trial be committed 'wilfully',¹⁷ whereas this intent was not explicitly required for genocidal acts¹⁸ while, again differently, destruction of cities not justified by military necessity was a war crime even if only done 'wantonly'.¹⁹ Though it might be true that these provisions had been drafted under the silent proposition that 'guilty intent is a condition for the crime' and whilst it might in the end be merely a question of procedure whether this intent is assumed or must be proven individually,²⁰ two shortcomings cannot be overlooked: firstly that the subjective requirement of a certain state of mind if not explicitly provided for,²¹ appears underestimated and eventually even neglected in practice. Secondly, the sporadic manner of requiring 'wilful', 'deliberate' or even merely 'wanton' commission of one type of crime but not of others, may lead to the reverse conclusion that for certain crimes no special state of mind is required for even mere negligence may suffice. It was felt that the only way to overcome these uncertainties was to come up with a general rule for the mental element. After the *Ad Hoc* Committee on the Establishment of an International Criminal Court in 1995 appeared amenable to this suggestion²² and a non-governmental committee of experts, convening in Siracusa in 1995,²³ supported the need for express regulation,²⁴ the Freiburg Draft of 1996, prepared by a working group of the aforementioned Siracusa Committee, in a general rule on *mens rea*, made two fundamental proposals: first, that 'criminal responsibility [for international crimes] cannot be based on strict liability', and secondly, that 'unless provided for otherwise, [international crimes] are punishable only if committed intentionally'.²⁵ Whereas the principal denouncement of 'strict liability' was seen as perhaps too challenging to common law tradition, and was therefore not integrated into the Updated Siracusa Draft, 'knowledge' was incorporated as a possible alternative to 'intent'.²⁶ Although this alternation between intent and knowledge, as will be shown later, appears conceptually disputable, the efforts to draft general mental requirements proved successful at least insofar as the ILC Draft Code of 1996 required the perpetration of relevant crimes to be committed 'intentionally';²⁷ again oddly, however, aiding and abetting were to be carried out (merely) 'knowingly',²⁸ whereas with regard to the various other forms of complicity the Draft Code remained silent. At any rate, from then on, despite occasional variations, all further inter-governmental drafts by the Preparatory Committee and its working groups contained a general regulation for the mental element(s) of crime, starting with the Report of the Preparatory Committee of 1996²⁹ and ending with the Draft Statute and Draft Final Act of 1998.³⁰

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

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

Although this indecisiveness of the ILC on essential issue was sharply criticized by academics,³⁶ the ILC in its Draft Code of 1996 upheld its position of leaving it to the Court whether to admit a defence, including mistake, or not.³⁷ In the meantime the ICTY and ICTR Statutes of 1993/1994 were even more reluctant, completely refraining from any general clause on defences or other extenuating circumstances, thus, leaving it up to the Tribunals whether to pay attention to defences of mistake, as it might have done in the *Erdemović* case.³⁸ At any rate, it had again taken the impetus of non-governmental initiatives to put the problems of mistake of fact and law onto the legislative table. After the Siracusa Draft of 1995 had identified mistake of fact and mistake of law as issues to be regulated,³⁹ the Freiburg Draft of 1996, by clearly distinguishing between factual and legal errors as well as requiring reasonable belief in not acting unlawfully, provided two rules by which not only mistakes with regard to the definitional elements of the crime and its prohibition but also mistakes with regard to justifying circumstances and provisions would have been covered.⁴⁰ Although the Updated Siracusa Draft appears to preserve the same pattern by literally adopting paragraph 2 on mistake of law from the Freiburg Draft, it deviates significantly by starting its paragraph 2 with an equation of mistake of law and fact by equally requiring that the mistake 'negates the mental element' and by degrading the reasonable belief of the perpetrator to a mere proviso.⁴¹

Whereas the *ad hoc* Committee in 1995 had not yet taken explicit notice of mistake of fact or mistake of law,⁴² the non-governmental demands for regulations on mistake of fact or mistake of law seem to have exerted sufficient influence to have this issue taken up officially and not to see it dropped any longer. Still, however, wide-ranging differences in proposals (as evidenced in the compilation by the Preparatory Committee of 1996,⁴³) led to basically two opposing approaches in further discussions: whereas a more general option would recognize both mistake of fact or of law as a defence 'if not inconsistent with the nature of the alleged crime' and even if avoidable would still leave room for mitigation of punishment, the other option would accept mistake of fact only 'if it negates the mental element' and would reject mistake of law in principle.⁴⁴

When looking back from the final result in the Rome Statute's Article 32, the latter, stronger option was obviously victorious by precluding mistake of law as far as possible and, in addition, by equating mistake of fact or mistake of law in requiring the negation of the mental element, as proposed in the Updated Siracusa Draft.⁴⁵

Whereas the first decision on a narrow scope of mistake of law is political in nature and, thus, the politicians are responsible for it, the equation issue is of a more doctrinal nature and thus open for conceptual criticism. At any rate, however, when keeping in mind that, even in its final draft of April 1998, the Preparatory Committee felt urged to note that there were still widely divergent views on this article,⁴⁶ we cannot but wonder that a consensus was reached at all.

III . Variety of Mental States in the Rome Statute

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

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

On the one hand, the requirements of mens rea can remain below the threshold of intent. Since, for instance, according to Article 28(1)(a) of the ICC Statute a commander is deemed responsible not only if he knew but also if he ‘should have known’ that a subordinate was committing or about to commit a relevant crime, his responsibility may be based on mere negligence rather than full intent. In a similar way, the mental level of responsibility is lowered with certain grave breaches of the Geneva Conventions in that it suffices that the extensive destruction and appropriation of property, not justified by military necessity, is carried out merely ‘wantonly’ (Article 8(2)(a)(iv) of the ICC Statute) as ‘wantonness’ comes closer to ‘recklessness’ than to intent.⁴⁸ The same is true of a commander’s responsibility for failure to exercise control properly by ‘consciously disregarding information’ on the subordinates committing a crime.⁴⁹ Still less strong than intent, another variation can consist of the combination of partially higher, partially lower mental requirements as in the case of crimes against humanity which require a certain criminal act, such as murder, enslavement, torture or rape, which each on its own part must be part of a widespread or systematic attack directed at any civilian population: whereas the core crime (as murder, etc.) must be committed ‘with intent and knowledge’ according to the general requirements of Article 30(1) of the ICC Statute, with regard to it possibly being involved with a widespread or systematic attack it suffices that the perpetrator has ‘knowledge of the attack’ (Article 7(1) of the ICC Statute).

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

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

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

C . Specific Intent

Some provisions are characterized by their requiring that the crime be committed with a certain aim as, for instance, in the case of genocidal acts ‘with intent to destroy a protected group’⁵⁷ or in the case of aiding and abetting ‘for the purpose of facilitating’ the commission of the main crime.⁵⁸ In these cases, the general ‘intent and knowledge’ of Article 30(1) of the ICC Statute must be accompanied by a special intent (*dolus specialis*). This combination of a ‘general intent’ (with regard to the basic act and its regular consequences and circumstances) and a ‘specific intent’ (with regard to an additional aim)⁵⁹ is clearly exemplified in the case of complicity in group crimes in which the relevant contribution must be made ‘intentionally’ and, in addition, ‘with the aim of furthering the criminal activity of the group’.⁶⁰ In order to avoid uncertainties, it had been contemplated making mention of both types of intent;⁶¹ the Preparatory Committee, however, deemed it not necessary to explicitly mention both forms of ‘intent’ in the present Article 30 of the ICC Statute as ‘any specific intent should be included as one of the elements of the definition of the crime’.⁶²

On closer inspection, however, it is questionable in some cases whether crime definitions with the explicit element of ‘intentionally’ or ‘with intent’ merely mean ‘intent’ in its general form or in terms of a specific

intent. A clear answer is rarely found solely from the wording as such; more important is therefore the context in which ‘intent’ is required. If it appears to be used in broader terms, it merely determines the general requirements of the mental element. If, however, it is to express a certain purpose or a specific goal of the perpetrator, a specific intent is at stake.⁶³ Although there might be doctrinal differences between both, as evidenced in the rich as well as divergent literature in certain countries,⁶⁴ no fitting formula has been found which could be easily handled. At any rate, one remarkable difference seems to be the following: whereas with special intent particular emphasis is put on the volitional element, thus excluding mere *dolus eventualis*,⁶⁵ general intent is characterized by Article 30 of the ICC Statute as requiring ‘knowledge’ as well, thus strengthening the cognitive element. This means, for instance, in case of aiding and abetting, that, according to Article 25(3)(c) of the ICC Statute, the aider in terms of ‘general intent’ must have knowledge of the main crime to be committed, whereas with regard to the special intent of facilitating the commission of the crime, the aider and abettor must not only know but even wish that his assistance shall have this effect.⁶⁶ In a similar way, it would suffice for the general intent of genocidal killing according to Article 6(a) of the ICC Statute that the perpetrator, though not striving for the death of his victim, would approve of this result whereas his special ‘intent to destroy’ in whole or in part the protected group must want to effect this outcome.⁶⁷

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

A . Underlying Basic Concepts

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

1 . The Exclusion of ‘strict liability’

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

Although a general one, this requirement is not absolute, as it is conditioned by the restriction of ‘unless otherwise provided’. Thus, by leaving the door open for a multiplicity of regulations regarding the mental element, Article 30(1) of the ICC Statute could, at least in theory, allow its complete suspension. Such a return to ‘strict’ liability concepts, meanwhile happily relinquished in most criminal justice systems of the world, is hardly likely to happen in practice though, since the Rome Statute, rather than yield to any sort of strict liability, in the end rejected preliminary proposals for the inclusion of recklessness or mere negligence,⁷⁰ the only exception being the commander’s responsibility for negligently not realizing his forces were committing a crime.⁷¹

As a matter of course, the mental element, whatever it is required for, must not be presumed but proven in each individual case.⁷² Consequently, it appears questionable whether conclusions from the objective commission of a crime to the presence of the relevant mental element can be drawn as easily as suggested by the Preparatory

Commission's Elements in allowing that the 'existence of intent and knowledge can be inferred from relevant facts and circumstances'.⁷³ If at all, such an inference would only be feasible as a procedural device, but not in terms of a substantive substitute for intent.

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

When reading of 'mental element' one could perhaps expect more than mere regulations on intent and knowledge or on the exclusion of recklessness and negligence. For if 'mental element' is understood as '*mens rea*', as it appears from the equivocal usage of 'mental element' and '*mens rea*' in the drafts of the Rome Statute,⁷⁴ and if the Latin phrase of '*mens rea*' is translated into modern English in terms of 'guilty mind', as commonly done,⁷⁵ criminal guilt for an international crime seems to be either synonymous with intent and knowledge, and thus restricted to a purely psychological fact, or guilt may also have a broader meaning by requiring, beyond mere intention and knowledge, some sort of normative culpability or blameworthiness which may be lacking even if the perpetrator, as in the case of mental disease or duress (Article 31(1)(a) and (c) of the ICC Statute), is aware that he is killing a human being and does it nevertheless. This broader concept is represented in several recently reformed penal codes, such as those of Austria and Germany, which expressly speak of '*Schuld*' (guilt) in terms of culpability or blameworthiness as distinct from intent and negligence,⁷⁶ and thus, in fact, recognize normative elements such as blameworthiness as well as psychological mental elements such as intention and negligence, and both together under the common umbrella of subjective elements. Contrary to this, the Rome Statute appears to adhere to a narrower psychological concept of the mental element (intent and knowledge according to Article 30 of the ICC Statute) while the defendant's incapacity to appreciate the unlawfulness of the conduct or his acting under duress are described less specifically as 'grounds for excluding criminal responsibility' (Article 31 of the ICC Statute). This more psychological approach rather than a normative reproach may also explain why mistake of law shall exclude criminal responsibility only if it negates the 'mental element' (Article 32(2) of the ICC Statute), whereas in the case of the perpetrator's ignorance of the prohibition German law, better reflecting reality and leaving the mental intention of the act untouched, would merely deny his '*Schuld*' (in terms of blameworthiness), provided that his mistake of law was unavoidable.⁷⁷ Therefore the Rome Statute can hardly be accredited a full comprehension of blameworthiness, as occasionally assumed.⁷⁸ In the Rome Statute's favour, however, it must be conceded that quite a few national penal codes barely older than the Rome Statute, such as those of France and Spain, neither speak specifically of 'mental element' nor distinguish the lack of blameworthiness from other grounds for excluding responsibility.⁷⁹ Nevertheless, the criminal law doctrines of these countries did not prevent them from developing normative concepts in terms of the French '*élément moral*' or the Spanish personal '*culpabilidad*'.⁸⁰ There is no reason why a similar development of a more comprehensive concept of the mental elements and blameworthiness should not be possible on the basis of the Rome Statute as well.

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

At first glance, Article 30 of the ICC Statute appears quite clear when, first, requiring ‘intent and knowledge’ with regard to the material elements of the crime (paragraph 1) and, second, by defining ‘intent’ (paragraph 2) and ‘knowledge’ (paragraph 3). On closer inspection, however, it appears puzzling that the elements of intent and knowledge, although through the use of the word ‘and’ they are required together conjunctively (paragraph 1), they are not equally related to the same points of reference: whereas ‘intent’ is related to conduct (paragraph 2(a)) and its consequences (paragraph 2(b)) and in the latter case even reduced to mere awareness of the consequences, ‘knowledge’ is related to the existence of certain circumstances or consequences occurring in the ordinary course of events (paragraph 3). The uncertainty is increased when you realize that prior to the February 1997 session of the Preparatory Committee there had been some debate as to whether the two terms in question should be disjunctive using the word ‘or’ rather than conjunctive as in the final draft.⁸¹ However, if the conjunctive version was chosen on the theory that one cannot act ‘intentionally’ without having the ‘knowledge of the relevant surrounding circumstances’,⁸² it would not have been necessary to mention knowledge as an element of its own at all as an inherent precondition of intent. At any rate, the conjunctive version is at least better than a disjunctive one would have been as the latter might promote the misinterpretation that an international crime may be punishable either for mere proof of the perpetrator’s intention to act (without necessarily knowing all relevant circumstances) or for the perpetrator’s mere awareness of the circumstances and consequences of a crime (without necessarily intending for them to occur).⁸³

In order to ease the apparent frictions in the structure and wording of Article 30 of the ICC Statute, both an analytical and a linguistic clarification might be helpful. From the psychological-analytical point of view, the mental element is determined by (the presence or absence of) cognitive and volitional components both of which can vary in different degrees.⁸⁴ Only to name five gradations of the mental element most common in national criminal codes and textbooks, its strongest type is characterized by the perpetrator’s full knowledge of all material elements of the crime and by his purposeful will to bring about the prohibited result; in this so-called *dolus directus in the first degree* the volitional element is certainly predominant, as for instance in the case of genocide where the perpetrator plans on killing as many members of the protected ethnic group as possible. This final will to kill is less strong in terms of a *dolus directus in the second degree* when, as in the case of a war crime, the perpetrator aims at destroying a certain building, while not wishing, however certainly knowing that he cannot reach his military aim without inevitably killing innocent civilians. The volitional element becomes even less strong and, thus, the cognitive element gains more weight, in the case of so-called *dolus eventualis*, where in the aforementioned example of a war crime the perpetrator does not wish to kill civilians, but in being aware of this danger is prepared to approve of it if it should happen. Although coming very close to this last gradation, a further one can vary insofar as the perpetrator is aware of the dangerousness of his bombing a building, but is not prepared to hit innocent civilians as well and therefore acts solely due to his relying on the absence of civilians at the scene; within this spectrum of ‘recklessness’ or ‘conscious negligence’, as named in certain jurisdictions, the cognitive element is still present while the volitional element is lacking. One step further takes us to so-called ‘unconscious negligence’, where even the cognitive element is no longer actually present, but is merely hypothetical in that the perpetrator should and could have known of the presence of circumstances and the occurrence of consequences constituting a crime by his conduct.

When in describing these various gradations of the mental element the terms ‘intent’, ‘intention’ and ‘intentionally’ did not appear, this was done on purpose as these terms are burdened with various meanings and their broader and narrower senses may be easily mixed up. This terminological problem seems to be an English phenomenon. Whereas other legal languages, such as Italian and German, can easily comprise the three aforementioned forms of *dolus* as ‘*dolo*’ or ‘*Vorsatz*’, thereby possessing special expressions for their cognitive and volitional elements in terms of ‘*coscienza e volontà*’ or ‘*Wissen und Wollen*’,⁸⁵ in English legal terminology a similar distinction between ‘*dolus*’ as distinct from other mental elements (such as recklessness

and negligence) and their cognitive and volitional components seems not to exist; therefore, the term 'intentional' appears at times in the broader sense of '*dolus*' and in other contexts in the narrower sense of volitional (as distinct from cognitive). Despite the fact that 'intention' and 'purpose' are commonly used synonymously,⁸⁶ however, if it is true that 'intention' is the general word, while 'intent' is directed at a certain result and 'purpose' expressing a certain determination,⁸⁷ 'intention' could stand for *dolus*, whereas 'intent' could express its volitional component.⁸⁸

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

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

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

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

Fourth, whatever else the material elements may be,⁹⁰ according to paragraph 2, the reference points of *intent* are only the *conduct* and the *consequence(s)* thereof. But even between these two material elements a remarkable difference must be mentioned: whereas the relation to conduct must be truly volitional (sub-paragraph (a)), the relation to a consequence (of the conduct) need not in any case be volitional as according to sub-paragraph (b), rather it suffices that the perpetrator is 'aware' that the consequence will occur in the ordinary course of events—thus, even within the intent requirement a clear degradation from volition to mere cognition is to be noticed.⁹¹

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

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

C . The Object of Intention: The ‘material elements’

It seems worth mentioning that the ‘material elements’ as the object of intention came into Article 30(1) of the ICC Statute at the very last moment, another sign of uncertainty about how to define the mental element. While the earlier drafts had continuously spoken of ‘physical elements’⁹² and the late change to ‘material elements’ may appear as nothing more than a matter of synonymy,⁹³ there is at least a difference between the two terms insofar as ‘physical’ would certainly be narrower in connoting some sort of corporeal or at least external objects (such as bodily harm or destruction of property) whereas ‘material’ is open enough to comprise psychological injuries (as breaking the victim’s will) or even legal detriments (as discrimination by apartheid or deprivation of a prisoner of war of a fair trial). On the other hand, however, ‘material’ element might even be understood as open enough to comprise any element connected ‘with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct’. In these terms, as they can be found in the definition of ‘material element of an offense’ in the American Model Penal Code (Section 1.13 (10)), the intention of the perpetrator would have to comprise not only all positive definitional elements of the crime but the absence of justifications or other exclusions of criminal responsibility as well. Thus, provided that ‘material’ is understood in terms of ‘substantive’ as distinct from procedural elements, the only exceptions not to be covered by the intention would be matters of a procedural nature, such as the jurisdiction of the Court or the statute of limitations.⁹⁴ This broad notion of material elements, as it is represented in the German literature by a minority of scholars,⁹⁵ certainly has its merits if one is confronted with a mistake as to a ground of justification; for if the intention must comprehend both the presence of all positive elements of the crime (i.e. the act, its consequences, and attending circumstances) and the absence of facts which might negate the crime (as by a justification), the perpetrator’s mistaken belief of being in a situation of self-defence would exclude his intention and, thus, his criminal responsibility. In this way, as will be seen later, one could indeed quite easily treat the mistaken assumption of a justification, as in the case of putative self-defence; for if the intention also had to comprise the absence of justifying facts, the erroneous assumption of those would ‘negate the mental element’ according to Article 32(2) sentence (2) of the ICC Statute.⁹⁶

Yet, it is very questionable whether this route can in fact be taken. Even if the aforementioned broad notion of ‘material elements’ in the Model Penal Code is a strong argument in this direction, the American Law Institute itself does not adhere to it consistently, as it later on defines the ‘material element’ of offences as ‘those characteristics (conduct, circumstances, result) of the actor’s behaviour that, when combined with the appropriate level of culpability, will constitute the offense’.⁹⁷ As culpability is thereby only mentioned as an additional (albeit necessary) component of responsibility, the ‘material elements’ constituting the offence are conduct, circumstances, and result (in terms of consequences) and, thus, exactly the same three objects of intent and knowledge according to Article 30(2) and (3) of the ICC Statute. So when certain drafters of the Rome Statute considered ‘material’ to be interchangeable with ‘physical’, they apparently had the traditional *actus reus* in mind, as it also obviously underlay the definition of the ‘material element’ in Article IV(2) of the Draft International Criminal Code.⁹⁸ This narrower notion of ‘material element’ also corresponds to the ‘*élément matériel*’ in the French translation of the Rome Statute, as the classical French doctrine would comprehend this element as ‘*manifestation extérieure de la volonté délictueuse*’ (in terms of a prohibited result, such as aggression towards a human person and injuries in the case of homicide or, in the case of theft, the taking away of another’s property),⁹⁹ as distinct from the ‘*élément légal*’ comprising the unlawfulness and the absence of justification.¹⁰⁰ It thus comes as no surprise that the German translation of Article 30(1) of the ICC Statute (drawn up by the Federal Government) speaks of ‘*objektive Tatbestandsmerkmale*’ in terms of comprising the positive definitional elements of the crime while not covering negative grounds for excluding responsibility.¹⁰¹

Continuing in this vein, precluding elements of (constituting or negating) unlawfulness from the concept of the ‘material elements’ and thus from being objects of intention, limits intention to the material elements and leads to the disregard of the prohibition as such and, consequently, to the irrelevance of the perpetrator’s

consciousness of unlawfulness (which meanwhile by many jurisdictions is deemed a necessary requirement of culpability). This logic could provide another explanation why the common law tradition with its narrow restriction of intent to the ‘material’ (in terms of physical-factual) elements of the crime definition has such difficulties in incorporating mistake of law into a comprehensive concept of an unlawful and culpable act.¹⁰²

D . Reference Points of ‘intent’: Conduct—Consequences

1 . The Distinction between Conduct, Consequences, and Circumstances

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

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

Different again are two other types of provisions. One is characterized by merely proscribing a certain result without specifying the action bringing it about, as in the case of ‘causing serious bodily or mental harm to members of the group’.¹¹⁰ The other type is composed of both a specific action and a special result, as in the case of ‘other inhumane acts of a similar character intentionally causing great suffering’.¹¹¹

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

2 . Intent in Relation to ‘conduct’

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

First, speaking of ‘conduct’ seems to ‘constitute either an act or an omission, or a combination thereof’, as proposed in the 1997 Session of the Preparatory Committee¹¹² and finally submitted to the Rome Conference.¹¹³ As the Conference was not able to reach agreement on the circumstances in which a person could be held criminally responsible for an omission, the aforementioned definition of conduct was deleted with the understanding that the question of when omissions might constitute or be equivalent to (positive) conduct should be resolved by the Court.¹¹⁴ Thus, the term conduct in this article on the mental element seems to be a forgotten remnant which would have to be understood as a positive act which is to be intended by the perpetrator. With this interpretation, however, any cases of omission would not be covered by Article 30 but

would rather need special regulation according to the opening words of paragraph 1 ('unless otherwise provided').¹¹⁵ Yet, this interpretation is neither cogent nor recommendable since the Rome Statute does indeed contain instances of responsibility for omissions, as in the case of 'intentionally using starvation of civilians as a method of warfare'¹¹⁶ or of a commander 'failing to take all necessary and reasonable measures' to prevent his subordinates from committing a crime.¹¹⁷ Even if in the first instance intent is required explicitly, its content has to be determined according to Article 30(2)(a) of the ICC Statute in that, in the case of omitting duties, the perpetrator must 'mean to engage in the omission'.

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

3 . Intent in Relation to a 'consequence'

According to Article 30(2)(b) of the ICC Statute, this relation can exist in two ways: first, in that the perpetrator 'means to cause that consequence'; or secondly, that it suffices that the perpetrator 'is aware that [the consequence] will occur in the ordinary course of events'. Whereas in the preceding subparagraph (a) on conduct little was to be learned with regard to the content and degrees of intent, this subparagraph (b) contributes more in these respects.

- (a) First and foremost, it must be made clear what is meant by the 'consequences' the perpetrator must mean to cause or at least to be aware of. Although this provision is primarily designed for 'result crimes' in the aforementioned sense, and thus, can be treated as referring to the prohibited result (such as the death or the pain of the victim in cases of homicide or torture and their preceding causal chains), this provision can also concern 'conduct crimes' at least insofar as the perpetrator must intend to procure the prohibited effect. So in the case of declaring to give no quarter¹²⁴ this declaration would need to be understood as such by the addressees or, in the case of the employment of poisoned weapons, the perpetrator must intend the poison to be exposed in such a way that it can become effective on humans.¹²⁵ Therefore, in transgressing the borderline between result and conduct crimes, 'consequences' must be understood in the broad sense of all definitional effects which may ensue from the prohibited conduct.
- (b) The next question is that of the degree to which the intent must, more or less purposefully or perhaps merely 'eventually', be orientated towards the relevant consequence. In remembering the main gradations by which the volitional element of intention maybe analysed,¹²⁶ three types of '*dolus*' must be examined with regard to sub-paragraph (b).

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

Secondly, even if the perpetrator does not desire the prohibited consequence to occur, he can still have intent if, according to alternative (2) of Article 30(2)(b) of the ICC Statute, he is 'aware' that the consequence will occur in the ordinary course of events. Whatever may be meant by 'ordinary course of events',¹²⁸ with regard to the awareness thereof this clause is obviously meant to cover *dolus directus in the second degree* in which the volitional component of intention seems to be substituted by the cognitive component in terms of the perpetrators being aware that the action will result in the prohibited consequence (though not desired) with certainty, as in the case of bombing a building inhabited by members of a persecuted ethnical group where some of them will unavoidably be killed, with the further inevitable consequence of destroying parts of this group. If in this case the genocidal act is considered as 'intentional' although the bomb planter may not have desired to kill any people or does not personally support the ethnical cleansing intentions of his superiors, this conclusion can be supported by attributional as well as evidentiary arguments: with regard to attributing consequences to the causer, it does not matter whether he was directly aiming at them or whether he, in pursuing a different goal, was prepared to let the prohibited result occur, thus using it as means to another end, as in the case where it is the military commander's first priority to destroy the building for strategic reasons while knowing with certainty that this goal could not be reached without killing innocent inhabitants. And from an evidentiary point of view, one could argue that, in acting though aware of the prohibited consequences, the perpetrator was indeed willing to accept them. This position is at least feasible so long as the perpetrator assumes that the prohibited consequences 'will' occur, as required by sub-paragraph (b).

Finally, the last mentioned requirement of the perpetrator's awareness that the prohibited consequence 'will' occur, is also crucial in marking the borderline mere *dolus eventualis* and other less strong forms of the mental element,¹²⁹ as in the case where the perpetrator is merely aware of the risk that the prohibited effect may result from his conduct but is not certain that it will in fact occur. Whereas the civil law tradition would still treat it as intention if the perpetrator, aware of the risk that his conduct may cause the prohibited result, is prepared to accept the result should the prohibited result in fact occur,¹³⁰ this seems not to be the position of the Rome Statute when requiring that in the perception of the perpetrator the consequences 'will' rather than merely 'may' occur. Therefore, when bombing the building, the perpetrator would be responsible for intentional killing only if he was certain that he could not reach his strategic aim without necessarily killing inhabitants of the building, but not if he either assumed that the building was empty of any people or that they could have had the chance of leaving it in time after having been warned. Thus, even if in the latter case the perpetrator would be prepared to take the risk of possibly killing people, he would not—unless otherwise provided, which is not the case thus far—act intentionally in terms of Article 30(2)(b) of the ICC Statute so long as in the perception of the perpetrator it is not certain that the casualties 'will' in fact occur.

E . 'Knowledge' with Regard to Circumstances and Consequences

1 . The Role of Knowledge for the Mental Element

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

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

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

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

2 . With Regard to 'consequences'

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

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

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

Third, although it seems to come very close to the last configuration, as it also has to do with the course of events, another question concerns the awareness of *causation* as the link between the conduct and its

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

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

At any rate, however, aberrations are irrelevant if the *perpetrator* is *indifferent* to the consequences his conduct may ensue. If the perpetrator shoots into a crowd without aiming at a specific victim, it does not matter if he hits this or that person. The same is true with regard to a so-called *error in persona* to be dealt with in connection with other errors.¹³⁶

3 . With Regard to ‘circumstances’

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

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

though the Rome Statute, unlike most national codes, has not provided for this so far—merely of an aggravating or mitigating nature.

With regard to the required awareness that a circumstance *exists*, the wording is one-sided in its solely thinking of the presence of positive constituents of the crime (such as the victim's belonging to an ethnical group or the use of certain means) while the knowledge of the absence of circumstances which would negate the crime (such as for instance grounds permitting deportation or necessities of war justifying the destruction or seizure of the enemy's property¹⁴⁰) seem to have been forgotten. As it is indeed difficult to define knowledge in a way that it comprises both the presence of positive circumstances and the absence of negative circumstances of the crime, national codes, such as those of Germany and Poland, are more cautious, avoiding the reference to the 'existence' of a circumstance, they merely require the knowledge of the circumstances which are part of the crime definition,¹⁴¹ and thereby leave it open whether these circumstances are of a positive or negative nature. Nevertheless, the provision in question here can be construed in such a way as is favourable to the perpetrator and, thus, in accordance with Article 22(2) sentence (2) of the ICC Statute. Consequently, in order to have knowledge in terms of Article 30(3), the perpetrator must be aware of both the presence of the constituting circumstances and the absence of excluding circumstances of the crime.

4 . With Regard to Aggravating or Mitigating Consequences or Circumstances

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

F . Requisites of 'awareness'

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

1 . Factual Knowledge

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

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

2 . Normative Evaluation

At a closer look, however, mere factual knowledge does not suffice in all, or even most cases. This is due to the psychological experience that the perception of a fact by the human senses must be transformed into a conceptual picture in order to be perceived as a definitional element of the crime. Although this may be realized regularly almost automatically and thus quickly, even in the simple case of attacking a 'vehicle' the perpetrator must not only see that the object of the attack is a construction with wheels, he must also perceive it as a 'vehicle' in terms of the crime definition concerned. Even this simple step, however, requires a conclusion which, beyond the sensual perception of facts, presupposes a (more or less) conscious or automatic judgement and, thus, implies some sort of normative evaluation. If more attention were paid to this psychological phenomenon, quite a bit of the dispute about whether *mens rea* is satisfied with mere factual knowledge or whether it requires some sort of value judgement as well (and, if so, whether the borderline runs between 'descriptive' and 'normative elements' or rather between elements of criminal and extra-criminal law¹⁴⁸) would lose significance as mere gradual rather than categorial issues. Nevertheless, it remains true that a material element of the crime, the more normative it is in nature, the more it requires some evaluation by the perpetrator for his being aware of it in terms of Article 30(3) of the ICC Statute.

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

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

Further down the ladder of normative elements are those which, without referring to specific legal norms, are inherently evaluative in nature, as with war crimes by 'inhumane' treatment¹⁵⁴ or by severe damage to the natural environment clearly 'excessive' in relation to the anticipated military advantage.¹⁵⁵ Obviously, it is impossible to find treatment 'inhumane' or environmental damage 'excessive' without some sort of value judgement the criteria of which may differ.¹⁵⁶

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

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

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

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

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

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

Secondly , with regard to material elements, whose definition depends on normative criteria, as with regard to the differentiation between ‘military’ and ‘civilian’ objects, the perpetrator cannot, of course, be expected to have first read a military manual; rather, by becoming aware of the way the vehicle is employed in a battle or the building is used for counter-attacks, he will be able to make that judgement without first having consulted special regulations.

Thirdly , the same is true with regard to material elements that are inherently, or at least partly,

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

3 . Special Issues of ‘referential norms’

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

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

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

- (a) On the one hand, there can be no doubt that referential norms or circumstances, as long as they are not of a predominantly jurisdictional or otherwise procedural nature as shown below (b), do in principle

require awareness by the perpetrator in the same way as any other element material for constituting the crime as such or for heightening its gravity. On this basis, it does not matter whether an element is part of the specific crime definition, as in the case of severe deprivation of physical liberty in violation of 'fundamental rules of international law',¹⁷² or whether the relevant element is part of the chapeau, such as the genocidal intent to destroy a protected group (Article 6 of the ICC Statute). This general statement requires some specifications, however.

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

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

- (b) These statements are only true, however, as long as the definitional element of the crime concerned is a 'material' one in terms of Article 30(1) of the ICC Statute. Although one might expect that all elements of a crime definition are 'material' as a matter of course, this is not necessarily so because certain elements may be of jurisdictional rather than 'material' nature. This situation is brought about by the double structure of the crime definitions of the ICC Statute which both constitute the jurisdiction of the Court and define the crimes for which the perpetrator can be held responsible under the jurisdiction of this Court.¹⁸⁰ Since it seems universally agreed upon that matters of procedure, including the jurisdictional power of the Court, are not constituent for the perpetrator's substantive *mens rea*, he does not need to be aware of requirements which are merely relevant to the jurisdiction of the Court. Questionable elements of this sort can be found in particular in Article 8 of the ICC Statute on war crimes in three respects: first, by the general, though not exclusive ('in particular'), requirement that the crime must be committed 'as part of a plan or policy or as part of a large-scale commission of such crimes',¹⁸¹ second, with regard to the requirement of an 'armed conflict',¹⁸² and third, by distinguishing between 'international' and non-international conflicts.¹⁸³ Although this is not the place for a final analysis and evaluation of Article 8 of the ICC Statute,¹⁸⁴ more needs to be said here, at least for the purpose of demonstrating the possible consequences for the mental element.

First, although the 'policy requirement' in the chapeau of Article 8(1) seems similar to that of Article 7(1) of the ICC Statute, thus requiring awareness of the perpetrator in the same way, there is one decisive difference to be taken into account. Crimes against humanity and genocide on the one hand acquire

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

Second, with regard to the requirement of an 'armed conflict' in Article 8 of the ICC Statute, the jurisdictional aspect appears similarly predominant. Therefore, as was discussed in an Inter-Sessional Meeting of the Preparatory Commission,¹⁸⁶ a so-called 'objective international law approach' took the view that the existence of an armed conflict, legitimizing an international authority's intervening at all, is merely an objective requisite for the Court's jurisdiction and, consequently, independent of the perpetrator's awareness of such a conflict. When considering the fact, however, that most of the criminal acts which qualify as a war crime, are punishable *per se* under national law as well and that, therefore, the wrongdoing of these crimes is aggravated when committed in connection with an armed conflict, it is more convincing to require the perpetrator to have been aware of an armed conflict, as suggested by a so-called 'subjective criminal law approach'. In its final Elements, the Preparatory Commission only went half way when having denied in a first step the requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict, it required in a second step the perpetrator's awareness of the 'factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with"'.¹⁸⁷ This position is certainly acceptable so long as the mere knowledge of facts enables the awareness of an armed conflict. To the same extent, however, that the perception of the connection of the individual crime to an armed conflict requires an evaluative judgement, the same rules must apply as with any other normative material element of the crime.¹⁸⁸

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

- (c) A further category of referential norms which have a sort of 'justifying' significance in common, have received scarcely, if any attention in the Elements of the Preparatory Commission. Whereas for the crime against humanity of deportation the perpetrator is merely required to be aware of the factual circumstances that established the (unwritten) lawfulness of the presence of those concerned,¹⁹² with the war crime of improper use of a flag the perpetrator must have known of the 'prohibited nature' of such use.¹⁹³ By the same token, the war crime of sentencing or execution without due process requires the perpetrator to have been aware of the absence of a previous judgment or of the denial of relevant guarantees, essential or indispensable for a fair trial,¹⁹⁴ a mental requirement hardly to be met without any legal evaluation.

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

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

G . The Relevant Time of Knowledge

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

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

H . ‘Wilful blindness’

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

Since these recommendations were dropped in the end, with the result that the ICC Statute does not contain a special provision for ‘wilful blindness’, this waiver could certainly be interpreted as a decision against covering this case, as indeed opined by some authors.²⁰³ This conclusion is not cogent though, as an offender shutting his eyes to the truth is at least aware of possible, or even obvious, facts he merely does not want to see. Whether this may be called ‘implied knowledge’, ‘constructive knowledge’²⁰⁴ or, as occasionally suggested, the ‘second degree of knowledge’²⁰⁵ does not matter as long as it is considered sufficient knowledge.²⁰⁶ With this question not having been dealt with by the Preparatory Commission, the final clarification as to this point is again left up to the Court.

I . ‘Dolus eventualis’ and ‘recklessness’

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

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

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

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

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

J . Mental Element and Complicity

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

In general, due to the accessory nature of complicity,²²⁰ the accomplice must have a ‘double intent’, both with regard to his own conduct and with regard to the intent and knowledge of the principal.²²¹ In both relations the requirements of intent and knowledge are basically the same as with regard to a single perpetrator. This general line is not without exceptions, however, which in particular concern two groups: one being aiders and abettors who, beyond their general double intent, must act ‘for the purpose of facilitating the commission of [such] a crime’ according to Article 25(3)(c) of the ICC Statute,²²² and the other being accomplices in group

crimes, who, beyond their ordinary double intent, must have a special intention according to Article 25(3)(d) of the ICC Statute.²²³

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

A . Main Approaches

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

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

On the other hand, from more modern perceptions prevailing in civil law jurisdictions and theories, the aforementioned strengths are in fact the very weaknesses of the ICC regulation; for, first, when accepting a mistake (of fact or of law) only if it negates the mental element,²²⁸ Article 32 is repetitious—and, thus, appears superfluous²²⁹—in merely restating the mental element as a requirement of criminal responsibility according to Article 30(1) without giving any further information as to when and how a mistake may negate the mental element.²³⁰ Second, by almost completely closing the door to mistake of law in requiring legal ignorance to nullify a mental element essentially focused on facts, the Rome Statute disregards growing sensitivity to the principle of culpability, particularly with regard to consciousness of unlawfulness (as distinct from and in addition to the fact-oriented intention), and third, in limiting intent and knowledge to the positive material elements of the crime, the Statute forecloses the possibility of mistakes with regard to (negative) grounds excluding criminal responsibility. From this perspective, it is no wonder that the ICC regulation of mistake, in particular with regard to that of law, has been described as 'archaic'.²³¹

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

B . Conceivable Objects and Ways of Misperceptions

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

First, although the basic distinction between mistakes of *fact* (paragraph 1) and *law* (paragraph 2) appears clear, this, if at all, only holds true with regard to elements of the crime completely perceivable by the human senses such as, for instance, identifying a living person as the victim of a killing. As soon as the question arises,

however, as to whether this person belongs to a protected ethnical group, some sort of normative judgement may be required as has been demonstrated with regard to the awareness of normative elements according to Article 30(3) of the ICC Statute.²³³ This entails the question of whether an erroneous evaluation with regard to a normative implication, as given in the example of the mistaken denial of the victim's protected status due to a normative misjudgement, is a mistake of fact, thus negating the mental element according to paragraph (1), or rather a mistake of law according to paragraph (2), and thus not necessarily excluding the mental element—a question which is not explicitly answered by the ICC Statute, therefore requiring further elaboration.

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

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

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

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

- the misinterpretation of a normative element (as, for instance, the understanding of 'inhumane acts'²³⁷), or
- the unawareness of a protective norm (as with regard to the age of the victim),²³⁸ or
- the ignorance of referential norms (such as 'fundamental rules of international law' violated by imprisonment),²³⁹ or
- the unawareness of the prohibition as such (as, for instance, to the improper use of flags or other protected symbols²⁴⁰), or
- the assumption of a justification which is in fact not recognized (as the '*tu quoque*' argument), or
- the erroneous assumption of an excuse (as with regard to duress), or
- the case where the perpetrator is fully aware of his wrongdoing but believes it unpunishable or, even if so under national law, believes that the ICC lacks jurisdiction.

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

consequential importance whether an error falls within this or that category of recognized or irrelevant mistakes.

C . Recognized Mistakes

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

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

- (a) The sole clear category of recognizable mistakes of fact is that 'about *factual* elements of the definition'²⁴² in terms of 'descriptive elements' of the crime, perceivable by means of the human senses.²⁴³ If the soldier, for instance, does not realize that the body he is shooting at, is already dead or that the building which appears to be a military unit, had in fact been turned into a civilian kindergarten, he would lack the factual knowledge of elements material for a wilful killing or attacking civilian objects and, thus, could not be held criminally responsible under Article 8(2)(a)(e) or (b)(ii) of the ICC Statute.

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

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

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

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

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

- (c) With regard to the erroneous assumption of facts, which, if given, would produce a ground for justification it is doubtful as well whether it could be considered a mistake of fact as, for instance, in the case where the perpetrator, if he was imminently and unlawfully attacked as he erroneously believed, would have been allowed to defend himself with deadly force. Although this is a clear 'mistake about the *factual* elements of justification', resembling the '*factual* mistake about elements of the definition',²⁵² thus certainly related to facts, this category of mistakes can hardly be covered by Article 30(1). Again, it is the requisite connection between the mistake and its negating effect on the mental element which causes problems. For, as according to Article 30(1) the mental element is (solely) related to the 'material elements' of the crime and if this must be understood as merely comprising the positive elements of the crime (as distinct from grounds negatively excluding criminal responsibility such as justifications) as generally assumed,²⁵³ then putative self-defence as with any other erroneous assumption of a justifying situation leaves the mental element untouched. Therefore, in these cases, the door to a recognizable mistake of fact could be opened only if the 'material elements' of the crime were understood as comprising both the positive and negative components of unlawfulness, that is the definitional elements of the crime as one part and the (absence of) justification as the counterpart.²⁵⁴
- (d) Even the last mentioned route to a mistake of law is closed, however, with regard to non-justificatory grounds for excluding criminal responsibility, such as mere excuses or other exemptions from punishability or jurisdiction under the ICC Statute.²⁵⁵ If, for instance, a soldier kills a civilian in fear of being himself killed for not giving into pressure from his comrades who, in fact, only wanted to test his resistance, his mental element to kill would certainly not be negated; neither would his intent to kill be nullified if he had acted under actual duress which would excuse him according to Article 31(1)(d) of the ICC Statute. Consequently, his mental element in knowingly killing would be negated even less if he erroneously assumed the situation of a duress.
- (e) In sum, only cases in which the perpetrator did not become aware of or misperceived factual circumstances or consequences required as 'material elements' of the crime definition, are clear instances of a mistake of fact in terms of negating the mental element and, thus, exclude his criminal responsibility according to Article 32(1).

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

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

- (a) In foreclosing mistakes of law as to 'whether a particular type of conduct is a crime within the jurisdiction of the Court' (sentence 1), it is made clear that mistake of law need not concern the international prohibition of the crime as such,²⁵⁷ thus restricting the possible reach of mistakes of law to something more special although without naming it.
- (b) The restrictiveness of this course is intensified by allowing mistake of law to exclude responsibility only 'if it negates the mental element' of the crime (sentence 2). As seen with mistake of fact,²⁵⁸ this has two implications: (i) the mistake has to have been capable of negating the mental element and (ii) this can be procured solely by the perpetrator's lack of knowledge of a material element of the crime. Whereas it was easier to conceive that the unawareness of a material fact affects the knowledge of this element, it is much harder to see a way in which the ignorance of a norm might eliminate the mental element with regard to a material element, the factual basis of which the perpetrator is aware of. As one should not assume that the drafters of sentence (2) wanted it to run idle, this 'cryptic' provision²⁵⁹ was perhaps meant to open the door for mistakes with regard to normative elements and evaluations. Thus, insofar as one does not wish to resort to mistake of fact as shown above,²⁶⁰ with regard to normative references and elements of the crime,²⁶¹ evaluative misperceptions could be treated in the following manner: since his mental element can only be negated by mistake to the extent that the perpetrator must be aware of material elements, accordingly normative misjudgements are capable of ensuing from a mistake of law only to the extent that the mental element is open to (mis)judgements. As, in addition, the mental element does not require more than the perpetrator's awareness of the social significance of a definitional element, it presupposes neither positive knowledge of the underlying legal provisions nor of their jurisprudential interpretation. Consequently, normative ignorance or evaluative misperceptions would constitute a mistake of law negating the mental element only if the perpetrator did not even realize the social everyday meaning of the material element of the crime. This, for instance, might be the case if he had no idea that certain letters on a car were to indicate the protected status of this personnel, but not, however, if he related these letters to another organization which would have had a protected status as well.
- (c) Even if the mental element is negated by a mistake of law in the way described before, this does not necessarily lead to the exclusion of criminal responsibility though; for, as according to sentence (2) this 'may merely be the case, it seems as if the ICC Statute wants to leave some *discretion* to the Court to either accept or ignore the mistake. Although the use of 'may' could perhaps simply mean that not every mistake of law negates the mental element,²⁶² the other interpretation appears preferable. Not only is 'may' not referring to the negation of the mental element but rather to the exclusion of criminal responsibility (if the mental element is negated by the mistake of law), but the same reference to the exclusion of responsibility can be found in sentence (1), with one significant difference, however: whereas mistakes of law in terms of sentence (1) definitely not capable of excluding criminal responsibility, the principal admissibility of mistakes of law in terms of sentence (2) was intended perhaps to be limited, and therefore subjected, to the discretionary non-exclusion of criminal responsibility by the Court.²⁶³

Even more convincing in this direction from a legal policy point of view is the fact that, unlike national laws and former international drafts,²⁶⁴ the ICC Statute does not pay any attention to the

(un)avoidability of the mistake, thus not providing a clause rejecting a mistake of law completely or merely allowing mitigation of the sentence, depending on the degree to which the mistake was avoidable for the perpetrator. This lack of flexibility corresponding to the degree of potential blameworthiness of the perpetrator is partly made up for by at least granting the Court discretion with regard to the exclusion of criminal responsibility.

- (d) In complementing the general rules on mistake of law dealt with above, a special regulation²⁶⁵ is provided for *mistakes with regard to superior orders* according to Article 33(1)(b) and (c) of the ICC Statute. In recognizing the at times delicate situation in which a subordinate was ordered to carry out a command without having had the chance of examining the lawfulness of what he is going to do, the perpetrator, when committing the crime in obedience to superior orders or prescriptions of law, can be relieved of criminal responsibility if he did not know that the order was unlawful (subparagraph b), provided, however, that the order was not manifestly unlawful (subparagraph c).²⁶⁶
- (e) In sum, aside from the special case of the ignorance of the (non-manifest) unlawfulness of a superior order, mistake of law, as required to negate the mental element, is of practical relevance solely with regard to normative implications of material elements or referential norms.²⁶⁷ Even within this narrow scope, however, a mistake of law cannot be established by the perpetrator's claiming not to have known the legal provisions and/or their jurisprudential interpretation, but only by his not even having been aware of the social meaning or significance of the material element in a layman's perspective. And even if the perpetrator succeeds in proving this degree of normative ignorance, the Court will still have the discretionary power of rejecting the mistake completely or merely mitigating the sentence²⁶⁸ according to the degree to which the perpetrator would have been able to avoid his mistake.

D . Non-recognized or Disregarded Errors

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

- (a) As by nature leaving the mental element related to material elements of the crime untouched, mere *ignorance of legal norms or their misinterpretation* can, in principle, not establish a valid mistake of law, the only major exception being the misperception of normative elements or references, provided that the perpetrator is not even aware of the social significance of the normative implications concerned.²⁷²
- (b) The ICC Statute's disregard of ignorance of law is expressed with particular regard to the prohibition as such. Although Article 30(2) sentence (1) explicitly excludes mistake of law only 'as to whether a particular type of conduct is a crime within the jurisdiction of the Court', this is not merely to be understood in terms of a procedural error of the perpetrator; for due to the double structure of the Rome Statute in providing both the procedural jurisdiction of the Court and the definition of the prohibited international crimes,²⁷³ the perpetrator's ignorance of the Court's jurisdiction can, at the same time, imply his ignorance of the international prohibition. Consequently, in precluding the jurisdictional mistake, Article 32(2) sentence (1) excludes the *ignorance of the prohibition* as well.²⁷⁴ Thus, unlike various recent national penal codes prepared to recognize the 'mistake of prohibition', if unavoidable, as a special type of mistake of law,²⁷⁵ in this fundamental issue the ICC Statute adheres to the old principle of '*ignorantia juris (criminalis) non excusat*'.
- (c) Accordingly, it cannot come as a surprise that the ICC Statute does not take notice of the *mistaken*

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

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

E . Possible Solutions

Although the emotional abhorrence of crimes as serious as those in question here may argue against the attempt to find further loopholes by widening the door for errors, from the legal point of view, defendants charged with international crimes should not be denied the general principles and defences that are valid for 'normal' everyday criminality. Just as a person accused of killing his neighbour may defend himself by having reasonably believed in being seriously attacked, the soldier in an armed conflict must be given the same chance if he believed himself attacked by a civilian from behind. Similarly, even if the crimes prohibited by the ICC Statute are of a nature and gravity commonly known as unlawful, even the soldier who has been informed of the contents of the Geneva Conventions may not be aware of the variety and reach of all relevant prohibitions, particularly insofar as they are of formal character.²⁷⁹ Therefore, it appears appropriate to reflect on ways in which some of the shortcomings of the Rome Statute's regulations on mistake of fact and law may be improved. This appears necessary in at least in two respects.

- (a) With regard to the *mistake about factual elements of justification*²⁸⁰ it appears appropriate to apply Article 32(1) by analogy.²⁸¹ This is particularly true in view of the fact that it can be a matter of accident whether a material element is formulated in a positive or a negative way. If, for instance, sexual offences are defined as acting 'against the victim's will', thus granting the perpetrator a mistake of fact if he reasonably believed in the victim's agreement with the molestation, it would hardly be understandable to disregard his mistake if the crime definition did not require acting 'against the victim's will' but instead granted a justification if the victim consented. Since in both configurations the perpetrator's intention, or his mistake, were essentially the same, his criminal responsibility cannot differ between being excluded in the first instance and remaining in the other. As mistakes of this sort have apparently been missed by the ICC Statute, it would be up to the Court to make use of its power to have recourse to principles derived from national laws according to Article 21(1)(c) of the ICC Statute.
- (b) Even in recognizing the fact that international crimes, as in general of the gravest nature, are universally known as unlawful and highly reprehensible, there may be situations in which the perpetrator is without fault unaware of the criminal character of his conduct.²⁸² The more the principle of culpability is recognized as an essential requirement of criminal responsibility, the less an international penal code can afford, particularly if it wishes to function as a model of enlightened criminal law, to completely ignore lack of culpability by *unavoidable mistake of prohibition*.²⁸³ As the recognition of such a ground for excluding criminal responsibility would function in favour of the

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

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

VI . Concluding Assessment

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

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

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

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

Notes

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

and 32' of the ICC Statute.

- 2 Cf. G. Williams, *Textbook on Criminal Law* (2nd edn., 1983) 70. In a gender-free reformulation of Lord Hailsham's translation (in *Haughton v. Smith* (1975) AC 476, at 491 f.): 'An act does not make a person guilty of a crime, unless the person's mind be also guilty' (cited after J. Smith and B. Hogan, *Criminal Law* (9th edn., 1999) 28).
- 3 As particularly in common law countries: as to England, cf. Smith/Hogan, *supra* note 2, 79 ff.; J. Watzek, *Rechtfertigung und Entschuldigung im englischen Strafrecht* (1997) 257 ff., as to US criminal law, W. LaFave and A. Scott, *Substantive Criminal Law*, Vol. 1 (1986) 575, at 577. But see also A. T. H. Smith (in A. Eser and G. P. Fletcher (eds.), *Justification and Excuse: Comparative Perspectives* (1987) Vol. II, p. 1077 ff.) in questioning the common maxim of 'ignorance of the law is no excuse' as 'aphoristic half-truth'; cf. also the criticism by A. Ashworth, 'Excusable Mistake of Law', *Crim. L. Rev.* (1974) 652–662, at 655) and J. Kaplan (in Eser and Fletcher, Vol. II, pp. 1125 ff.) with regard to American concessions. As to the position of other legal cultures in Europe and Asia, see the contributions by Tiedemann, Arzt, Stratenwerth (in Eser and Fletcher, Vol. II, pp. 1003 ff., 1025 ff., and 1055 ff., respectively), by Figueiredo Dias, Frisch, MirPuig, Stile, Castoldo (in A. Eser and W. Perron (eds.), *Rechtfertigung und Entschuldigung* (1991) Vol. III pp. 201 ff., 217 ff., 291 ff., 311 ff., and 343 ff., respectively) and by Gao, Burkhardt, Cho, and Nishida (in A. Eser and H. Nishihara (eds.), *Rechtfertigung und Entschuldigung* (1995) Vol. IV, pp. 379 ff., 405 ff., 234 ff., and 431 ff., respectively).
- 4 See Preparatory Committee, *Draft Statute and Draft Final Act*, p. 67 with note 21 (in M. C. Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1998) 145); cf. the comments by O. Triffterer, 'Art. 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), margin No. 11.
- 5 For more details, see *infra*, V.C. 1 (c), D(d).
- 6 As, for instance, the puzzling relation between intent and knowledge in Art. 30 of the ICC Statute; cf. *infra*, IV.B.
- 7 Some of these different approaches will show up later; see *infra*, V.
- 8 For more details as to the development of some sort of 'general part' for a code of international crimes, see Ch. 20 above, at II–III.
- 9 *Report of the Preparatory Committee*, 51st Sess., pp. 92, 95 f. (in Bassiouni, *supra* note 4, 488, 490 f.).
- 10 *Charter of the International Military Tribunal*, 82 UNTS 280, reprinted in M. C. Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (1997) 183 ff., and in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (2000) Vol. II/1, p. 61.
- 11 Namely, that the perpetrator 'could honestly conclude that urgent military necessity warranted the decision made': *In re List and Others (Hostage Trial)*, 15 ILR (1948) 632, at 649. For more details with regard to 'honest error', see C. Nill-Theobald, 'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und den USA (1998) 342 ff.
- 12 Cf. Art. 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, UN Doc. A/9030 (1973).
- 13 Cf. Art. 3 of the Geneva Conventions of 1949, reprinted in McDonald and Swaak-Goldman, *supra* note 10, Vol. II/1, pp. 87 ff.
- 14 Draft Code of Crimes against the Peace and Security of Mankind of 1954 (*YILC* (1954) Vol. II, p. 151 f.; (1983) Vol. I, p. 4; (1983) Vol. II/2, p. 11; (1984) Vol. I, p. 4 f.; (1984) Vol. II/2, p. 8; (1985) Vol. II/2, p. 8), Art. 2(10)(iii).
- 15 Art. 85(4) of the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977, reprinted in Bassiouni, *supra* note 10, 457 ff. and in McDonald and Swaak-Goldmann, *supra* note 10, Vol. II/1, p. 219 ff.
- 16 Draft Code of Crimes against the Peace and Security of Mankind of 1991, UN Doc. A/46710, *YILC*(1991) Vol. II/1, p. 94 ff.), Art. 22(2)(f) and Art. 26.
- 17 Art. 2(a), (c), and (f) of the ICTY Statute. With regard to genocide, the regulation is similar to that of the ILC Draft 1954 (*supra* note 14); cf. Arts. 4 and 2 of the ICTY and ICTR Statute, respectively.
- 18 Cf. Arts. 4 and 2 of the ICTY and ICTR Statute, respectively.
- 19 Art. 3(b) of the ICTY Statute.
- 20 On speculations of this sort within the ICL on its Draft Code 1991, see O. Triffterer, 'Bestandsaufnahme zum Völkerstrafrecht', in G. Hankel and G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen* (1995) 223; cf. also A. Eser, in 'The Need for a General Part', in M. C. Bassiouni (ed.), *Commentaries on the ILC's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (1993) 46 f.
- 21 See also the criticism by T. Weigend, in Bassiouni, *supra* note 20, 113 f.
- 22 *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GA, 50th Sess., Supp. No. 22, A/50/22 (1995), p. 19, reprinted in Bassiouni, *supra* note 4, 630.
- 23 As to the three steps which finally led to the Updated Siracusa Draft (*infra* note 26), see Ch. 20 above, at note 38.
- 24 See (Unpublished) Draft Statute for an International Criminal Court—Alternative to the ILC Draft—(Siracusa Draft) prepared by a Committee of Experts, Siracusa/Freiburg, July 1995, p. 38 f. See also Eser, in Bassiouni, *supra* note 20, 46 f.
- 25 Art. 33(f) of Freiburg Draft of February 1996 (by A. Eser, D. Koenig, O. Lagodny, O. Triffterer), originally unpublished, but thereafter integrated into an amendment of the ILC Draft Code of Crimes of 1991, published as annex in O. Triffterer, 'Acts

of Violence and International Criminal Law', 4 *Croatian Annual* (2/1997) 872; with regard to *mens rea*, see Art. 3(4), p. 877. Cf. also *infra* note 26, to Ambos.

- 26 Art. 33-7 of 1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa Draft) prepared by a Committee of Experts. Submitted by AIDP *et al.*, Done in Siracusa/Freiburg/Chicago, 15 March 1996. For a critical comparison of Art. 33-7 of the Updated Siracusa Draft and the aforementioned Freiburg Draft cf. K. Ambos, 'Der "Allgemeine Teil" des Völkerstrafrechts' (2002) 941 ff.
- 27 Art. 2(3)(a) of the Draft Code against the Peace and the Good of Mankind (Report of the ILC, 48th Sess., p. 14 ff., paras. 50 ff., reprinted in McDonald and Swaak-Goldman, *supra* note 10, Vol. II/1, p.335 ff.).
- 28 Art. 2(3)(d) of the Draft Code 1996.
- 29 Art. H in the *Report of the Preparatory Committee* (Compilation of Proposals), 51st Sess., p. 92, reprinted in Bassiouni, *supra* note 4, 488.
- 30 Art. 29: *Mens rea* (mental elements) in the *Report of the Preparatory Committee* (A/CONF. 13/2/Add.1 (1998) 65, reprinted in Bassiouni, *supra* note 4, 144). Further sessions at which *mens rea* was taken notice of were the 1997 Session in New York (A/AC.249/1997/L.5 (1997) 18, 27, reprinted in Bassiouni, *supra* note 4, 377, 382) and the Inter-Sessional Meeting of 1998 in Zutphen (A/AC.249/1998/L. 13 (1998) 59 f., reprinted in Bassiouni, *supra* note 4, 249).
- 31 Cf. *supra* II.A at note 10 f.
- 32 For details on this and the following, see Triffterer (ed.), *supra* note 4, Art. 32, margin Nos. 3 ff.
- 33 Art. IX(7) of A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (by M. C. Bassiouni 1980, reprinted 1987, p. 110). As to the negation of the mental element by the mistake, the American Model Penal Code § 2.04(1)(a) seems to have been the guiding example.
- 34 Art. 9(d), *YILC*(1987) Vol.II/1, p.7 f.
- 35 Cf. *YILC*(1991) Vol. II/2, pp. 95, 100 f.
- 36 Aside from my own criticism (Eser, in Bassiouni, *supra* note 20, 48 ff.) see also Robinson (in Bassiouni, *supra* note 20, 200 f.).
- 37 Art. 14 of the Draft Code of 1996.
- 38 Cf. K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10 *Criminal Law Forum* (1999) 29 f. to ICTY Appeals Chamber Case No. IT-96-22.
- 39 See Siracusa Draft, *supra* note 25, 39.
- 40 Art. 33n: Mistake of Fact or Law of the Freiburg Draft (in substance identical with the Proposed Amendments to the ILC Draft Code of 1991 Art. 14(d), reprinted in Triffterer, 4 *Croatian Annual* (2/1977) 881) reads as follows:

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

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

'A mistake of law or mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.'

For a critical comparison of the mistake regulations of the Freiburg Draft (Art. 33n) and the Updated Siracusa Draft (Art. 33-15) cf. Ambos, *supra* note 26, 941 ff.

- 42 Cf. *Report of the Ad Hoc Committee*, *supra* II.B at note 22, 19 (in Bassiouni, *supra* note 4, 630).
- 43 *Report of the Preparatory Committee*, 51st Sess., p. 95 f. (in Bassiouni, *supra* note 4, 490 f.).
- 44 For details see, *Decisions Taken by the Preparatory Committee at its Session held in New York from 11 to 21 February 1997*, Art. K, p. 18, 28 (in Bassiouni, *supra* note 4, 377/383), *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zutphen*, Art. 24(K), p. 59 f. (in Bassiouni, *ibid.*, 249), *Report of the Preparatory Committee, Draft Statute and Draft Final Act 1998*, Art. 30, p. 65 f. (in Bassiouni, *ibid.*, 145). For further details of the various drafts, see Triffterer, *supra* note 4, margin Nos. 9 f.
- 45 And from there probably to be traced back to the Bassiouni Draft of 1980/87; see *supra* note 33.
- 46 *Preparatory Committee, Draft Final Act*, *supra* note 44, 67 (in Bassiouni, *supra* note 4, 145).
- 47 Cf. D. K. Piragoff, 'Art. 30', in Triffterer, *supra* note 4, margin Nos. 2 f.
- 48 Cf. J. Allain and J. R. W. D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the

- Peace and Security of Mankind', 8 *EJIL* (1997) 100, at 106; Ambos, *supra* note 38, 21.
- 49 Ar. 28(b)(i) ICC Statute; cf. Piragoff, in Triffterer, *supra* note 47, margin No. 14.
- 50 Art. 8(2)(a)(i), (iii), (vi) ICC Statute.
- 51 Art. 8(2)(b)(xi) and (e)(ix) ICC Statute.
- 52 Art. 25(3)(c) and (d)(i) ICC Statute; cf. Ch. 20 above, V.E and F.
- 53 Cf. e.g. Art. 8(2)(a)(i), (iii), (vi), on the one hand, and (2)(b)(i) to (iv), on the other, and again different (2)(a) (iv), (v), (vii) and (viii) and (b)(v) to (viii) ICC Statute.
- 54 Cf. E. M. Wise, 'General Principles of Criminal Law', in L. Sadat Wexler and M. C. Bassiouni (eds.), *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15–July 17 1998* (1998), 52.
- 55 Cf. Art. 8(2)(a)(iii), Art. 7(1)(k) and Art. 6(c) ICC Statute, respectively.
- 56 In this respect, it would have been preferable as proposed in the Model Draft Statute (by Sadat Wexler and Bassiouni, Art. 29), to merely regulate the basic mental elements while abstaining from defining intent and knowledge; see Wise, *supra* note 54, 50 ff.
- 57 Art. 6 ICC Statute; for details cf. W. A. Schabas, *Genocide in International Law* (2000) 213 ff.; see also with regard to crimes against humanity the requirement of a certain 'intention' in Art. 7(2) (h) and (i) ICC Statute.
- 58 Art. 25(3)(c) ICC Statute.
- 59 As to this terminology, one must be aware that 'general' and 'specific' or 'special intent' are far from a worldwide common understanding and may even differ within the same legal system: whereas in France, for instance, some authors seem to follow the same line as here, thus extending in particular '*dol general*' to the definitional result of the crime (as e.g. in case of murder to the death of victim), the French majority would restrict the '*dol general*' to the act as such, thus being forced to comprise the result of the act as '*dol special*' and to catch additional aims as '*dol aggravé*' (cf. C. Elliott, 'The French Law of Intent and its Influence on the Development of International Criminal Law', 11 *Criminal Law Forum* (2000) 35–46 with further references). Cf. also *infra*, IV.D.2 at note 122.
- 60 Art. 25(3)(d) ICC Statute; cf. Ch. 20 above, V. F. 2.
- 61 Art. H in *Report of the Preparatory Committee*, 51st Sess., Vol. II, p. 92 (in Bassiouni, *supra* note 4, 488).
- 62 *Report of the Preparatory Committee*, 51st Sess., Vol. I, p. 45, para. 199 (in Bassiouni, *supra* note 4, 415 f.); cf. also Wise, in Sadat Wexler and Bassiouni, *supra* note 54, 51 f.; W. A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 420. As with the various interpretations of 'intent' in Art. 6 ICC Statute, cf. Piragoff, in Triffterer, *supra* note 47, margin No. 23.
- 63 Cf. K. Ambos, 'Art. 25', in Triffterer, *supra* note 4, margin Nos. 22 f.
- 64 As for instance in Italy, see L. Picotti, *Il dolo specifico* (1993) with many comparative references.
- 65 Cf. *infra* IV.B and IV.I.
- 66 Cf. Ch. 20 above, IV.E.2.
- 67 Cf. W. A. Schabas, 'Art. 6', in Triffterer, *supra* note 4, Art. 6, margin No. 4.
- 68 As in Art. 25(3)(c) and (d) ICC Statute.
- 69 In the same sense Piragoff, in Triffterer, *supra* note 47, margin Nos. 7, 10. As to certain peculiarities with regard to complicity, cf. *infra*, IV.J.
- 70 Cf. *Report of the Preparatory Committee*, 51st Sess., Vol. I, p. 45, Vol. II, p. 92 (in Bassiouni, *supra* note 4, 416 and 488, respectively), *Draft Statute Draft Final Act*, p. 65 (in Bassiouni, *supra* note 4, 144).
- 71 Art. 38(a)(i) ICC Statute.
- 72 Cf. A. Sereni, 'Individual Criminal Responsibility', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 141.
- 73 Preparatory Commission Elements, General Introduction, p. 5, para. (3); cf. also K. Ambos, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis— From Nuremberg to The Hague', in McDonald and Swaak-Goldman, *supra* note 10, Vol. I, p. 24 to the *Tadić* case.
- 74 Cf. in particular *Report of the Preparatory Committee*, 51st Sess., Vol. I, p. 18, 27, *Draft Statute and Draft Final Act*, p. 65 (both documents in Bassiouni, *supra* note 4, 144 and 377, 382, respectively).
- 75 See Lord Hailsham's translation, *supra* note 2.
- 76 Cf. § 4 Austrian Strafgesetzbuch and §§ 16, 17, 20, 35 German Strafgesetzbuch.
- 77 § 17 German Strafgesetzbuch.
- 78 As, for instance, by Piragoff, in Triffterer, *supra* note 47, margin Nos. 1 f., 18, when obviously understanding the mental element in terms of 'moral culpability'.
- 79 Cf. Art. 122-1 to 122-8 French Code pénal and Arts. 5, 14, 19, 20 Spanish Código Penal.
- 80 Cf. to the French law G. Stefani, G. Levasseur, and B. Boulloc, *Droit pénal général* (16th edn., 1997), margin No. 253, and to the Spanish law S. Mir Puig, *Derecho Penal* (5th edn., 1998) 535 ff. From a comparative perspective, see also J. Vogel, 1998

Goltdammer's Archiv für Strafrecht, p. 133 f.

- 81 Cf. *Report of the Preparatory Committee*, 51st Sess., Vol. II, p. 92, and *Decisions Taken by the Preparatory Committee at its New York Session February 1997* (A/AC.249/1997/L.5 (1997) 382 (in Bassiouni, *supra* note 4, 488 and 382, respectively).
- 82 As the decision of the Preparatory Commission is explained by Piragoff (in Triffterer, *supra* note 47, margin No. 10). He can be hardly followed, however, insofar as he declares the concepts of 'intent' and (as its prerequisite) 'knowledge' as incorporated in the civil law term '*dolus directus*' (ibid., margin No. 19); at least in German doctrine '*dolus eventualis*' as well is characterized by both volitional and cognitive components, as described hereafter. Cf. also the criticism by Wise, in Sadat Wexler and Bassiouni, *supra* note 54, 51 f.
- 83 To be sure, however, there exists quite a strong doctrine which would mainly, if not even exclusively, base the responsibility for an intentional crime on the perpetrator's awareness of all material elements of the crime and his notwithstanding performing it; cf. in particular, W. Frisch, *Vorsatz und Risiko* (1983) esp. pp. 94 (ff., 255 ff., 494 ff; for criticism of this position, see A. Eser and B. Burkhardt, *Strafrecht* Vol. I, (4th edn., 1992) p. 77 ff., 84 ff.
- 84 For more details to this and the following, cf. Eser and Burkhardt, ibid., Vol. I, p. 73 ff., 84 ff. with further references.
- 85 Cf. to Art. 42 of the Italian Codice Penale C. Fiandaca and E. Musco, *Diritto Penale, Parte Generale* (3rd edn., 1999) 305 ff. and to § 15 German Strafgesetzbuch, P. Cramer and D. Sternberg-Lieben, in A. Schönke and H. Schröder, *Strafgesetzbuch: Kommentar* (26th edn., 2001) §15, margin Nos. 9 ff.
- 86 An observation which had induced the Canadian drafters of a new Penal Code to substitute 'intent', because of the difficulties surrounding this term, entirely by 'purpose' (in Law Reform Commission of Canada, recodifying criminal law, 1987, p. 22).
- 87 Cf. *The Random House College Dictionary* as to intention. As to the still varying use of these terms and concepts in English legal terminology, see G. P. Fletcher, *Rethinking Criminal Law* (1978) 396 ff.; Smith and Hogan, *supra* note 2, 54 ff.
- 88 As a matter of fact, this terminology seems also reflected in Art. H Proposal 3 of the Preparatory Committee which in providing that 'there cannot be a crime without the intention to commit it' (*Report of the Preparatory Committee*, 51st Sess., p. 92 f., in Bassiouni, *supra* note 4, 488), obviously understood 'intention' in the broader sense of *dolus* (as distinct from mere recklessness or negligence) whereas Proposal 1 in requiring 'intent [or] [and] knowledge' means 'intent' in the narrower sense of volitional (as distinct from cognitive). Yet, a completely different position was taken by Proposal 2 which wanted to exclude punishability only 'if a person is not aware of the facts constituting an offence', thus apparently getting completely rid of the volitional element.
- 89 For more details, see H. Von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 79–126 (98). Another example of different requirements with regard to the volitional and cognitive element can be found in Art. 8(2)(b)(iv) ICC Statute.
- 90 For more details, see hereafter at IV.C.
- 91 As to whether the volitional requirement for conduct is nothing more than the basic voluntariness of the act or as to how far the cognitive alternative with regard to the consequences is a gangway to mere *dolus eventualis* or even to a basically cognitive notion of intention, has to be dealt with later; see *infra*, IV.D.2.
- 92 Cf. Art. H Proposal 1(1) in *Report of the Preparatory Committee*, 51st Sess., p. 92 (in Bassiouni, *supra* note 4, 488) up to Art. 29(1) in Draft Statute and Draft Final Act, p. 65 (in Bassiouni, ibid., 144).
- 93 As obviously assumed by Piragoff, in Triffterer, *supra* note 47, margin No. 8, when speaking of 'physical or material elements'.
- 94 As, indeed, accepted in the aforementioned MPC formula as well.
- 95 In particular by the so-called 'Lehre von den negativen Tatbestandsmerkmalen'; cf. the survey (with criticism) by H.-H. Jescheck and T. Weigend, *Strafrecht, Allgemeiner Teil* (5th edn., 1997) 248 ff.
- 96 Cf. *infra*, V.C.1(c), D(d), F(a).
- 97 Model Penal Code § 2.02, Comment (1), note 1, p. 229.
- 98 *Supra* at note 33.
- 99 R. Merle and A. Vitu, *Traité de Droit Criminal* (7th edn., 1997) 604 ff.
- 100 Cf. Merle and Vitu, ibid., 506 ff.; see also Vogel, *supra* note 80, 132.
- 101 In the same sense comparing English and German law, see J. Watzek, *Rechtfertigung und Entschuldigung im englischen Strafrecht: eine Strukturanalyse der allgemeinen Strafbarkeitsvoraussetzungen aus deutscher Perspektive* (1997) 39 ff.
- 102 This restricting of intent and knowledge to the positive material elements of the crime, as Art. 30(1) ICC Statute was prepared to accept, would in the end also stand in the way of the so-called 'theory of intention' (as distinct from the 'theory of culpability'), according to which the consciousness of unlawfulness is part of intention (rather than an additional element of culpability); cf. Fletcher, *supra* note 87, 736 ff. For details to this competing '*Vorsatztheorie*' and '*Schuldtheorie*', discussed in other countries such as Spain as well in terms of '*teoría del dolo*' and '*teoría de la culpabilidad*', cf. Jescheck and Weigend, *supra* note 95, 452 f. and Mir Puig, *supra* note 80, 561 ff., respectively, both with

- further references. As to the general structure of the crime, cf. the scheme by Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 61 ff.
- 103 Cf. *supra* IV.B.
- 104 As a now 'classical' example, see Art. 2 § 2.02 Model Penal Code, p. 255 ff; this same distinction can be found in § 2(4) of the Canadian Draft Bill, *supra* note 86, 21 f.
- 105 Cf. Jescheck and Weigend, *supra* note 95, 260 ff; in the same way the Spanish doctrine distinguishes between '*delito de mera actividad*' and '*delito de resultado*'; cf. Mir Puig, *supra* note 80, 200 ff. Although with different terminology, in substance the same distinction seems to underlie the French differentiation between '*infraction formelle*' and '*infraction matérielle*'; cf. F. Desportes and F. Le Guehec, *Droit pénal*(1999) 361, at 377 ff.
- 106 Cf. G. Williams, *Criminal Law* (1983) 78; Smith and Hogan, *supra* note 2, 29 f.; P. Alldridge, 'The Doctrine of Innocent Agency', 2 *Criminal Law Forum* (1990) 45–83 (54 f.).
- 107 Art. 6(a) ICC Statute.
- 108 Art. 8(2)(b)(xii) and (d)(x) ICC Statute. Another example might be 'conscripting or enlisting children under the age of fifteen years into the national armed forces' (Art. 8(2)(b)(xxvi) ICC Statute whereas the other alternative of this provision as to 'using [the children] to participate actively in hostilities' would constitute a result crime.
- 109 Art. 8(2)(b)(xvii) ICC Statute. For further examples, see Art. 8(2)(b)(xvii–xx) ICC Statute.
- 110 Art. 6(b) ICC Statute.
- 111 Art. 7(1)(k) ICC Statute.
- 112 Art. G: *Actus reus* (act and/or omission) (1) in *Decisions Taken by the Preparatory Committee at its Session held in New York 11–21 February 2000*, A/AC.249/1997/L.5 (1997) 26 (in Bassiouni, *supra* note 4, 382).
- 113 Art. 28(1) of the *Draft Statute and Draft Final Act*, p. 64 (in Bassiouni, *supra* note 4, 144); as to the inclusion of *omission* finally not recognized by the ICC Statute as general base of criminal responsibility (Ch. 20 above, at VII), cf. P. Saland, 'International Criminal Law Principles', in Lee, *supra* note 89, 205.
- 114 Cf. Piragoff, in Triffterer, *supra* note 47, margin No. 17.
- 115 As suggested by Piragoff, in Triffterer, *ibid.*, margin No. 18.
- 116 According to Art. 8(2)(b)(xxv) ICC Statute.
- 117 Art. 28(a)(ii) and (b)(iii) ICC Statute.
- 118 As for instance suggested by Piragoff, in Triffterer, *supra* note 47, margin No. 19.
- 119 As speculated by C. Kress, 'Die Kristallisation eines Allgemeinen Teils des Völkerstrafrechts', 1 *Humanitäres Völkerrecht* (1999) 6 and apparently assumed by Piragoff (*ibid.*) in perhaps misinterpreting the civil law concepts of intent.
- 120 Cf. *supra*, IV.D.1.
- 121 The same seems to be meant in the German translation that 'die betreffende Person im Hinblick auf ein Verhalten dieses Verhalten setzen will'.
- 122 To this extent, para. 2(a) could indeed correspond to the French '*dol général*', as probably assumed by Elliott, *supra* III.C at note 59), whereas subparagraph (b) would correspond to the '*dol special*'.
- 123 *Infra*, IV.E.
- 124 Cf. *supra* at note 107.
- 125 Cf. *supra* at note 108.
- 126 Cf. *supra* IV.B.
- 127 Although not specifying in terms of 'first degree', Piragoff seems to conceive it in the same sense when speaking of '*dolus directus*' (in Triffterer, *supra* note 47, margin No. 21). Remarkably enough, however, Piragoff does not treat this alternative of 'means to cause the consequence' within para. (2)(b) here in question, but rather under the heading of 'knowledge' according to para. (3), for reasons not exposed but quite understandable as will be seen later.
- 128 As will be discussed in connection with the 'knowledge' thereof according to para. (3), *infra*, IV.E.2.
- 129 Cf. *supra*, III.A.
- 130 Although very much could be said about the critical borderlines of *dolus eventualis* to *dolus directus*, on the one side, and 'recklessness' and 'negligence', on the other, the demarcation as suggested here seems to prevail. Cf., for instance, Jescheck and Weigend, *supra* note 95, 297 ff.; M. Cobo Del Rosal and T. S. Vives Anton, *Derecho Penal* (3th edn., 1990) 46 ff.; F. Mantovani, *Diritto Penale* (3rd edn., 1992) 330 ff. For further considerations, see *infra*, IV.I.
- 131 Cf. Art. 8(2)(b)(iv) ICC Statute.
- 132 Art. 6(c) ICC Statute; cf. also Art. 7(2)(b) where an almost identical crime definition speaks of 'intentional' instead of 'deliberately'.
- 133 For more details to this aspect, cf. *supra*, IV.D.1.
- 134 According to Art. 7(1)(b)(2)(b) ICC Statute.
- 135 For more details, see Jescheck and Weigend, *supra* note 95, 313 f.; Mir Puig, *supra* note 80, 260 ff.; Smith and Hogan, *supra* note 2, 73; cf. also the explicit Italian legislation of Art. 82 of the Codice Penale and Mantovani, *supra* note 130, 383 ff.

- 136 Cf. *infra*, V.C.1(a).
 137 Cf. *supra*, IV.E.2.
 138 Cf. Art. 28 ICC Statute.
 139 Cf. Art. 6(e) and Art. 7(1)(i) ICC Statute, respectively.
 140 Cf. Art. 7(2)(d) and Art. 8(2)(b)(xii) and (e)(xii) ICC Statute; for further examples, see Art. 8(2)(b)(v) and (viii) ICC Statute.
 141 Cf. § 16(1) German Strafgesetzbuch and Art. 28 Polish Kodeks karny.
 142 Art. 8(2)(b)(xix) ICC Statute.
 143 Preparatory Commission Elements, p. 33.
 144 As in Art. 8(2)(b)(iii) and (v) ICC Statute.
 145 For more details, see *infra*, V.C.1.
 146 Cf. Art. 7(2)(f) in connection with Art. 25(3)(c) ICC Statute.
 147 As in Art. 8(2)(b)(xxiii) and (xxv) ICC Statute, respectively.
 148 As to a survey on this issue, see Jescheck and Weigend, *supra* note 95, 308 f.; C. Roxin, *Strafrecht, Allgemeiner Teil* (3th edn., 1997) 107 ff.; Smith and Hogan, *supra* note 2, 82 ff.
 149 Art. 7(1)(e) ICC Statute.
 150 Art. 8(2)(b) ICC Statute.
 151 Without wishing to elaborate too extensively on this terminological problem, ‘referential’ appears preferable to ‘contextual’, as ‘referential’ expresses the relation to additional norms much better than ‘contextual’ elements which can be factual circumstances as well (as indicated by the Preparatory Commission Elements, Introduction, p. 5 para. 7 and p. 9, para. 3, respectively). The terming of ‘legal elements’ by Triffterer, in Triffterer, *supra* note 4, margin No. 17 f., seems even less helpful, as the other material elements of the crime are ‘legal’ as well.
 152 As to this issue, see *infra*, IV.F.3.
 153 Art. 8(2)(a)(v) ICC Statute.
 154 Art. 8(2)(a)(ii) ICC Statute; cf. also Art. 7(1)(k).
 155 Art. 8(b)(iv) ICC Statute.
 156 This is particularly evident with the war crime of outrages upon personal dignity according to Art. 8(2)(c)(ii) of the ICC Statute which the Preparatory Commission Elements also declare applicable to ‘dead persons’ (p. 39 fn. 57). In doing so, the Commission employs a concept of ‘person’ which may not be accepted universally, thus, evidencing its value character, the underlying criteria of which are open to dispute. This invitation to invoke mistake of law (Art. 32(2) ICC Statute) could have been easily avoided, however, if the Preparatory Commission had adhered to the wording of the Statute which does not speak of ‘dignity’ of a ‘person’ but rather of ‘personal dignity’ as still attributable to a human corpse even if it is no longer a ‘person’.
 157 Art. 8(2)(a)(v) ICC Statute.
 158 According to Art. 8(2)(b)(xiii) and (e)(xii) ICC Statute, respectively.
 159 Cf. Preparatory Commission Elements, p. 18 ff. to Arts. 8(2)(a)(i)–(viii), (b)(iii), (xiii), (c)(i)–(iii), (e)(iii), (xii).
 160 According to Art. 8(2)(b)(iv) ICC Statute; cf. Elements, p. 24 f.
 161 According to Art. 8(2)(b)(xxii) and Art. 8(2)(e)(vi) ICC Statute, respectively; cf. Preparatory Commission Elements, p. 45.
 162 References *supra* note 159.
 163 That such an exclusion of a value judgement by the perpetrator, although indicated in the Preparatory Commission’s General Introduction (Elements, p. 5, para. 4) is not its absolute position, is exemplified by the Commission’s exception with regard to the excessiveness (required by the war crime of excessive incidental death, injury, or damage according to Art. 8(2)(b)(iv) ICC Statute) the knowledge of which required ‘that the perpetrator makes the value judgement’ as described therein (Elements, p. 25, note 37).
 164 Art. 8(2)(a)(ii) ICC Statute; cf. *supra* note 154.
 165 Art. 8(2)(b)(xxi), (c)(ii) ICC Statute; cf. *supra* note 156.
 166 As in particular employed in German theory and practice in terms of a ‘Parallellwertung in der Laiensphäre’: cf. P. Cramer and D. Sternberg-Lieben, in Schönke and Schröder, *supra* note 85, § 15 margin Nos. 39, 43 f.; Jescheck and Weigend, *supra* note 95, 295 f., both with further references.
 167 According to Art. 8(2)(a)(iv) ICC Statute.
 168 Cf. *supra* notes 149–151.
 169 Art. 8(2)(a)(vii) ICC Statute.
 170 Art. 8(2)(c)(iv) ICC Statute.
 171 Preparatory Commission Elements, p. 11, paras. 2 f. to Art. 7(1)(d).
 172 Art. 7(1)(e) ICC Statute.
 173 As proposed by the 1999 Preparatory Commission Elements, p. 5 ff.
 174 Cf. Preparatory Commission Elements, Introduction to Art. 6, p. 6.

- 175 *Prosecutor v. Kayishema/Ruzindana*, Judgment 21 May 1999 (ICTR-95-1-T), paras. 94, 133 f; cf. also *ICTY Prosecutor v. Tadić*, Judgment 15 July 1999 (IT-94-1-A), paras. 248, 271; *Prosecutor v. Kupreškić*, Judgment 14 January 2000 (IT-95-16-T), paras. 556 ff.; *ICTR Prosecutor v. Rutaganda*, Judgment 6 December 1999 (ICTR-96-3-T), para. 70; *Prosecutor v. Ruggiu*, Judgment 1 June 2000 (ICTR-97-32-I), para 20. Cf. also Ambos, *supra* note 26, 356 f., 774 ff.
- 176 Cf. Preparatory Commission Elements, p. 9, Introduction to Art. 7(2).
- 177 Cf. Art. 7(1)(e) and (h) ICC Statute.
- 178 Cf. Art. 8(2)(a)(vii) ICC Statute.
- 179 For details, cf. *supra* IV.F.2(b). With regard to the negation of unlawfulness on grounds of justification cf. *infra* V.D(c).
- 180 As to this double structure of the Rome Statute, cf. Ch. 20 above, I.
- 181 Chapeau of Art. 8(1) ICC Statute.
- 182 Cf. explicitly, Art. 8(b), (c), (e) ICC Statute.
- 183 Cf. Art. 8(c), (d) and (e), (f) ICC Statute, respectively.
- 184 As has been dealt with in Ch. 11.3 above.
- 185 The same view seems to be taken by W. J. Fenrick, 'Art. 8' in Triffterer, *supra* note 4, Art. 8, margin No. 4 as well as by A. Zimmermann, 'Art. 5' in Triffterer, *ibid.*, margin Nos. 8.
- 186 Informal Intersessional Meeting of the Preparatory Commission for the International Criminal Court on 'Elements of Crimes', Siracusa/Italy, 31 January–6 February 2000; cf. also HRW 2000, Commentary, p. 3.
- 187 Preparatory Commission Elements, Introduction to Art. 8, p. 18.
- 188 For further details to this, see *supra* IV.F.2(b).
- 189 Preparatory Commission, Elements, Introduction to Art. 8, p. 18.
- 190 Cf. Art. 8(2)(d) and (f) ICC Statute.
- 191 This material irrelevance of the character as international or non-international is, incidently, a further reason why the categorization as 'international element' in terms of not requiring the awareness of the perpetrator and the equation with 'jurisdictional' can be misleading and is therefore avoided here.
- 192 Preparatory Commission Elements, p. 11, to Art. 7(1)(d).
- 193 Preparatory Commission Elements, p. 27, to Art. 8(2)(b)(vii).
- 194 Preparatory Commission Elements, p. 40, to Art. 8(2)(c)(iv).
- 195 Cf. Preparatory Commission Elements, pp. 20, 43, and 45, to Art. 8(2)(a)(iv), (e)(v), and (vi), respectively.
- 196 Cf. Preparatory Commission Elements, pp. 46 and 47f., to Art. 8(2)(e)(viii) and (xi), respectively.
- 197 Cf. in particular, *infra*, V.C.1(c), 2, D.3, E(a), (b).
- 198 This seems to be universally agreed upon, although its practical application may differ; for references, see Cramer and Sternberg-Lieben, in Schönke and Schröder, *supra* note 85, § 15, margin No. 49.
- 199 For more details on this concept, see W. Platzgummer, *Die Bewußtseinsform des Vorsatzes* (1964) 83, 89ff.; Cramer and Sternberg-Lieben, in Schönke and Schröder, *supra* note 85, para. 15, margin No. 51 with more references.
- 200 As a landmark case in this respect, see *Bayerisches Oberstes Landesgericht*, 30 *Neue Juristische Wochenschrift* (1977) 1974 f. with comment by Eser and Burkhardt, *supra* note 83, Vol. I, p. 71 ff.
- 201 Art. 8(2)(b)(vii) ICC Statute.
- 202 Art. H (Proposal 1)(3)(b) *Report of the Preparatory Committee*, 51st Sess., Vol. II, p. 92 (in Bassiouni, *supra* note 4, 488).
- 203 Cf., though himself appearing undecided, Piragoff, in Triffterer, *supra* note 47, margin No. 26.
- 204 As used by the ICTY in *Prosecutor v. Tadić*, 11 September 1999, No. IT-94-9-T, para. 659. Cf. also ICTY Appeals Chamber in *Prosecutor v. Aleksovski*, IT-95-14/I-Ar 77, Judgment, 30 May 2001, paras. 49ff.
- 205 As by J. W. Wilson, *Criminal Law*, (1998) 164.
- 206 As, for instance, recognized by M. McAuliffe de Guzman, 'The Road from Rome: The Developing Law of Crimes against Humanity', 22 *HRQ* (2000) 335, 400; Schabas, *supra* note 57, 213 (with further references to the common law), and most likely sympathized with by Piragoff, in Triffterer, *supra* note 47, margin No. 26.
- 207 Which seems to be weighed differently from the gradation made here (*supra*, IV.B) in the common law (cf. Wise, in Sadat Wexler and Bassiouni, *supra* note 54, 51 f.).
- 208 Cf. also *supra*, III A and B, IV.E.3.
- 209 Art. H (Proposal 1) (4) *Report of the Preparatory Committee*, 51st Sess., p. 92 (in Bassiouni, *supra* note 4, 488).
- 210 As, for instance, expressed by Ambos, *supra* note 38, 21 f. and A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 153 f.; see also Schabas, *supra* note 57, 211 f.
- 211 As to this common evaluation, see, for instance, Ambos, *supra* note 38, 21, but also Saland, in Lee, *supra* note 89, 206, pointing out that the concept of recklessness, though not the term itself, is present in the ICC Statute's Art. 28, which was negotiated after Art. 30.
- 212 Cf. Schabas, *supra* note 62, 420.
- 213 Cf. *supra*, IV.E.3 as to note 127.

- 214 Cf., in particular, A. Gil Gil, *Derecho Penal Internacional* (1999) 235 ff.
- 215 Cf. Piragoff, in Triffterer, *supra* note 47, margin No. 22.
- 216 Arts. 6(e), 8(2)(b)(xxvi) and (e)(vii) ICC Statute.
- 217 Cf. Preparatory Committee Elements, pp. 8, 37, 46 to Art. 6(e), 8(2)(b)(xxvi) and (e)(vii), respectively.
- 218 Preparatory Commission Elements, pp. 26 and 27 to Art. 8(2)(b)(vii). Strangely enough, the Elements are not satisfied with 'should have known' in all alternatives of the aforementioned war crime, but only with alternative (2) on improper use of a flag and alternative (4) on improper use of the distinctive emblems of the Geneva Conventions, but not with regard to alternative (1) on improper use of flag of truce and alternative (3) on improper use of a flag of the United Nations, without any explanation given for this different treatment.
- 219 See also the criticism by Schabas, *supra* note 57, 212.
- 220 As to this structure underlying the ICC Statute's regulation of perpetration and participation, see Ch. 20 above, V.A.2.
- 221 For details, see Ch. 20 above, V.D.4, E.2, F.2, G.3.
- 222 For details, see Ch. 20 above, V.E.2(a).
- 223 For further details, see Ch. 20 above, V.E.2(a).
- 224 Cf. *supra*, I and II with references to the various documents and drafts.
- 225 Cf. *supra*, I at note 3.
- 226 Even this narrow gate, however, appears too broad for some as in particular Cassese, *supra* note 210, 155 f., if compared with the traditional adherence of international case law to the principle of 'ignorantia legis non excusat'.
- 227 Although the present wording of Art. 32 ICC Statute was finally proposed by Saland (in Lee, *supra* note 89, 210), its basic contents has earlier sources (cf. *supra*, II.C at note 33).
- 228 According to Art. 32(1) and (2) (sentence 2), respectively.
- 229 See Schabas, *supra* note 62, 426, Triffterer, in Triffterer, *supra* note 4, margin No. 11.
- 230 For further deficiencies of this sort, see *supra* I.
- 231 T. Weigend, 'Zur Frage eines internationalen Allgemeinen Teils', in B. Schünemann et al. (eds.), *Festschrift für Claus Roxin* (2002) 1392. For further criticism see Kress, *supra* note 119, 7.
- 232 As a first, though still not comprehensive analysis of potential errors cf. Fletcher, *supra* note 87, 146 ff., furthermore refined in his *Basic Concepts of Criminal Law* (1998) 149 ff.
- 233 For details, see *supra*, IV.F.2 and 3.
- 234 As to this distinction cf. the scheme in Eser and Burkhardt, *supra* note 83, Vol. I, p. 179.
- 235 According to Art. 31(1)(c) ICC Statute.
- 236 As to more details on the various elements and levels which might be reference points of misperception cf. the scheme of the general structure of the offence by Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 62.
- 237 According to Art. 7(1)(k) ICC Statute.
- 238 E.g. according to Arts. 6(e), 8(2)(b)(xxvi) and (e)(vii) ICC Statute.
- 239 According to Art. 7(1)(e) ICC Statute; to further instances, cf. *supra*, IV.F at note 172 f.
- 240 According to Art. 8(2)(b)(vii) ICC Statute.
- 241 As already had been criticized within the Preparatory Committee; cf. *Report and Draft Statute and Draft Final Act*, p. 67 note 21 to Art. 30 (in Bassiouni, *supra* note 4, 145), furthermore Triffterer, in Triffterer, *supra* note 4, margin No. 11.
- 242 As described by Fletcher, *supra* note 232 (Basic Concepts), 156.
- 243 Cf. *supra*, IV.F.1.
- 244 Art. 7(1)(d) ICC Statute.
- 245 Although this position is not undisputed in that in the case of an *error in persona vel objecto* the perpetrator should be merely liable for negligence (which is not punishable in the area of the ICC Statute), the position taken here seems to prevail worldwide: cf. Jescheck and Weigend, *supra* note 85, 311; Smith and Hogan, *supra* note 2, 73 f.; Mir Puig, *supra* note 80, 259; with regard to the explicit regulation in Arts. 60, 82 Italian Criminal Code, cf. Mantovani, *supra* note 130, 423 f.
- 246 Thus far on the same line the elements of the Preparatory Commission, p. 42 (para. 5) to Art. 8(2)(e)(iii).
- 247 As termed by Fletcher, *supra* note 232 (Basic Concepts), 156.
- 248 Cf. *supra*, IV.F.2 and 3.
- 249 Cf. *supra*, IV.F.2(b).
- 250 As it seems also to be the position of the Preparatory Commission by not expecting a value judgement from the perpetrator (as, in principle, ruled by the Preparatory Commission Elements, Introduction, p. 5).
- 251 For, if evaluations are declared irrelevant for the mental element, neither the complete lack of an evaluation nor normative misjudgements are capable of negating the mental element. This has to be remembered when talking about the (disputed) culpability of mistakes of law to negate the mental element. See *infra*, 2(a).
- 252 As described by Fletcher, *supra* note 232 (Basic Concepts), 148 f.
- 253 Cf. *supra*, IV.C.

- 254 For further details of this conception which, after having been developed in German theory (cf. with criticism as well, T. Lenckner, in Schönke and Schröder, *supra* note 85, § 13 prenotes 15 ff.), has also found followers in Italy and Spain; as to Italy cf. Mantovani, *supra* note 130, 158, as to Spain, Mir Puig, *supra* note 80, 416 f.
- 255 For further details as to the distinction between justification and excuse, cf. Ch. 24.1 below; Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 34 ff. As to ‘grounds of justification and excuse as distinguished from other grounds for denying culpability’, cf. Roxin, in Eser and Fletcher, *supra* note 3, Vol. I, pp. 229–262; as to the proliferation of these distinctions in Romanic jurisdictions, see the contributions in Eser and Perron, *supra* note 3.
- 256 Cf. *supra*, V.B to D.
- 257 As perhaps misunderstood by Cassese, see *supra* note 210.
- 258 See *supra*, V.C.1.
- 259 As described by Kress, *supra* note 119, 7.
- 260 *Supra*, V.C.1(b).
- 261 As to their variety and types cf. *supra*, IV.F.2 and 3.
- 262 As suggested by Weigend, *supra* note 231, 1391.
- 263 In the same sense Triffterer, in Triffterer, *supra* note 4, margin No. 38 f.
- 264 Cf. *supra*, *inter alia*, Freiburg Draft, Art. 33n (2) and the Updated Siracusa Draft Art. 33-15 (2), *supra* II.C, at note 40.
- 265 Referred to in the last phrase of Art. 32(2) to Art. 33 ICC Statute.
- 266 For further details, see Ch. 24.2 above; P. Gaeta, ‘The Defence of Superior Orders’, 10 *EJIL* (1999) 172–191 (188 f.). As to the practical unlikeness of such a case of recognizable mistake, see Cassese, *supra* note 210, 157.
- 267 This principal disregard of the (non)consciousness of the prohibition as such is, incidentally, a fundamental difference from modern theories of error, also insofar as, with Arts. 30 and 32 ICC Statute, the demarcation of mistakes still runs between mistake of *fact* and of *law*, whereas the distinction between ‘factual errors’ (with regard to elements both constituting and negating the unlawfulness of the crime) and ‘prohibitional errors’ with regard to norms (whether constituting or excluding the unlawfulness) allows the orientation of culpability to the perpetrator’s ability of realizing his wrongdoing; cf. § 9 (1) Austrian Strafgesetzbuch, § 17 German Strafgesetzbuch; in the same sense, see Art. 14(3) (Spanish Código Penal, Arts. 29 f. Polish Kodeks karny); as to evidentiary requirements of Art. 122-3 French Code Pénal, see Merle and Vitu, *supra* note 99, No. 587.
- 268 According to Art. 78 ICC Statute.
- 269 Cf. *supra*, V.C(d) to Art. 33(1)(b) and (c) ICC Statute.
- 270 Cf. *supra*, V.C.2 and 3(b).
- 271 *Supra*, V.B.
- 272 *Supra*, V.C.2(b).
- 273 Cf. Ch. 20 above, I.
- 274 This exclusion of a mistake, at least according to Art. 32(2), seems to have been overlooked by Cassese, *supra* note 210, 155, in his example of a serviceman, not being aware of his violating an international law prohibition. As to whether the result may be different in case of a superior order, believed by the serviceman to be lawful, cf. Gaeta, *supra* note 267, 188 f.
- 275 As, *inter alia*, Art. 14 Spanish Código Penal; Art. 122-3 French Code Pénal; § 17 German Strafgesetzbuch. Though probably arriving at the same end, § 9 Austrian Strafgesetzbuch recognizes mistake of law if the perpetrator cannot be blamed for his actions (‘nicht vorzuwerfen ist’).
- 276 As to the same conclusion cf. Ambos, *supra* note 38, 29 f.
- 277 Cf. *supra*, v.c.1(c).
- 278 See *supra*, v.c.1(d).
- 279 This is particularly true with regard to rules of warfare the knowledge of which cannot just simply be expected of any ordinary soldier (cf. Weigend, *supra* note 231, 1392, with reference to Art. 8(2)(b)(xiv) and (e)(xii) ICC Statute). In this respect, the situation has hardly changed for the better since Y. Dinstein, in *The Defence of Obedience to ‘Superior Orders’ in International Law* (1965) 33, declared that ‘one should take into account the relative uncertainty of laws of war and other branches of international law’.
- 280 Cf. *supra*, V.C.1(c), D(d).
- 281 To the same end, though not explicitly taking recourse to analogy, see Triffterer, in Triffterer, *supra* note 4, margin No. 14.
- 282 Cf. A. Eser, ‘“Defences” in War Crimes Trials’, 24 *IYHR* (1995) 202, at 216 f.
- 283 As to the same view, see Ambos, *supra* note 38, 30; see also Nill-Theobald, *supra* note 11, 347 f. with references to Pre-Rome voices to the same end.