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Topic: **DOES ARTICLE 30 OF THE ROME STATUTE INCLUDE *DOLUS EVENTUALIS* AND RECKLESSNESS?**

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DECLARATION

I, Caroline Ann Wilson, declare that the work presented in this research paper is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Law.

Signed…….

Date…….

LIST OF ABBREVIATIONS

DRC Democratic Republic of Conge

ICC International Criminal Court

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the Former Yugoslavia

MPC Model Penal Code

PTC Pre-Trial Chamber

UPC Union des Patriotes Conglias

US United States of America

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CHAPTER ONE

1. INTRODUCTION

1.1 Background to the study

The Rome Statute of the International Criminal Court (ICC) was established on 17 July 1998 by a multilateral treaty signed in Rome by 120 States.[1] The ICC Statute entered into force on 1 July 2002 after it had been ratified by 60 states.[2]

Article 30[3] of the Rome Statute, provides a general definition for the mental element necessary to trigger criminal responsibility of individuals for serious violations under international humanitarian law.[4] A person shall be criminally responsible and liable for a crime within the jurisdiction of the International Criminal Court if the material elements of a 'crime are committed with 'intent and knowledge'.[5] For the first time, international criminal Law does only confirm general requirement for international criminal liability but codifies the

[1] Gallmetzer, R and Klamberg, M "Individual responsibility for Crimes under International Law The *Ad Hoc* Tribunals and the International Criminal Court" www.individualresponsibility.pdf (accessed September 2009).
[2]Badar M "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective" (2008) 19 *Criminal Law Forum* 473.
[3] Rome Statue of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entered into force on 1 July 2002.
[4] Badar (2008) 473.
5Ambos K "General Principles Of criminal Law in the Rome Statute" (1999) 10 *Criminal LawForum* (hereafter *Criminal Law Forum)* 1 at 20.

requirement of individual criminal responsibility within Article 30 of the Rome Statute.[6]

It is a principle of law that the establishment of criminal culpability requires a certain state of mind on the part of the perpetrator.[7] That is the mental element of *mens rea*.[8] Different legal systems often require different standards of *mens rea.* In common law systems, the *mens rea* of *dolus eventualis* and/or recklessness is sufficient to ground liability for serious crimes while in others the mere possibility of risk is not enough.[9]

The Rome Statute does not define the different standards of *mens rea.* The 'intent and knowledge' covers *dolus directus* but the question is whether it covers *dolus eventualis* and/or recklessness. The Rome Statute does not mention *dolus eventualis* and/ or recklessness explicitly as one of the forms of culpability although article 28, the exception, provides for *dolus eventualis*/recklessness.[10]

Neither the Nuremberg Charter nor the Statutes of the *ad hoc* Tribunals clearly defined the various standards of *mens rea.*[11] However, the Yugoslavia and Rwanda *ad hoc* Tribunals recognised both recklessness and *dolus eventualis.*[12] The different standard of *mens rea* is therefore still the subject of much dispute.

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[6]Werle G and Jessberger F "Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law" (2005) *3 Journal of International Criminal Justice (*hereafter *Journal of International Criminal Justice*) 35 at 36.
[7] Werle G *Principles of International Criminal Law* (2005) 100.
[8] Badad M "*Mens Rea*- Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunal"(2005) 5 *International Criminal Law Review* 203 at 204.
[9] *Ibid.*
[10]*Ibid;* Werle and Jessberger (2005) 47.
[11] Werle (2005) 100.
[12] Werle G and Jessberger F "Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law" (2005) *3 Journal of International*

The *Lubanga*[13] *decision* is the first case of the International Criminal Court in which reference was made to the various standards of *mens rea.*[14] 'Lubanga Dyilo was charged with the war crimes of conscripting and enlisting children under the age of fifteen into an armed group and using them to participate actively in hostilities.'[15] He was 'alleged to be connected to the crimes as a ''co-perpetrator''.'[16]

This Research Paper seeks to assess whether *dolus eventualis*/recklessness is included within the structure of Article 30 of the Rome Statute.[17]

1.2 Focus and objectives of the study

Firstly, the study will examine the history of *dolus eventualis* and recklessness within the draft of Article 30 and why it 'fell out of the written discourse before Rome.' [18] Secondly, it will discuss the meaning of *dolus eventualis* and recklessness under common and civil legal systems. It will consider whether the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) referred to the concepts of

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*Criminal Justice (*hereafter *Journal of International Criminal Justice*) 35 at 53; Werle (2005) 114.

[13] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007.

[14] Clark R S "Drafting the General Part to Penal Code: Some Thoughts inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Courts first substantive law discussion in the *Lubanga Dyilo Confirmation* proceedings" (2008) 19 *Criminal Law Forum* 519 at 527.

[15] Clark (2008) 528.

[16] Clark (2008) 527.

[17] Werle and Jessberger (2005) 53.

[18] Clark (2001) 301; Clark (2008) 488.

dolus eventualis and recklessness. It will specifically discuss case law of the Former Yugoslavia. It will then examine the *Lubanga Decision.* Finally, it will attempt to answer the following question 'does Article 30 of the Rome Statute include *dolus eventualis* and recklessness?'

1.3 Significance of the study

The research paper will examine 'whether and to what extent *dolus eventualis* or recklessness is sufficient to establish criminal responsibility under'[19] Article 30 of the Rome Statute. The research paper is an attempt to contribute to the broader understanding of *dolus eventualis* and recklessness in Article 30 of the Rome Statute.

1.4 Hypothesis and research questions

The study will aim to answer the following pertinent question in respect to criminal responsibility under Article 30 of the Rome Statute:
Does Article 30 of the Rome Statute include *dolus eventualis* and recklessness?

1.5 Literature survey

The most relevant books for this study are the books by Bantekas, Cassese, Fletcher, Schabas, Snyman, Triffterer and Werle.

[19] Werle and Jessberger (2005) 52.

"Recklessness (*dolus eventualis*) is defined by Cassese as, "a state of mind where the person foresees that his action is likely to produce its prohibited consequence, and nevertheless takes the risk of so acting."[20] Cassese is further of the opinion that although Article 30 of the Rome Statute, does not refer explicitly to recklessness (*dolus eventualis)*, it may be encompassed by the definition of intent laid down in paragraph 2 of Article 30 of the Rome Statute.[21]

Triffterer argues that the concepts of *dolus eventualis* and recklessness can be read within the text of Article 30 of the Rome Statute. The phrase 'will occur' may be interpreted as to include both concepts.[22]

A number of journal articles will be used. Theses are, among others, the articles; of Ambos, Badar, Clark, Jessberger, and Werle.

Werle and Jessberger argue that as far as the mental element is otherwise provided for, *dolus eventualis* or recklessness may legitimately be made the basis for culpability.[23]

Ambos observes that the wording of Article 30 of the Rome Statute leaves no room for an interpretation which includes *dolus eventualis* and recklessness.[24]

Authors including Eser are of the opinion that *dolus eventualis* and recklessness

[20] Davidson E "United States Foreseeability, Awareness and Knowledge of the Consequences of the Sanctions Against Iraq" www.aldeilis.net (accessed June 2009).
[21] Cassese A *International Criminal Law* (2003) 73.
[22]Badar (2008) 485; also Piragoff D K 'Article 30 Mental Element' in Triffterer O ed. (1999) 851 at 857.
[23] Werle and Jessberger (2005) 53.
[24] Ambos (1999) 22.

may apply while, Hellor is of the opinion the wording in Article 30 of the Rome Statute of the International Criminal Court should be amended.[25]

A number of International instruments such as ICC,[26] ICTR,[27] ICTY[28] will be relied on. A study of the *ad hoc Tribunal cases* and the *Lubanga Decision*[29] will be mainly considered for this study. A number of websites will be accessed for.

1.6 Methodology

This research will review the literature on the topic. It will rely on the relevant primary and secondary sources relating to international criminal law and national criminal law. This includes the Rome Statute of the International Criminal Court and the Statutes of the *ad hoc* Tribunals. The study will refer extensively to leading text books, articles and law journals on the topic. Other sources will include judgements handed down by international judicial bodies, comments on decisions, reports and electronic sources on the topic. This study adopts both critical and active research methods.

[25] Clark (2008) 535.
[26] Rome Statue of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entered into force on 1 July 2002.
[27] Statute for the International Criminal Tribunal for Rwanda (1994) adopted 8 November 1994 by resolution 955.
[28] Statute for: the International Criminal Tribunal for the Former Yugoslavia (1993) adopted 25 May 1993 by resolution 827.
[29] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007.

1.7 Limitations of the study

The scope of this research paper is confined to the mode of liability in the form of *dolus eventualis* and recklessness.

This paper will engage in a discussion on the meaning of *dolus eventualis* and recklessness under common and civil legal systems. It will consider whether the Tribunals (ICTY and ICTR) referred to the concepts of recklessness and *dolus eventualis.* It will consist of a systematic analysis of the judgements of the ICTY, ICTR and the *Lubanga Confimation decision.* Finally, it will attempt to answer the following question 'does Article 30 include *dolus eventualis* and recklessness?'

1.8 Overview of chapters

The study will consist of five chapters. Chapter one will provide the context in which the study is set. It introduces *dolus eventualis* and outlines the basis of the study. Chapter two will give a brief history of *dolus eventualis* and recklessness in the draft of Article 30. Chapter three will endeavour to define the concepts, *dolus eventualis* and recklessness. This chapter will also outline these concepts under common and civil legal systems. Chapter four will consider whether the Tribunals (ICTY and ICTR) referred to the concepts of *dolus eventualis* and recklessness. It will discuss the relevant case law of the Former Yugoslavia and Rwanda. It will focus on the *Lubanga Decision* of the ICC. Chapter five will

consist of a summary of the entire presentations and conclusions drawn from the study.

CHAPTER TWO

2. HISTORY OF *DOLUS EVENTUALIS*/RECKLESSNESS

2.1 Introduction

The *ad hoc* tribunal created in Nuremberg after World War II set a precedent for the international community to hold individuals responsible for grave crimes.[30] The *ad hoc* criminal Tribunals were established to address the crises in former Yugoslavia and in Rwanda.[31] These Tribunals continued the pattern of holding individuals responsible for serious 'breaches of human rights law such as; genocide, crimes against humanity, and war crimes.'[32] The international community acknowledged the desire for a permanent court rather than the *ad hoc* tribunals.[33] In response to this need, the international community agreed on the ICC initiative.[34]

The goal of this chapter is to give a brief history of *dolus eventualis* and recklessness in the draft of Article 30 of the Rome Statute. It will clarify why *dolus eventualis* and recklessness fell out of the written discourse before Rome'[35]

[30] Gallmetzer R and Klamberg M "Individual responsibility for Crimes under International Law The *Ad Hoc* Tribunals and the International Criminal Court" www.individualresponsibility.pdf (accessed September 2009).
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] Kittichaisaree K *International Criminal Law* (2001) 28.
[35] Clark (2001) 301; also Badar (2008) 488.

2.2 History

In 1996, the International Law Commission[36] completed the Draft Code. The Draft Code reflects the Nuremberg Principles.[37] The General Assembly requested the Preparatory Committee to draft the Draft Statute for the International Criminal Court (Draft Statute).[38] The Preparatory Committee considered the Draft Code while drafting the Draft Statute.[39] Similar to the ICTY and the ICTR, the Rome Statute enshrines the principle of individual criminal responsibility.[40] The Rome Statute applies to all persons without any distinction based on official capacity.[41]

The drafting of the Draft statute was divided into drafters of the special part and drafters of the general part. The drafters of the special part were mostly foreign officers and military lawyers. The drafters of the general part were from the Justice Ministries. The drafters were ignorant to what the others were drafting. Article 30 of the Rome Statute falls under the general part.[42]

[36] Clark (2001) 299.
[37] Gallmetzer R and Klamberg M "Individual responsibility for Crimes under International Law The *Ad Hoc* Tribunals and the International Criminal Court" www.individualresponsibility.pdf (accessed September 2009).
[38] *ibid.*
[39] *ibid*.
[40] *ibid* 61.
[41] *Ibid.*
[42] Clark (2008) 525.

In the development of an independent permanent International Criminal Court, the drafters of the Statute had to find common ground between different legal systems.[43]

Knowledge is an important element in determining the culpable intent.[44] This occurs when the perpetrator denies having intended the undesirable consequences of his conduct.[45] A general rebuttable presumption in law exist that a 'person intends the foreseeable consequences.'[46]

In 1996, the Preparatory Committee included a compilation of proposals in ways the different legal systems could approach *dolus eventualis* and recklessness.[47] This compilation was entitled 'Article H, *Mens rea*, Mental elements of crime'.[48] It stated as follows:

> "1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent [or] [and] knowledge [whether general or specific or as the substantive crime in question may specify].
>
> 2. For the purposes of this Statute and unless otherwise provided, a person has intent where: (a) In relation to conduct, that person means to engage in the act or omission; (b) In relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

[43] Gallmetzer R and Klamberg M "Individual responsibility for Crimes under International Law The *Ad Hoc* Tribunals and the International Criminal Court" www.individualresponsibility.pdf (accessed September 2009); also Clark (2008) 525.
[44] Davidson E "United States Foreseeability, Awareness and Knowledge of the Consequences of the Sanctions Against Iraq" www.aldeilis.net (accessed June 2009).
[45] *Ibid.*
[46] *Ibid.*
[47] Bassiouni M C *The Legislative History of the International Criminal Court* (2005) 226; also Clark (2001) 299.
[48] Clark (2001) 299; also Bassiouni (2005) 226.

> 3. For the purposes of this Statute and unless otherwise provided, 'know', 'knowingly' or 'knowledge' means:
>
> (a) To be aware that a circumstance exists or a consequence will occur; or
>
> (b) [To be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists] [to be wilfully blind to the fact that a circumstance exists or that a consequence will occur.]
>
> 4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:
>
> (a) The person is aware of a risk that the circumstance exists or that the consequence will occur; (b) The person is aware that the risk is highly unreasonable to take; [and] (c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur".[49]

The mental elements in the Rome Statute are 'intent and knowledge.'[50] The material elements relate to 'circumstances, conduct and consequences.'[51] The 'elements' are the building blocks that makes up the crime.[52] It is the duty of the prosecutor to meet the 'onus' by establishing any one of the elements.[53]

Article 30 of the Rome Statute 'contemplates that 'unless otherwise provided', there is no criminal responsibility in the absence of 'intent and knowledge' in respect of what the article calls material elements.'[54] Three types of material

[49] Bassiouni (2005) 226; See also Clark (2001) 299.
[50] Working Group on the Crime of Aggression "Elements of the Crime of Aggression" 1-12 July 2002 PCNICC/2002/WGCA/DP.2 Proposal submitted by Samoa New York.
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*

elements is recognised in article 30 of the Rome Statute. Namely, 'conduct', 'consequences' and 'circumstances'.[55]

'Conduct' refers to an act or omission and a 'consequence' is the result of such conduct. 'Circumstances' is a 'crucial factor in the environment in which the perpetrator operates.'[56] In the light of the words 'unless otherwise provided' at the beginning of article 30 of the Rome Statute, it is important to consider the appropriate mental element in respect of each material element of a crime.[57]

Clark (2001) explains that the; 'brackets in the compilation proposal indicates, 'disputed issues and "disputed issues" within disputed issues.'[58] Many participants were reluctant to base criminal responsibility on *dolus eventualis* and recklessness.[59] Recklessness 'vanished' from the Rome Statue in 1998.[60] Clark (2001) mentions, in a footnote that ultimately the Rome Statute did include a type of recklessness in Article 28 (b).[61] *Dolus eventualis* also 'fell out of the written discourse before Rome.'[62] However, recklessness and *dolus eventualis* later became the focus of many debates. The interpretation from different legal systems caused much confusion.[63]

[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] Clark (2001) 301.
[59] *Ibid.*
[60] *Ibid;* also Badar (2008) 488.
[61] Rome Statue of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entered into force on 1 July 2002.Rome Statute of the International Criminal Court (1998).
[62] Clark (2001) 301; also Badar (2008) 488.
[63] *Ibid.*

Article 30 (1) of the Rome Statute states that 'unless otherwise provided', a person shall be criminally responsible within the jurisdiction of the International Criminal Court 'only if the material elements are committed with intent and knowledge'[64] Article 30(2) of the Rome Statute defines 'intent' in two ways. That is, 'with regard to conduct and with regard to consequence.'[65] On one hand, 'in relation to conduct that person means to engage in the conduct.' On the other hand, 'in relation to a consequence' there is intent where 'that person means to cause that consequence or is aware that it will occur in the ordinary course of events.'[66] 'Knowledge' is defined as, 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.[67] With regard to the consequences, 'awareness that it will occur in the ordinary course of events', fits the definitions of both intent and knowledge.[68]

Clark (2001) observes that there was considerable debate about the conjunctive 'and' between intent and knowledge.[69] He concludes that the French insisted that both 'intent and knowledge' were necessary while those from common law jurisdictions argued that the appropriate mental element for each element had to be considered on its own merits.[70] In particular, the term "circumstance" as it is also used in Article 30(3) of the Rome Statute.[71]

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[64] Rome Statue of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entered into force on 1 July 2002, Article 30.
[65] Rome Statue of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entered into force on 1 July 2002.Rome Statue of the International Criminal Court (1998).
[66] Shabas (2007) 225.
[67] *Ibid*.
[68] Clark (2001) 302.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid* .

'Intent and knowledge' refers to the material elements of the crime.[72] The word 'physical' was changed to 'material' in the draft statute of 1998.[73]Article 30 of the Rome Statute assigns different levels of mental elements to each of the material elements in question.[74] Article 30 of the Rome Statute assigns different levels of mental element to each of the material elements of the crime in question.[75] This is clearly remarkable move from an 'offence analysis approach to an element analysis approach.'[76]

The Model Penal Code adopted by the American Law Institute uses 'material' in a different way. According to the Model Penal Code, section 2.02(4), the mental culpability must be proved with respect to each material element of the or there will be no conviction.[77] 'Knowledge and recklessness' in the draft refers to the subjective elements.[78]

Recklessness in Article 30(4)(b) of the draft Statute, refers to the risk being 'highly unreasonable.'[79] This adds an objective element in that the perpetrator must prove awareness of unreasonableness.[80] The 'difference between "knowledge" and "recklessness" is that knowledge is that the circumstance exists or that a consequence will occur.'[81] While recklessness is a question of being aware that 'there is a risk a circumstance exists or that the consequence it

[72] Werle(2005) 102.
[73] Clark (2001) 305.
[74] Piragoff D K 'Article 30 Mental Element' in O. Triffterer ed. (1999) 851 at 857.
[75] Badar (2008) 476.
[76] *Ibid.*
[77] American Law Institute's Model Penal Code promulgated in 1962.
[78] Werle (2005) 103.
[79] Clark (2001) 205.
[80] *Ibid* 302.
[81] *Ibid.*.

will occur.'[82] The word 'indifference' in Article 30(4)(c) of the Draft Statute confirms the subjective elements. [83]

One of the principal drafters of Article 30 of the Rome Statute, Piragoff, reasons in Triffterer, 'that the conjunctive formulation "and" in Article 30(1) of the Rome Statute ensures that if knowledge of a particular circumstance is a separate element of the crime, the person cannot be criminally responsible and liable for punishment unless the other material elements are also committed with intent. He also notes 'that "Knowledge" is not defined with regard to "conduct" but only in relation to "circumstances".'[84] This creates the impression that it could later create misconceptions.[85] According to Robinson and Grall the Model Penal Code (MPC) failed to define recklessness and negligence with respect to conduct.[86]

The 1996 draft's definition of 'recklessness was, in respect to the distinction between an explicit use and a default rule.'[87] This remained in play until the Rome Conference. Aside from the controversy about whether recklessness was an appropriate basis for responsibility, 'paragraph 1 of the proposed draft of article H ultimately became the heart of Article 30 of the Rome Statute.'[88] 'Intent and knowledge' within Article 30 of the Rome Statute was drafted as a default rule.[89]

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[82] *Ibid*.
[83] *Ibid.*
[84] *Ibid*.
[85] *Ibid.*
[86]Robinson P and Grall J A "Element Analysis in Defining Criminal Liability: TheModel Penal Code and Beyond" (1983) 35 *Stanford Law Review* 710.
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*

The paragraph on recklessness in the draft Statute, included the words 'where this Statute provides that a crime may be committed recklessly' followed by a definition of recklessly.[90] This gave the impression that it was drafted as an explicit use rule. However, 'after it was pointed out that the word recklessness did not appear anywhere in the definitions of crimes, it was agreed that a definition of that concept was unnecessary.'[91] It was dropped, since no explicit use had been made of it.[92]

The participants responsible for drafting the statute, concluded, that the inclusion of these mental elements might 'send the wrong signal in that these forms of culpability were sufficient for criminal liability as a general rule.'[93] These mental elements should be incorporated in individual articles that define the specific crimes.[94] The opening words of Article 30 of the Rome Statute recognise that the mental elements might be provided elsewhere in the Rome Statute.[95]

2.3 Conclusion

The drafters were uncomfortable with liability based on *dolus eventualis* or recklessness.[96] According to Clark, the drafters agreed upon a default rule in

[90] Clark (2001) 295.
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid.*
[94] Piragoff (1999) 851.
[95] Piragoff (1999) 851.
[96] Clark (2001) 296.

Article 30 of the Draft Statute. It only applies unless there is a more specific provision.[97]

The following provision was finally adopted by the Rome Conference in 1998 as the following:

> "Article 30 Mental element
>
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purpose of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly'[98]

Each of us brings our own legal cultural experience to issues of comparative law.[99] The use of language is also different. Clark concludes that the 'trick is to make it work. It is like a sui generis piece of work. It is neither form common law nor is it from civil law.'[100]

[97] Arnold R "The *Mens Rea* of Genocide under the Statute of the International Criminal Court" (2003) 14 *Criminal Law Forum* 127 at132; Werle and Jessberger (2005) 53.
[98] Rome Statue of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entered into force on 1 July 2002, Article 30.
[99] Clark (2001) 334.
[100] Clark (2008) 552.

However, the drafters have provided a framework which the judges of the ICC 'will feel compelled to use as they set out on the path of creating a new jurisprudence.'[101]

[101] *Ibid.*

CHAPTER THREE

3. DISCUSSION ON *DOLUS EVENTUALIS* AND RECKLESSNESS

3.1 Introduction

A person is considered to intend the consequence not only if he's conscious objective is to cause that consequence, but also if he acts with knowledge that the consequence is virtually certain to occur as a result of his conduct. [102] In Article 30 of the Rome Statute, intent denotes two different meanings.[103] The meaning depends on whether the material element is related to conduct or consequence.[104] 'A person has intent in relation to conduct, if he means to engage in the conduct. A person has intent in relation to consequence. A person is said to have intent if that person means to cause that consequence or is aware that it will occur in the ordinary course of events.'[105]

The goal of this chapter is to define the concepts *dolus eventualis* and recklessness. This chapter will also consider these concepts under common and civil legal systems. Specific reference will be given to the various theories of these *dolus eventualis* and recklessness under German Law.

[102] Badar (2008) 479.
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*

3.2 Dolus Eventualis

A person acts with *dolus eventualis* if he is aware that a material element included in the definition of a crime may result from his conduct and reconciles himself or 'makes peace' with this fact.[106] The offender must reconcile himself with the prohibited result.[107] German legal scholars are of the opinion that the offender must 'seriously consider' that the result will occur. He accepts the fact that his conduct could fulfil the legal elements of the offence.[108]

3.3 Recklessness

Recklessness is defined as the 'consciously taking risk.'[109] The term 'recklessly' refers to the subjective state of mind of a person. The 'person foresees that his conduct may cause the prohibited act but nevertheless takes a risk of bringing it about.'[110] The term recklessness is conscious risk taking.[111] The person consciously takes the risk. In some civil legal systems it is distinct from negligent while in others it is regarded as negligence or borderlines negligence.[112]

[106] Werle and Jessberger (2005) 52.
[107] *Ibid.*
[108] Badar (2008) 490.
[109] Snyman CR *Criminal Law* (2002) 393.
[110] Badar (2008) 488.
[111] Davids M T "Recklessness and the Model Penal Code" (1981) 9 *American Law Journal* 291.
[112] *Ibid.*

3.3 *Dolus eventualis*/Recklessness in German Legal System

In Fletcher's (2000) analysis German law, it encompasses *dolus eventualis* if it is included within particular result.[113] Fletcher (2000) defines *dolus eventualis* as "a particular subjective posture toward the result. The tests … vary; the possibilities include everything from being 'indifferent' to the result, to 'being reconciled' with the result as a possible cost of attaining one's goal."[114] In German law, *dolus eventualis* is considered an aspect of intention and not of recklessness.[115] However, recklessness only requires ignorance to the harmful consequence.[116] This concept of recklessness seems similar to the Model Penal Code's, which requires conscious awareness of a substantial risk.'[117]

In *Leather Belt case* the Federal Supreme Court ruled that *dolus eventualis* requires the perpetrator to 'foresee the consequence as a possible result and he approves it.'[118] The 'approval of the result' can be seen as a decisive criterion distinguishing *dolus eventualis* from recklessness.[119]

In a more recent case, the Federal Supreme Court held that in order to make a finding of *Dolus eventualis,* the perpetrator must have considered the proscribed result to occur. This occurrence should not to be an entirely distant possibility.[120] Intention is present if he approved of it or reconciled himself to it in order to

[113] Fletcher G *Rethinking Criminal Law* (2000) 446.
[114] *Ibid.*
[115] Badar (2005) 224.
[116] *Ibid.*
[117] Fletcher (2000) 446.
[118] Badar (2005) 229.
[119] *Ibid*.
[120] *Ibid* 27.

achieve a goal.[121] The perpetrator must earnestly and not merely in an unclear way rely on the proscribed result not occurring.[122]

Dolus eventualis is considered to be the usual minimum level of culpability for criminal liability. [123] Yet, it is the highest disputed form of intention in German criminal law.[124] A finding of *dolus eventualis* may be made if the perpetrator was uncertain that his conduct would lead to a specific prohibited result. The fact that the accused has taken a particularly great risk and even intended to cause a lesser form of harm will not secure a conviction based on a finding of *dolus eventualis.*[125]*Dolus eventualis* in German law is treated differently according to the various theories.

3.4 Theories In German Law

3.4.1 Consent and Approval Theory

The majority of German legal scholars ascribe to this theory. They agree that, the perpetrator must 'seriously consider' that the result will occur.[126] The offender must 'reconcile himself' to the prohibited result.[127] This coincides with *dolus eventualis* in many other legal systems.[128]

[121] *Ibid*.
[122] *Ibid.*
[123] Badar (2005) 230.
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid* 231.
[128] *Ibid.*

If the perpetrator has reason to believe that 'though he foresees it as a possibility' the result will not occur, he lacks *dolus eventualis*.[129] Knowledge and wilfulness must both be present. The perpetrator 'foresees the consequences as possibility' is a sufficient component of knowledge. While 'approval' of the result or to 'reconcile himself' is a sufficient component of wilfulness.[130]

3.4.2 Indifference Theory

According to this theory, the perpetrator foresees the occurrence of the result as a possibility and is indifferent to the occurrence of the result.[131] Being indifferent to the occurrence of the result which the perpetrator foresees as a possibility, constitutes the volitive element of *dolus eventualis.*[132] This theory might seem similar to the 'consent and approval theory.'[133] This theory can lead to an acquittal if the result was highly undesired.[134]

3.4.3 The Intellectual Theory

The intellectual theory does not require the component of wilfulness. It restricts *dolus eventualis* to the intellectual component. This theory also 'negates the existence of a conscious form of negligence. The intellectual theory implies that a distinction between *dolus eventualis* and negligence is unnecessary.'[135]

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[129] *ibid* 231.
[130] *ibid*.
[131] *ibid.*
[132] *ibid.*
[133] *ibid*.
[134] *ibid* 29.
[135] *ibid.*

3.4.5 The Possibility Theory

According to this theory, the perpetrator must recognise a substantial or a considerable possibility that the result could materialise.[136] If the defendant foresees or recognises the result as 'concretely possible' he acts with *dolus eventualis*.[137] If the perpetrator seriously believed that the prohibited result will not occur or did not accept this result, he will still possess (*dolus eventualis*).[138]

3.4.6 The Probability Theory

This theory is contrary to the 'possibility theory'. The 'probability theory' requires awareness of a higher degree of risk.[139] The result must have been considered to be likely. The perpetrator acts with *dolus eventualis,* if he 'foresees that the occurrence of the prohibited result is probable.'[140] 'Probable' is defined as being 'more than possible.[141]

3.4.7 Frank Formula

The Frank Formula is not considered to be a proper definition of *dolus eventualis.* It is merely means to inquire into the mental states of an offender.[142] According to Frank Formula if the perpetrator is aware of the possibility of the

[136] *ibid* 29.
[137] *ibid*.
[138] *ibid* 30.
[139] *ibid*.
[140] *ibid*.
[141] *ibid*.
[142] *ibid* 31.

circumstance or consequence then the proper inquiry into the mental state of the offender is then followed.[143]

The German courts favour the 'consent and approval theory'. According to the jurisprudence of the Federal Supreme Court, acting with *dolus eventualis* requires that the perpetrator perceive the occurrence of the criminal result as possible.[144] The criminal result should not be completely remote.[145] In conclusion, he acts with *dolus eventualis* if he foresees the possibility and reconciles himself to that possibility.[146]

3.5 *Dolus eventualis*/Recklessness in the French Legal System

French criminal law gives intent a very different meaning than English common law.[147] The nineteenth century French criminal lawyer, Emile Garçon provides a classic definition of general intent:

> "Intent, in its legal sense, is the desire to commit a crime as defined by the law; it is the accused's awareness that he is breaking a law."[148]

In French criminal law a distinction is made between two forms of intent. Namely, intent to act unlawfully and special intent that needs to be proved for certain offences. The term intent in French criminal law means the deliberate

[143] *ibid*.
[144] *ibid*.
[145] *ibid*.
[146] *ibid*.
[147] Elliot C "The French law of intent and its influence on International Criminal Law (2000) 11 *Criminal Law Forum* 35.
[148] *ibid* 36.

intention to commit a wrong. It involves both 'knowledge' that something is prohibited and the 'deliberate willingness' to carry out the proscribed conduct.[149] Elliot (2000) explains that general intent is 'criminal awareness and desire.[150] Awareness simply requires the perpetrator to be aware that the act is unlawful.[151] The perpetrator must also understand the unlawful act is the same as described in the criminal code.[152] The 'element of desire refers to the perpetrators willingness to commit the wrongful act and not the desire to accomplish the result of the act in question.'[153]It appears that in French law the perpetrator need not reconcile himself with the possibility of the result occurring. The perpetrator has to understand that the act is unlawful and the perpetrator must be willing to accomplish this unlawful act.

3.6 *Dolus eventualis*/Recklessness in Italy

Under the Italian criminal law all serious crimes require proof of the mental element known as *dolus*.[154] This implies that the prohibited result must be both foreseen and willed.[155] Badar (2008) observes that, according to the Italian criminal law a result may be wanted or willed even though it is not desired.[156] The perpetrator act with *dolus eventualis,* if the conduct of the perpetrator brings about the contemplated possibility of the prohibited result and the perpetrator is prepared to run the risk. The perpetrator still acts with *dolus eventualis* even if a small risk is wanted or willed. The perpetrator needs to reconcile him with the

[149] *ibid.*
[150] *ibid.*
[151] *ibid.*
[152] *ibid.*
[153] *ibid*.
[154] Badar (2008) 489.
[155] *ibid.*
[156] *ibid* 490.

possibility or accept it as a part of the price he is prepared to pay to secure his objective.[157]

3.7 *Dolus eventualis*/Recklessness in South African law

In South African law, *dolus eventualis* is a form of intention different to 'intention' in its ordinary sense.[158] Snyman (2002) explains that some writers refer to this type of intent as 'constructive intention.'[159] *Dolus eventualis* consists of two components. Namely; the 'perpetrator subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue and he reconciles himself to this possibility.'[160]

The perpetrator should foresee the possibility of the result and he should also reconcile himself to this possibility.[161] The foreseeability aspect is described as the 'cognitive part while the reconciling aspect is the conative or volitional' part this concept.[162] According to Snyman (2002) the term possibility in this context may be a 'strong possibility, a slight, remote or even exceptional.'[163] Snyman (2002) submits that *dolus eventualis* is absent if the perpetrator foresees the possibility only as remote or far fetched. If any normal person foresees that there is a remote or exceptional possibility that an everyday activity may lead to an

[157] *ibid.*
[158] Snyman (2002) 181.
[159] *ibid.*
[160] *ibid.*
[161] *ibid* 182.
[162] *ibid*.
[163] *ibid.*

unlawful act, it does not mean that there is *dolus eventualis.*[164] *Dolus eventualis* is not limited to cases where the result is foreseen as to cases where the result is foreseen as a strong possibility. The correct approach is to assume that there must be a substantial or reasonable possibility that the result may ensue.[165]

The fact, that the perpetrator foresees the result as a substantial possibility, still does not ensure the presence of *dolus eventualis.*[166] *Dolus eventualis* is only present if the perpetrator reconciles him to the possibility that the result may follow. This can be compared to the 'possibility theory' in German law.[167] This means if the perpetrator acts even though he foresees the possibility of the prohibited result. To him it is therefore immaterial whether the result flows from his actions or not.[168] He does not allow himself to be deterred by the prospect of the forbidden result flowing from his act. He acts reckless in respect of the prohibited result. By reckless it means that the perpetrator consciously accepts the risk.[169]

Snyman (2002) agrees with various writers, that the volitional element is 'redundant and that all that is required for *dolus eventualis* is subjective foresight of the possibility of the result, provided that the possibility is not too remote.'[170] The possibility should be substantial. However, the courts in South Africa do not follow this view of *dolus eventualis.* They favour the approach

[164] *ibid* 183.
[165] *ibid.*
[166] *ibid.*
[167] Badar (2005) 29.
[168] Snyman (2002) 184.
[169] *ibid.*
[170] *ibid.*

which includes the volitional element. In *Ngubane*[171] the court considered the view of only subjective foresight but held that 'the distinguishing feature of *dolus eventualis* is the volitional component. The perpetrator consents to the consequence foreseen as a possibility and he reconciles him to the possibility, he takes it into the bargain.'[172] The perpetrator acts with *dolus eventualis.*

3.7 *Dolus eventualis*/Recklessness in US Law

At common law, there was much confusion with regard to the concept of *mens rea* and specifically recklessness.[173] Davids (1981) explains that 'courts used a large variety of terms to establish fault without defining concepts.'[174] Due to lack of definitions terms such as wilful, wanton, negligence, culpable negligence, gross negligence, these terms were used interchangeably with recklessness. The terms negligence and recklessness might also be given different meanings in different states or depending on the crime involved.[175] Rather than attempting to undo the confusion of common law, the drafters of the Model Penal Code abandoned most of the common law terminology.[176] The confusion of terminology has been 'especially great when dealing with fault that has not been viewed as intentional.'[177]

[171] *SvNgubane* 1985 3 SA 677 (A).
[172] Snyman (2002) 185.
[173] Davids (1981) 294.
[174] *ibid.*
[175] *ibid.*
[176] *ibid.*
[177] *ibid.*

In civil law it is common to impose fault for unintentional behaviour as long as it is negligent, given the different purposes of criminal law.[178] It is usually agreed upon, that 'something more than ordinary civil negligence should be required for criminal liability.'[179]

It was left to the courts to describe the difference between 'fault required for involuntary manslaughter and civil or tort negligence.'[180] One approach that required this conduct, comprise more than an ordinary difference from the standard of care of a reasonable person.[181] Another approach focused on the perpetrators awareness that his conduct was causing the risk. Awareness of the risk in distinguishing criminal from civil liability was justified by the view that 'engaging in conduct while actually aware of a risk is more evil or criminally culpable than engaging in the same conduct while unaware of the risk.'[182]

The Model Penal Code requires gross deviation for negligence and recklessness and additionally requires for recklessness the subjective awareness of the risk of harm.[183] The common law interpretations were frequently unclear. Some states defined 'culpable or gross negligence as requiring a subjective standard while others treated it as an objective standard.'[184] Some states requiring more than criminal negligence used the term reckless but defined it objectively.[185]

[178] *ibid*.
[179] *ibid*.
[180] *ibid*.
[181] *ibid*.
[182] *ibid*.
[183] *ibid*.
[184] *ibid*.
[185] *ibid*.

The Model Penal Code definitions of culpability eliminated much of the common law confusion. For the variety of terms used for fault in regard to unintentional results or lack of knowledge of circumstances has been reduced to two: recklessness and negligence form wanton, wicked, evil or other undefined terms.[186]

The model code defines 'recklessness and negligence so that judicial interpretations which resulted in so many different interpretations is no longer necessary.[187]

The Model Penal Code has clearly distinguished recklessness from negligence by requiring subjective awareness of the risk. The code also makes it clear that recklessness like negligence requires more than an ordinary deviation from the standard of care of a reasonable person. According to Article 2(2)(c) of the US Model Penal Code, 'a person acts recklessly with respect to a result or to a circumstance described by a statute defining an offence when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstances exist. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation'.[188]

The code provides that a person acts 'recklessly' if he 'consciously disregards a substantial and unjustified risk that the material element exits or will result from

[186] *ibid*.
[187] *ibid*.
[188] Badar (2008) 489.

his conduct'.[189] The risk is 'substantial and unjustifiable' if 'considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.'[190]

Many questions regarding recklessness remain. The codes definition of recklessness includes the negligence and knowledge. Recklessness falls between knowingly and negligence. Recklessness requires only an awareness of a risk of existence of facts or awareness a risk will occur.[191]

According to Badar (2008) in *United States v. Albers,* the court held that a finding of recklessness may only be made when persons disregard a risk of harm of which they are aware. The requirement that the actor consciously disregard the risk is the most significant part of the definition of recklessness. It is this concept which differentiates recklessness from *dolus eventualis*.[192]

3.9 Conclusion

Hellor (2009) explains that Jescheck, a former President of the International Association of Penal Law, usually utilizes the theory of consent to define *dolus eventualis*.[193] The perpetrator must have consented to the result or at least take

[189] *Ibid.*
[190] *Ibid.*
[191] Davids (1981) 369.
[192] *Ibid.*
[193] Lareau F "The distinction between conscious negligence and recklessness" (2009:4). www.lareau-law.ca/intentAK.html

it into consideration.[194] Hellor (2009) quotes the following: 'More accurate, and corresponding more closely to the psychological state of the actor in case of uncertainty as to the realization of the non-desired result, is a recent theory requiring for *dolus eventualis* that the actor believed the result seriously possible and reconciled himself with that possibility.;[195]

To 'reconcile' one with a possible result is to accept the possible result. The familiar cliché, if it happens, live with it. *Dolus eventualis* can also include indifference and foresight to the possible result as explained by Fletcher.[196]

In some legal systems whether it is common law or civil law, the concept of recklessness is not different from the concept of *dolus eventualis*. However, this is not always so. In *Celebic* the defence submitted that the words 'reckless' and 'intent' are mutually exclusive. In the common law legal systems offences requiring intent are distinguished from those where mere recklessness will suffice.[197] The legal systems analysed in this paper requires the volitional element, *dolus eventualis.*

[194] *ibid.*
[195] *ibid*.
[196] *ibid*.
[197] Badar (2006) 26.

CHAPTER FOUR

4. THE ICTY, ICTR AND *LUBANGA CONFRIMATION DECISION*

4.1 Introduction

The Yugoslavia Tribunal has employed different degrees of *mens rea* in order to determine culpability. *Dolus eventualis* and recklessness is used by the ICTY interchangeably[198]. According to the ICTY both *dolus eventualis* and recklessness require the 'risk assessment.'[199] This chapter will consider recklessness and *dolus eventualis* within the Tribunals (ICTY and ICTR). It will specifically discuss the first case of the ICC in which the degrees of culpability was considered namely; *the Lubanga confirmation decision.*

4.2 ICTY CASE LAW

In *Blaskic* the Appeals Chamber of the ICTY discussed and analysed recklessness.[200] According to the ICTY the *mens rea* standard required for a conviction in which planning, instigating, and ordering is that of 'indirect intent.'[201] The 'Appellant submitted that 'indirect intent' is identical to recklessness and/or to *dolus eventualis*.'[202]

In order to support this notion, the ICTY came to the conclusion that:

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[198] Cassese (2003) 168.
[199] *Prosecutor v. Tihomir Blaskic* 2000 IT-95-14-A at para 33.
[200] Badar (2005) 215.
[201] *ibid*; *Prosecutor v. Tihomir Blaskic* 2000 IT-95-14-A at para 34.
[202] *ibid.*

> 'In common law systems, the *mens rea* of recklessness is sufficient to ground liability for serious crimes such as murder or manslaughter … According to the Model Penal Code … the degree of risk involved must be substantial and unjustifiable; a mere possibility of risk is not enough. Examining some of the major common law jurisdictions the Appeals Chamber concluded that the adequate *mens rea* of recklessness requires the awareness of a risk that the result or consequence will occur or will probably occur, and that the risk must be unjustifiable or unreasonable. Mere possibility of a risk that a crime or crimes will occur as a result of the actor's conduct generally does not suffice to trigger criminal responsibility.'[203]

The ICTY explained that, the concept of *dolus eventualis* in civil law systems may constitute the requisite *mens rea* for serious crimes. The ICTY considered the jurisprudence of France, Italy and Germany. A finding of *dolus eventualis* requires the perpetrator to foresee the possibility and accept the possible consequences. The ICTY stated 'that in the case of extremely dangerous, violent acts, it is obvious that the perpetrator takes into account the possibility of the victim's death and since he continues to carry out the act, accepts such a result. The volitional element denotes the borderline between *dolus eventualis* and advertent or conscious negligence.'[204]

The Appeals Chamber concluded upon examination of national systems as well as International Tribunal approaches that the mere knowledge of any kind of risk does not trigger criminal responsibility for serious violations of international

[203] *Prosecutor v. Tihomir Blaskic* 2000 IT-95-14-A at para34.
[204] *Prosecutor v. Tihomir Blaskic* 2000 IT-95-14-T at para 39.

humanitarian law.[205] This means that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard of *dolus eventualis*.[206] The Appeals Chamber concluded with the following: 'A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.'

The finding of the Appeals Chamber coincides with the 'consent and approval theory' as recognised by both German literature and jurisprudence. However, Badar (2005) still questions the immediacy of the risk, the degree of foresight or the assessment of the probability of the risk remains to be resolved.[207]

In *Celebic* the ICTY dealt with atrocities committed in early May 1992 when Bosnian Muslims and Croats took control of Bosnian Serb villages in the Konjic municipality. Men and women were taken to a facility that came to be known as the *Celibici* camp.[208]

The Trial Chamber in *Celebic* examined the requisite *mens rea* of murder in different common law countries.[209] The Trial Chamber considered the *mens rea* requirement in Australia. According to Australia 'knowledge' that death or grievous bodily harm will probably result from the actions of the accused is the

[205] *Prosecutor v. Tihomir Blaskic* 2000 IT-95-14-A at para 41.
[206] *Prosecutor v. Tihomir Blaskic* 2000 IT-95-14-A at para *42.*
[207] Badar (2005) 211.
[208] *Prosecutor v Delalic et al* 1998 IT-96-21-T (also known as *Celebici).*
[209] *Ibid.*

requisite test.[210] Under Canadian law, the accused is required to have a simultaneous awareness of the probability of death and the intention to inflict some form of serious harm. The same position applies in Pakistan.[211] Badar asserts that 'knowledge' is not a notion familiar to civil law countries but is considered by some of the common law countries like the UK as having the same value and intensity as intent. According to Badar 'a statute may require knowledge by requiring intention, but it may also require knowledge by explicitly employing that word, or one of its grammatical variants. The offence of knowingly possessing explosives is an example of an express requirement of knowledge'.[212]

According to Cassese, 'in some common law countries, 'Knowledge' denotes two different forms of mental states, depending on the contents of the substantive penal rule at stake: if the substantive penal rule prescribes the existence of a particular fact or circumstance for the crime to materialize, knowledge means awareness of the existence of this fact or circumstance; if instead the substantive criminal rule focuses on the result of one's conduct, then knowledge means awareness that one's actions is most likely to bring about the harmful result, and nevertheless taking the high risk of causing that result.'[213]

[210] Badar (2005) 208.
[211] *ibid 230*.
[212] *ibid.*
[213] *ibid.*

Williams on the other hand considers 'that in such legislation, the requirement of knowledge is generally interpreted as applying to all the circumstances of the offence, unless the statute makes the contrary meaning plain'.[214]

In the *Celebici,* the trial Chamber considered a unified definition for the requisite *mens rea* of murder by referring to civil law countries. The Trial Chamber stated that 'The civil law concept of *dolus* describes the voluntariness of an act and incorporates both direct and indirect intention. Under the theory of indirect intention (*dolus eventualis*), should an accused engage in life-endangering behaviour, his killing is deemed intentional if he "makes peace" with the likelihood of death. In many civil law jurisdictions the foreseeability of death is relevant and the possibility that death will occur is generally sufficient to fulfil the requisite intention to kill.'[215]

The Trial Chamber also considered the term 'wilful' and reached the conclusion that it is a form of intent that includes 'recklessness' as understood in common law jurisdictions but excludes ordinary negligence. Therefore recklessness or *dolus eventualis* are sufficient *mens rea* standards to trigger the criminal responsibility for murder or wilful killing.[216]

In *Stakic* the Trial Chamber had to establish the requisite *mens rea* for the crime of murder as a Violation of the Laws or Customs of War under Article 3 of the

[214] *ibid 231*.
[215] *Celebic* trial Judgement at para 437.
[216] Badar (2006) 324.

ICTY Statute.[217] The Yugoslavia Tribunal understood *dolus eventualis* as the following: 'if the actor engages in life-endangering behaviour, his killing becomes intentional if he ''reconciles himself'' or ''makes peace'' with the likelihood of death'.[218] According to the ICTY this is referred to the technical meaning of *dolus eventualis.*[219] If however the perpetrator is 'confident' and has reason to believe that the result 'though he foresees it as a possibility' will not occur, he lacks *dolus eventualis*. *Dolus eventualis* should include the two components of intent namely 'knowledge and wilfulness'. If one of these components is missing then *dolus eventualis* does not exist.[220] According to the *Stakic dolus eventualis* is sufficient to establish the requisite mental state of a crime.[221]

Thus, in the jurisprudence of the Yugoslavia Tribunal the *mens rea* of the offence of extermination is satisfied by either *dolus directus* or *dolus eventualis.* Mere recklessness is excluded.[222] This would correspond with the 'consent and approval theory'.

In *Oric* the Trial Chamber asserted that individual criminal responsibility for serious crimes over which the ICTY has jurisdiction requires intention. The Trial Chamber concluded that intent does not include recklessness.[223] In the words of the *Orić* Judgment, 'intention contains a cognitive element of knowledge and a volitional element of acceptance …' 'Knowledge' on the part

[217] Badar (2008) 490; *Prosecutor v. Milomir Stakic* 2003 IT-97-24-T at para 587.
[218] *ibid.*
[219] Cassese (2003) 73.
[220] Badar (2006) 225.
[221] *ibid* 228.
[222] *ibid 2*24
[223] P*rosecutor v. Naser Orić* 2006 IT-03-68-T at para 1020.

of the perpetrator is not sufficient to trigger the criminal liability for individuals for serious violations of international humanitarian law. Therefore recklessness would not suffice.[224] In *Galic* the Trial Chamber required the Prosecution to prove that the defendant was aware or should have been aware of the status of the persons attacked. [225]

In *Tadic,* the ICTY held, ' what is required is that, under the circumstances of the case it was foreseeable that a non-concerted crime might be perpetrated by or on other members of a group or collectively jointly pursuing a criminal intent and the accused unconsciously and deliberately took that risk'.[226] In other words *Tadić* was aware of this risk but nevertheless willingly participated in the common plan. [227] In *Jelisic* the prosecutor submitted: 'that an accused need not seek the destruction in whole or in part of a group and that it suffices that he knows that his acts will inevitably, or even only probably, result in the destruction of the group in question.'[228] This notion was rejected and it was considered to be constructive knowledge. This form of intention was insufficient to establish the mental element of genocide.[229] This argument was also used in *Krstic*.[230] Recklessness or *dolus eventualis* is insufficient to establish criminal responsibility for genocide.[231]

[224] Badar (2006) 229.
[225] *Prosecutor v Galic* 2003 IT-98-29-T at para 433.
[226] *Prosecutor* v *Tadic* 1999 IT-94-1-A at para 228.
[227] Danner A and Martinez J "Guilty Associations: Joint Criminal Enterprise, Command responsibility, and the Development of International Criminal Law" (2005) 93 *California Law Review* 75 at 104.
[228] Du Plessis M and Stephen P "Who guard the guards? The international criminal court and serious crimes committed by peacekeepers on Africa" 2006 121 *ISS Monograph Series* 1 at 15.
[229] *ibid.*
[230] *ibid.*
[231] *ibid.*

4.3 ICTR CASE LAW

In *Kayishema* the *mens rea,* can be divided into two subjective thresholds. [232] Namely; 'the superior must have actual knowledge with regard to the crimes; or he must possess information putting him on notice of the risk of such crimes, which indicates a need for additional investigation to determine whether crimes were committed or were about to be committed.'[233] The accused had to be 'aware that his act or omission formed part of mass killing attack.'[234]

4.7 *Lubanga Confirmation Decision*

The *Lubanga Confirmation decision*[235] was the first time that the ICC had to consider *dolus eventualis* and recklessness within Article 30 of the Rome Statute Lubanga Dyilo was charged with war crimes of conscripting and enlisting children under the age of fifteen into an armed group and using them to participate actively in hostilities.[236]

Thomas Lubanga Dyilo was transferred to the ICC in March 2006. He was a founder and prominent leader of the Union des Patriotes Congolais (UPC), a group politically active since 2000 in Ituri a village in the Democratic Republic of Congo (DRC). Lubanga played a leading role in the military organisation.

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[232] Ambos (2007) 162.
[233] *ibid.*
[234] *Prosecutor v. Clément Kayishema and Obed Ruzindana* 1999 ICTR-95-1-T at para 144.
[235] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007.
[236] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007 at para 83.

The military organisation in 2002 became engaged in armed conflict with rivalling groups.[237]

Thomas Lubanga was alleged to be connected to the crimes as a 'co-perpetrator.' The Pre-Trial Chamber (PTC) found that a crime can be described in terms of 'objective' and 'subjective' elements. The subjective elements refer to the mental element.[238]

The PTC discusses the subjective elements. Article 30 of the Rome Statute encompasses the 'volitional element'. The PTC made reference to 'intent and knowledge' with Article 30 of the Rome Statue. 'Intention and knowledge' is used in a conjunctive way.[239] It requires the existence of a volitional element on the part of the suspect. 'Volition' is used here in the sense of an attitude towards the result. The 'volitional element' encompasses other forms of *dolus.* The PTC was aware that the two *ad hoc* Tribunals has recognised other degrees of intent other than direct intent. According the PTC the volitional element encompasses *dolus eventualis*.[240]

The PTC agreed that *dolus eventualis* applies in situations in which the suspect is aware of the risk and accepts such an outcome by reconciling himself or consenting to it. The Pre-Trial Chamber found it necessary to distinguish between being aware of the risk and accepting the outcome by reconciling

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[237] Wiegand T "Intent, Mistake of Law, and Co-perpetration in *Lubanga* Decision on Confirmation of Charges" (2008) 6 *Journal of International Criminal Justice* 471 at para 474.
[238] Badar (2008) 492.
[239] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007 para 351.
[240] *ibid.*

himself or consenting to it.[241] This refers to *dolus eventualis.* As *dolus eventualis* and recklessness were dropped out of the Rome Statute, the PTC had to consider an interpretation of the Statute.[242]

The PTC referred to the 'unless otherwise' provision in Article 30 of the Rome Statute. According to the PTC, the Elements of Crime in article 8 of the Rome Statute provides for the requirements of the objective elements of war crimes.[243] That is conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities.[244] The third element listed in the elements of crimes for these specific crimes requires in relation to the age of the victims, 'the perpetrator knew or should have known that such persons were under the age of 15yrs.'[245] The PTC regarded this as an exceptional instance in which article 30 of the Rome Statute as a default rule can be used.[246]

The PTC clarified this further by saying, that if there is a likelihood that it 'will occur in the ordinary course of events' and the perpetrator accepts the idea of bringing about the act, the material elements of the crime can be inferred.[247] It can be inferred from 'the awareness by the suspect of the substantial likelihood that due to his actions that the objective elements of the crime will be realised.'[248] It can also be inferred from the suspect's decision to carry out the

[241] Clark (2008) 529.
[242] *ibid.*
[243] *ibid* 530.
[244] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007 at para 357.
[245] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007 at para 358
[246] Clark (2008) 530.
[247] Badar (2008) 492.
[248] Badar (2008) 492.

act despite such awareness.[249] The PTC asserted that by requiring the existence of a volitional element in the sense of accepting the consequence the civil law concept of *dolus eventualis* is more appropriate. They ruled out the common law recklessness as it fell short of meeting the *mens rea* threshold as set out in Article 30.[250]

The *Lubanga* PTC provided further clarification as to the reason for ruling out recklessness from Article 30 of the Rome Statute:

'The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness, it does not require the suspect to reconcile himself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.'[251]

The Court notes that, in respect of the victims, 'the perpetrator knew or should have known that such person or persons were under the age of 15 years.'[252] Triffeterer (2003)[253] supports this argument. According the Triffeterer (2003) Article 30 of the Rome Statute encompasses *dolus eventualis* and recklessness. This can be inferred from the language in Article 30 of the Rome Statute. Namely; aware that a circumstance exists or a consequence

[249] *ibid.*
[250] *ibid* 528.
[251] *Prosecutor v Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007 at para 438; Badar (2008) 528.
[252] *ibid.*
[253] Trifterer O in Koufa K "The New International Criminal Law- Establishing Individual Criminal Responsibility" (2003) *The New International Criminal Law* 706.

'will occur'. Triffeterer (2003) makes reference, to the fact that 'will occur' is different to 'may occur'.[254]

Ambos (1999), disagrees with the above view by stating the following:

> 'Certainly, reckless conduct cannot be the basis of responsibility since a corresponding provision was deleted. The same applies for the higher threshold of *dolus eventualis:* this is a kind of ''conditional intent'' by which a wide range of subjective attitudes towards the result are expressed and, thus, implies a higher threshold than recklessness. The perpetrator may be indifferent to the result or be ''reconciled'' with the harm as a possible cost of attaining his or her goal... In such situations of *dolus eventualis* the perpetrator is not, as required by Article 30(2)(b), aware that a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible. Thus, the wording of Article 30 hardly leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of ''indirect intent'.'[255]

Ambos (1999) argues that *dolus eventualis* is a conditional intent similar to that referred to by some South African legal scholars. *Dolus eventualis* implies higher threshold than recklessness. The perpetrator has to reconcile him with the result of the possibility while recklessness the perpetrator need only be aware of a substantial risk. Ambos (1999) explains that the wording of article 30 of the Rome Statute requires the perpetrator to think of the possible result and not that the perpetrator must reconcile him with the possibility of the consequence.[256]

[254] *ibid.*
[255] Ambos (1999) 22.
[256] *ibid.*

4.9 Conclusion

The concept of recklessness according to the ICTY just as with the continental law *dolus eventualis* requires some sort of acceptance on the part of the accused of the risk that he has recognized and some sort of decision to act in spite of that risk. This decision to 'act anyway' can also be interpreted as equivalent to the 'manifest indifference'.[257] The decision to 'act anyway' displays a 'complete disregard' for the outcome of the conduct. According to various writers the question of the degree of foresight or the assessment of the probability of the risk remains unclear.[258]

According to the *Stakic* Judgment, if the perpetrator shows that he was aware of the nature of the attack, he is considered to posses the discriminatory intent without further evidence.[259] However, according to Ambos (1999), 'awareness of the circumstances does not necessarily imply the existence of intention.'[260] It may, however, 'be a fact, when considered with all the other evidence, lead to an inference that the perpetrator possesses the discriminatory intent.'[261] This could explain the finding in *Lubanga Confirmation decision.*

The *Blaskic* Appeals Chamber asserted that 'an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard'.[262]

[257] Karsten N and Badar M "Current Developments at the International Criminal Tribunals" (2007) 7/1 *International Criminal Law Review* 161 at 169.
[258] *ibid.*
[259] Badar (2006) 215.
[260] *ibid.*
[261] *ibid.*
[262] *ibid 2*39.

The findings rendered by the *Celebici* Trial Chamber on the law of 'wilful killing' and 'murder' support this notion.[263]

Different legal systems utilise differing forms of classification of the mental element, it is clear that some form of intention is required. However, this intention may be inferred from the circumstances whether one approaches the issue from the perspective of the foreseeability as a consequence of the acts of perpetrator or the taking of an excessive risk which demonstrates recklessness.[264]

Badar (2006) asserts that the 'absence of a general provision on the mental element in the ICTY Statute left the door open to the jurisprudence of this Tribunal to provide, on an *ex post facto* basis, the elements of criminal responsibility.'[265] It therefore requires judicial discretion. [266] Similarly, the same is considered in the *Lubanga Confirmation decision*.

Bassiouni observed that

> 'The judicial process in the cases of the IMT, IMTFE, ICTY and ICTR was, for all practical purposes, an intuitive judicial method of ascertaining and applying what they believe to be part of general principles of law. The term intuitive means that the judges in a given case acting on the basis of their knowledge and individual research, reach a conclusion without following a method recognized in comparative criminal law technique. The haphazard nature of the process, however, did not necessarily exclude the reaching of correct outcomes which are consonant with what a proper methodology would have reached. But that also meant that the process was unpredictable and the outcomes not always consistent with a given theory of law. The absence of pre-existing

[263] *ibid*.
[264] *ibid.*
[265] *ibid.*
[266] *ibid.*

norms of a general part also meant that the prosecution was frequently uncertain as to what it had to prove, and the defence equally uncertain as to its ability to challenge it, or advance argument for exoneration.'[267]

[267] Badar (2002) 36.

CHAPTER FIVE

5 Conclusion and Recommendations

Article 30 of the Rome Statute states: 'unless otherwise provided, a person shall be criminally liable for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.'[268] It is therefore, inevitable to conclude that where there is no reference made in the Elements of Crimes to a mental element, Article 30 of the Rome Statute acts as a default rule.[269]

In the *Lubanga Confirmation decision,* that there was a nexus to the armed conflict and the material elements contained in all of the war crimes provisions of The Elements. With respect to the existence of an armed conflict, the PTC noted, the perpetrator was aware of factual circumstances that established the existence of an armed conflict. As for the *mens rea* standards under article 30 of the Rome Statute, the PTC interpreted that article 30 includes three categories of *dolus.* Namely, *dolus directus* and *dolus eventualis*.[270]

Eight years prior to the *Lubanga confirmation* decision Cassese expressed his concerns about exclusion of *dolus eventualis* and recklessness by the drafters of the Rome Statute. Cassese noted, that he fails to see why recklessness would not

[268] Rome Statue of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entered into force on 1 July 2002.
[269] Clark (2008) 529.
[270] *ibid.*

suffice in war crimes.[271] He agrees that crimes of genocide, crimes against humanity and aggression, can only be perpetrator with intent and knowledge. However, for less serious crimes, such as war crimes, current international law must be taken to allow for recklessness.[272] Cassese continued his criticism regarding the exclusion of recklessness as a culpable mental element under the Rome Statute in the following words:

> 'Hence, on this score the Rome Statute marks a step backwards with respect to lex lata, and possibly creates a loophole: persons responsible for war crimes, when they acted recklessly, may be brought to trial and convicted before national courts, while they would be acquitted by the ICC. It would seem that the draughtsmen have unduly expanded the shield they intended to provide to the military'.

Since the adoption of the Rome Statute of the International Criminal Court, Article 30 has been subject to different interpretations by legal scholars and commentators. However, one of the major advantages of Article 30 of the Rome Statue assigns different levels of culpability to each of the material element of the crimes under the subject matter jurisdiction of the ICC.

The study reveals that there are exceptions regarding the application of the default rule of intent and knowledge to the crimes within the jurisdiction of the International Criminal Court. Article 30 of the Rome Statute can be applied on an ad hoc basis.[273] According to Badar (2008), if a particular definition of a crime is silent as to the requisite mental element, Article 30 can import the mental elements of 'intent and knowledge' as being the mental elements

[271] Badar (2008) 492.
[272] *Ibid.*
[273] Arnold R "The *Mens Rea* of Genocide under the Statute of the International Criminal Court" (2003) 14 *Criminal Law Forum* 127 at131.

required, in order to render an accused criminally responsible and liable for punishment for that particular crime.[274]

According to Badar (2008) this view is not shared by all writers. According to Schabas, 'several crimes within the subject matter jurisdiction of the ICC have their own built-in *mens rea* requirement.'[275] ICC judges have to consider Article 30 as a default rule that is applied to all crimes and modes of participation in criminal conduct.[276] However, there should be no specific rules expressly stated in these provisions.[277] Piragoff (1999) has a different opinion.[278] He notes that the inclusion of these adjectives is unnecessary. He believes that these terms, is merely due to the negotiation process. The drafters were determined to ensure that the 'intentional nature' of these crimes within the jurisdiction of the ICC is understood.[279] However, it is important to note Article 66 of the Rome Statue stipulates: 'in order to convict the accused, the Court must be convinced of the guilt of the accused beyond a reasonable doubt.'[280] Denying such a fundamental principle which the most significant factor in determining criminal liability, is still a complex area in international criminal law.[281] The terms legislatures use are sometimes vague and unclear.[282]

Glanville Williams commented "A layman might find it painfully ridiculous that, after a thousand of years of legal development, lawyers should still be arguing

[274] Werle and Jessberger (2005) 41; Piragoff (1999) 531; Badar (2008) 499.
[275] *ibid.*
[276] *ibid.*
[277] *ibid.*
[278] Badar (2008) 494.
[279] Werle and Jessberger (2005) 41; Piragoff (1999) 531; Badar (2008) 499.
[280] Badar (2008) 494.
[281] *ibid.*
[282] *ibid.*

about the expressions used to denote basic ideas of our Legal systems" he also wrote "English judges tend to eschew general definitions and merely use the words denoting legal concepts. Unfortunately, the desire of the judges to achieve particular results in particular leads them too often to warp a concept in order to meet the exigency of the moment……"[283]

As Williams explains that to the ordinary lay person the legal jargon can be treacherous. The legal system has been development over thousand of years and the ordinary person would expect concepts that are applicable to all legal systems. In answering question, whether *dolus eventualis/* recklessness is included in article 30 of the Rome Statute, one has to answer it with caution. It can definitely be confirmed that recklessness is not included in article 30 of the Rome Statute. The study has illustrated this; in terms of case law of the ICTR, ICTY and the ICC's first decision. Namely; the *Lubanga Confirmation decision.*

However, *dolus eventualis* creates a cross roads. On one hand, it would be totally unfair if the perpetrator is found guilty as to a finding of *dolus eventualis* under the perpetrators own domestic system and on the other hand, be acquitted by the ICC. According to Cassesse as previously noted, this would be a step backwards and not in favour of developing international criminal law.

In drafting Article 30, the codifiers of the ICC Statute have achieved several goals.[284] Article 30 sets a general requirement for international criminal liability which is based on 'intent and knowledge.'[285] The 'unless otherwise provided'

[283] Davids (1981) 281.
[284] Badar (2008) 500.

'enables the Statute to absorb the corresponding rules of international humanitarian law without having to modify the definitions of these crimes.'[286] An example of this is the crime of genocide. It has the same definition in the 1948 Genocide Convention.[287]

The presumption of innocence[288] is a fundamental principle in almost all legal systems. The dispute over article 30 of the Rome statute should not allow this principle to be taken lightly. I have to agree with many of the writers mentioned in this study that *dolus eventualis* neither recklessness is provided for in article 30 of the Rome Statute but could be considered as a default rule.

Word count10280 excluding footnotes.

[285] *ibid.*
[286] *ibid.*
[287] Badar (2008) 500.
[288] Schabas (2003) 293.

LIST OF REFERENCES

1. PRIMARY SOURCES:

A. International instruments

Rome Statue of the International Criminal Court of 17 July 1998 Entered into force on 1 July 2002

Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) Adopted 25 May 1993 by resolution 857

Statute of the International Criminal Tribunal for Rwanda (1994) Adopted 8 November 1994 adopted by resolution 955

B. National Instruments

South Africa: Implementation of the Rome Statute of International Criminal Court Act 27 of 2002

America: American Law Institute's Model Penal Code. Promulgated in 1962

Germany: Code of Crimes against International Law of 26 June 2002

C. Reports.

Report of the Preparatory Commission for the International Criminal Court Addendum Part II Finalized draft text of the Elements of Crimes U.N. Doc.2 (2000)

Working Group on the Crime of Aggression "Elements of the Crime of Aggression" 1-12 July 2002 PCNICC/2002/WGCA/DP.2 Proposal submitted by Samoa New York

D. Case Law

I Yugoslavia Tribunal:

Prosecutor v *Blaskic* 2004 IT-95-14-A

Prosecutor v Delalic et al 1998 IT-96-21-T (also known as *Celebici)*

Prosecutor v *Galic* 2003 IT-98-29-T

Prosecutor v *Krstic* 2004 IT-98-33-A

Prosecutor v Naser Oric 2006 IT-03-68-T

Prosecutor v *Stakic* 2003 IT-97-24-T

Prosecutor v *Tadic* 1999 IT-94-1-A

II Rwanda Tribunal

Prosecutor v *Kayeshema and Ruzindana* 1999 ICTR - 95-1-T

III Democratic Republic of Congo

Prosecutor v *Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007

IV South Africa

S v Ngubane 1985 3 SA 677 (A)

2. SECONDARY SOURCES

A. BOOKS

Bantekas I and Nash S *International Criminal Law* London: Cavendish Publishing Limited, 2007

Bassiouni M C *The Legislative History of the International Criminal Court* 2 New York: Transnational Publishers. Inc, 2005

Cassese A *International Criminal Law* Oxford: Oxford University Press, 2003

Dugard J *International Law A South African Perspective* 3rd Edition Lansdowne: Juta &Co Ltd, 2005

Fletcher G *Rethinking Criminal Law* Oxford: Oxford University Press, 2000

Kittichaisaree K *International Criminal Law* Oxford: Oxford University Press, 2001

Piragoff D K "Article 30 - Mental Element" in Triffterer O *Commentary on the Rome Statute of the International Criminal Court* 2nd Edition Baden-Baden: Nomos 1999

Schabas W *An Introduction to the International Criminal Court* 3rd Edition Cambridge: Cambridge University Press, 2007

Schabas W *The UN International Criminal Tribunals The Former Yugoslavia, Rwanda and Sierra Leone* Cambridge: Cambridge University Press, 2006

Snyman CR *Criminal Law* Durban: LexisNexis Butterworths, 2002

Werle G *Principles of International Criminal Law* Netherlands: T-M-C-Asser Press, 2005

B. Journal Articles

Ambos K "General Principles Of criminal Law in the Rome Statute" (1999) 1 *Criminal Law Forum* 10

Ambos K "Joint Criminal Enterprise and Command Responsibility" (2007) 159 *Journal of International Criminal Justice* 5

Arnold R "The *Mens Rea* of Genocide under the Statute of the International Criminal Court" (2003) 127 *Criminal Law Forum* 14

Badar M "Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals" (2005) 203 *International Criminal Law Review* 5 2

Badar M "Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (2006) 313 *International Criminal Review* 6

Badar M "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective" (2008) 473 *Criminal Law Forum* 19

Badar M and Karsten N "Current Development at International Criminal Tribunals" 163 (2007) *International Criminal Law Review* 7 1

Clark R S "The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences" 291 (2001) *Criminal Law Forum* 12 www.springerlink.com/index/ (accessed June 2009)

Clark R S "Drafting the General Part to Penal Code: Some Thoughts inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Courts first substantive law discussion in the *Lubanga Dyilo Confirmation* proceedings" (2008) 519 *Criminal Law Forum* 19

Danner A and Martinez J "Guilty Associations: Joint Criminal Enterprise, Command responsibility, and the Development of International Criminal Law" (2005) 75 *California Law Review* 93

Dawson G and Boynton R "Reconciling Complicity in Genocide and Aiding and Abetting in the Jurisprudence of the *Ad Hoc* Tribunals" (2008) 241 *Harvard Human Rights Journal* 21

David M T "Recklessness and the Model Penal Code" (1981) 294 *American Law Journal* 9

Degan V "On the Sources of International Criminal Law" (2005) 45 *Chinese Journal of International Law* 4 1 www.Chinesejil.oxfordjournals.orgkgi/content/full/4/1/45 (accessed June 2009)

Du Plessis M and Pete S "Who Guards the Guards?" (2006) *ISS Monograph Series* 121 http://www.issafrica.org (accessed April 2009)

Elliot C "The French Law of Intent and Its Influence on the Development of International Criminal Law" (2000) 35 *Criminal Law Forum* 11

Fletcher G P "Is Justice Relevant to the Law of War" (2009) 407 *Washburn Law Journal* 48

www.washburnlawedu/wlj/48-2/articles/fletcher-george (accessed September 2009)

Robinson P and Grall J A "Element Analysis in Defining Criminal Liability: TheModel Penal Code and Beyond" (1983) 710 *Stanford Law Review* 35

Simmons K W "Should the Model Penal Code's *Mens Rea* Provision's be amended" (2003) 179 *Ohio State Journal of Criminal Law* 1 www.bu.edu/lawlibary/facultypublications (accessed October 2009)

Triffterer O in Koufa K "The New International Criminal Law-Establishing Individual Criminal Responsibility" (2003) *The New International Criminal Law* 706.

Weigend T "Intent, Mistake of Law, and Co-perpetration in *Lubanga* Decision on Confirmation of Charges" (2008) 471 *Journal of International Criminal Justice* 6

Werle G and Jessberger F "International Criminal Justice is coming home: The New German Code of Crimes Against International Law" (2002) 191 *Criminal Law Forum* 13

Werle G and Jessberger F (2005) "Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law" (2005) 35 *Journal of International Criminal Justice 3*

C. Internet Articles

Davidsson E "United States Foreseeability, Awareness and Knowledge of the Consequences of the Sanctions Against Iraq" (2009) www.aldeilis.net

Gallmetzer, R and Klamberg, M "Individual responsibility for Crimes under International Law The *Ad Hoc* Tribunals and the International Criminal Court" (2005) Lecture at Summer School of the Groitus Centre for International Legal Studies, Hague
www.individualresponsibility.pdf

Heller K "JCE III, the Rome Statute, and Bashir" (2009)
http://opiniojuris.org/2009/02/11/jce-iii-and-the-rome-statute/

Lareau F "The Distinction between Conscious Negligence and Recklessness"
www.lareau-law.ca/intentAK.html

Nabiti N "Conference Summary: The Fragmentation and Diversification of International Criminal Law" (2009)
http://www.asil.org/accountability/winter2009/winter2009_4.html