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# Some Reflections on Article 30 of the Rome Statute in Light of the Lubanga & Katanga Decisions on the Confirmation of Charges

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## 1. Introduction

In January 2007, in the *Lubanga* case,<sup>1</sup> Pre-Trial Chamber I (PTC I) of the International Criminal Court (ICC) ruled that Article 30 of the Rome Statute (ICCSt.) encompasses the three degrees of *dolus*, namely, *dolus directus* of the first and second degrees and *dolus eventualis*. In September 2008, in the *Germain Katanga and Ngudjolo Chui* case,<sup>2</sup> PTC I refrained from relying on the elusive concept of *dolus eventualis* for the mental element in relation to the crimes charged and accordingly the decision lacks any discussion on whether the concept of *dolus eventualis* has a place within the framework of Article 30 ICCSt.<sup>3</sup> Accordingly, the Defence for the first accused requested leave to appeal the Pre-Trial Chamber's *Decision on the Confirmation of Charges*.<sup>4</sup> The Third and the Fourth Issues for which leave to appeal has been requested relate to the PTC I distinction between the notion of *dolus directus* of the second degree and *dolus eventualis* and the Chamber's approach not to entertain the question of whether or not the notion of *dolus eventualis* is part of the general subjective element provided for in Art. 30 ICCSt.<sup>5</sup> The Defence contended that the introduction of *dolus eventualis* through the backdoor may have an impact on the ultimate issue of guilt and that the doctrine of *dolus directus* of the second degree should be given a correct interpretation.<sup>6</sup>

This paper examines the different degrees of intentionality under Art. 30 ICCSt.; it draws a firm distinction between *dolus directus* of the second degree and *dolus eventualis*; and attempts to answer the question whether the notion of 'intent' as provided for in Art. 30 ICCSt. encompasses the triplet forms of *dolus*, namely, *dolus directus* of the first and second degree and *dolus eventualis*. In so doing recourse will be made to various legal systems of the World which recognise *dolus eventualis* as a sufficient mental state for intentional crimes. Based on the comparative survey the paper concludes that *dolus eventualis* is one of the genuine and independent pillars of criminal responsibility which forms, on its own, the basis of intentional crimes and suggests its inclusion in the legal standard of Article 30 ICCSt.

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1 Decision on the Confirmation of Charges, *Thomas Lubanga Dyilo*, 29 January 2007.

2 Decision on the Confirmation of Charges, *Germain Katanga and Mathieu Ngudjolo Chui*, 30 September 2008.

3 *Ibid.*, para. 531.

4 Defence Application for Leave to Appeal the Decision on the Confirmation of Charges, *Germain Katanga and Mathieu Ngudjolo Chui*, 6 October 2008.

5 *Ibid.*

6 *Ibid.*, para. 23.

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## 2. Background on the Lubanga and Katanga Decisions

On 29 January 2007, Pre-Trial Chamber 1 (PTC I) of the International Criminal Court (ICC) rendered its decision confirming the charges against Thomas Lubanga Dyilo.<sup>7</sup> According to the Prosecution, Lubanga was the leader of the *Union des Patriots Congolais* (UPC) – later renamed *Union des Patriots Congolais/Réconciliation* (UPC/RP) – and a commander-in-chief of its armed military wing, the *Forces Patriotiques pour la Libération du Congo* (the FPLC). Lubanga, the first accused to appear before the ICC, was charged under the relevant articles of the ICC Statute with the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group – the FPLC – and using them actively in hostilities.<sup>8</sup> As for the form of criminal responsibility, the Prosecution charged Lubanga under Article 25(3)(a) of the ICC Statute, which covers the notion of direct perpetration, co-perpetration and indirect perpetration (see Chart No. 1 below). In examining the concept of co-perpetration, as embodied in the ICC Statute, Pre-Trial Chamber I has devoted a lengthy discussion regarding the *mens rea* standards under Article 30 of the ICC Statute.

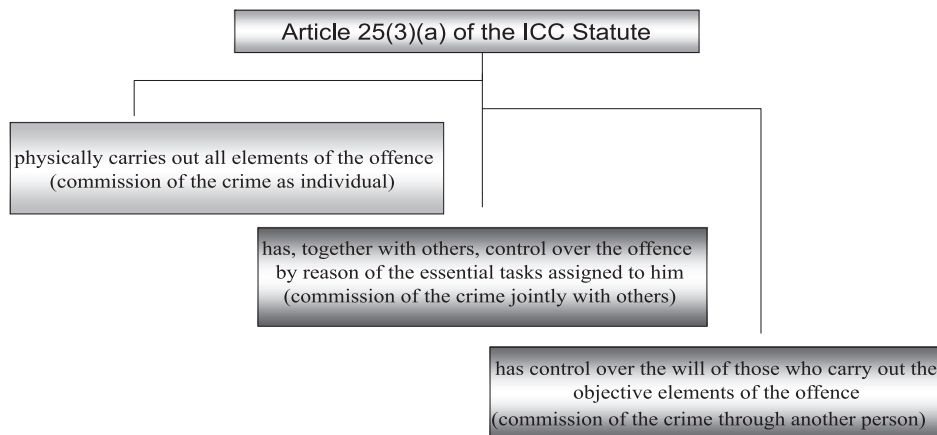


Chart No. 1

On 26 September 2008, PTC I of the ICC confirmed all but three of the charges against Germain Katanga (a DRC national), alleged commander of the *Force de résistance patriotique en Ituri* [Patriotic Resistance Force in Ituri] (FRPI) and Matthieu Ngudjolo Chui (a DRC national), alleged leader of the *Front des nationalistes et intégrationnistes* [Nationalist Integrationist Front] (FNI). The Chamber confirmed seven counts of war crimes and three counts of crimes against humanity. The judges found insufficient evidence to try Katanga and Ngudjolo for inhuman treatment and outrages upon personal dignity (war crimes). The Chamber also declined the charge of inhumane acts (crime against humanity). The Chamber confirmed the following war crimes committed during an attack on Bogoro village, on or about 24 February 2003: (1) Using children under the age of fifteen to take active part in the hostilities; (2) Directing an attack against a civilian populations as such or against individual civilians not taking direct part in hostilities; (3) Wilful killings; (4) Destruction of property; (5) Pillaging; (6) Sexual slavery;

<sup>7</sup> Decision on the Confirmation of Charges, *Thomas Lubanga Dyilo*, 29 January 2007.

<sup>8</sup> See Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the ICCSt.

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and (7) Rape. The Chamber also confirmed the following crimes against humanity: (1) Murder; (2) Rape; and (3) Sexual slavery.

In *Katanga and Ngudjolo Chui* the PTC I analysed principal responsibility under Article 25(3)(a) of the ICC Statute. Based on the *Lubanga Decision*,<sup>9</sup> the PTC I found that ‘when a criminal offence is committed by a plurality of persons, the definitional criterion of the concept “joint commission” is linked to the distinguishing criterion between principals and accessories to a crime.’<sup>10</sup>

In defining the elements for the commission of the crime through another person the *Katanga and Ngudjolo Chui* PTC I based its findings mainly on German law and literature (*mittelbare Täterschaft*).<sup>11</sup> *Mittelbare Täterschaft* or perpetration by means, also known as ‘indirect perpetration’ or ‘indirect perpetratorship’, is characterized by the predominance of the *perpetrator-by-means* (*Hintermann*), who uses the person that physically carries out the crime (*Tatmittler*) as his instrument.<sup>12</sup> The perpetrator by means ‘controls the situation because he has superior knowledge or superior powers in relation to the agent.’<sup>13</sup> However, ‘indirect perpetratorship’ is not limited to situations where the physical perpetrator is an innocent agent, or has a defence such as insanity or infancy. In such cases, an innocent agent is a ‘mere machine whose movements are regulated by the principal.’<sup>14</sup> Rather, the notion of indirect perpetration also applies even where the direct and physical perpetrator is criminally responsible (‘indirect’ perpetrator behind the ‘direct’ perpetrator or *Täter hinter dem Täter*).<sup>15</sup> According to the *Katanga* PTC this latter scenario, *Täter hinter dem Täter*, is the most relevant to international criminal law ‘in which the perpetrator behind the perpetrator commits the crime through another by means of “control over an organization” (*Organisationsherrschaft*).’<sup>16</sup>

9 Decision on the Confirmation of Charges, *Thomas Lubanga Dyilo*, 29 January 2007.

10 Decision on the Confirmation of Charges, *Katanga & Ngudjolo Chui*, para. 480.

11 Decision on the Confirmation of Charges, *Katanga & Ngudjolo Chui*, paras. 495–518. The second clause of § 25(1) of the *dStGB* (German Criminal Code) is concerned with the principal by means (*mittelbarer Täter*) a person who acts through the agency of another (*Tatmittler*). See M. Bohlander, *Principles of German Criminal Law* (Oxford: Hart Publishing, 2009), 156.

12 A. Eser, ‘Individual Criminal Responsibility’, in Antonio Cassese et al., (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 793–795. For an informative discussion of Article 25 ICCSt. see G. Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’, 5 *Journal of International Criminal Justice* (2007) 953–975.

13 M. Bohlander, *supra* note 11, at 156. See also para. 497 of the *Katanga & Ngudjolo Chui* decision on the confirmation of charges: “The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator [*Täter hinter dem Täter*] is responsible because he controls the will of the direct perpetrator.”

14 G. Williams, *Criminal Law: The General Part* (2nd ed., London: Stevens & Sons, 1961), 349–350. As noted by Professor Michael Bohlander, *supra* note 11, at 156 German jurisprudence and commentators have acknowledged five categories according to which a person can be considered as an instrument:

1. The agent is not fulfilling either the *actus reus* or *mens rea* of the offence.
2. The agent lacks a specific *mens rea* component or has a *mens rea* for a different offence.
3. The agent is acting objectively lawfully (*rechtmäßig*) under an accepted defence.
4. The agent is acting without personal guilt (*schuldlos*) under an accepted defence.
5. The agent lacks criminal capacity.

15 K. Ambos, ‘Individual Criminal Responsibility’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 478, margin 9.

16 Decision on the Confirmation of Charges, *Germain Katanga and Mathieu Ngudjolo Chui*, para. 498.

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The PTC I found that the commission of the crime through another person – the third variant of principal liability under Article 25(3)(a) of the ICC Statute – encompasses the perpetrator behind the perpetrator by means of control over an organisation.<sup>17</sup>

As regards the mental elements, the Chamber held that the persons must be aware of the factual circumstances enabling them to exercise control over the crime through another person, such as the character of the organisation, their authority within the organisation, and the factual circumstances enabling near-automatic compliance with their orders.<sup>18</sup> In examining the subjective elements of the war crime of pillaging the PTC I had this to say: ‘The intent and knowledge requirement of article 30 of the Statute applies to the war crime of pillaging under Article 8(2)(b)(xvi). This offence encompasses first and foremost, cases of *dolus directus* of the first degree. It may also include *dolus directus* of the second degree. However, this offence additionally requires two [mental] element, or *dolus specialis*. First the act of physical appropriation must be carried out with the intent to deprive the owner of his property. Second, the act of physical appropriation must also be carried with the intent to utilise the appropriated property for private or personal use.’<sup>19</sup> The PTC I found both *dolus directus* of the first and second degree sufficient to trigger the criminal responsibility for most of the crimes charged.<sup>20</sup>

### 3. The meaning of intent under Article 30 ICCSt.

In order to hold a person criminally responsible and liable for a crime within the jurisdiction of the ICC, it must be established that the material elements of the offence were committed with intent and knowledge. This is expressly mentioned in paragraph 1 of Article 30 ICCSt: ‘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.’<sup>21</sup> The term ‘intent’ as set out in Article 30 has two different meanings, depending upon whether the material element related to conduct or consequence. A person has intent in relation to conduct, if he ‘means to engage in the conduct’,<sup>22</sup> whereas 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’.<sup>23</sup>

17 Decision on the Confirmation of Charges, *Germain Katanga and Mathieu Ngudjolo Chui*, paras. 500–518. See also M. E. Badar and N. Karsten, ‘Current Developments at the International Criminal Tribunals’, 9 *International Criminal Law Review* (2009) 227–251, at 234–237.

18 Decision on the Confirmation of Charges, *Germain Katanga and Mathieu Ngudjolo Chui*, paras 534, 538.

19 *Ibid.*, paras. 331–332.

20 As for to the subjective element of the crimes of sexual slavery and rape the PTC I found that ‘both crimes include, first and foremost, *dolus directus* of the first degree. They also may include *dolus directus* of the second degree’, (para. 346); as for the war crime of inhumane acts the PTC I found that this offence encompasses *dolus directus* of the first and second degree (para. 359); for the war crime of outrages upon personal dignity the PTC I stated that ‘this subjective element includes, first and foremost, *dolus directus* of the first degree and *dolus directus* of the second degree.’ (para. 372).

21 Article 30 ICCSt. For the drafting history of Article 30 ICCSt. see R. S. Clark, ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences’, 12 *Criminal Law Forum* (2001) 291–334.

22 Article 30(2)(a) ICCSt.

23 Article 30(2)(b) ICCSt.

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### A. Direct intent or *dolus directus* of the first degree

In the *Lubanga* case,<sup>24</sup> the first test ever of Article 30 ICCSt., PTC I of the ICC asserted that the reference to intention and knowledge in a conjunctive way requires the existence of a volitional element on the part of the suspect.<sup>25</sup> This volitional element refers first to situations in which the suspect (i) knows that his acts or omissions will materialize the material elements of the crime at issue; and (ii) he undertakes these acts or omissions with the concrete intention to bring about the material elements of the crime. According to the PTC I, the above-mentioned scenario requires that the suspect possesses a level of intent which it called *dolus directus* of the first degree.<sup>26</sup>

This form of intent is equivalent to the Model Penal Code culpability term ‘purposely’. Section 2.02 of the Model Penal Code considers a person acts ‘purposely’ with regard to a result if it is his conscious object to cause such result.<sup>27</sup> In *United States v. Bailey et al.*, the Supreme Court ruled that a ‘person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct.’<sup>28</sup> *Dolus directus* of first degree, in German criminal law, is also identical to ‘direct intent’ as defined in Article 30(2)(b) ICCSt. According to a recent commentary on the German Criminal Code *dolus directus* of the first degree covers situation in which the *will* is directly focused on the result.<sup>29</sup>

### B. Oblique intent or *dolus directus* of the second degree

Article 30(2)(b) ICCSt. assigns a second alternative of intent with regard to the consequence element, providing that even if the perpetrator does not intend the proscribed result to occur, he is considered to intend that result if he ‘is aware that [the consequence] will occur in the ordinary course of events’. In the *Lubanga* case the PTC I asserted that Article 30 encompasses other aspects of *dolus*, namely *dolus directus* of the second degree.<sup>30</sup> This type of *dolus* arises in situations in which the suspect, without having the actual intent to bring about the material elements of the crime at issue, is aware that such elements will be the necessary outcome of his actions or omissions.<sup>31</sup> This degree of *mens rea* is akin to knowledge or awareness rather than intent in *stricto sensu*. This position is supported by the definition given to knowledge in paragraph 3 of Article 30, ‘[f]or the purpose of this article, “knowledge” means awareness that . . . a consequence will occur in the ordinary course of events.’ The essence of the narrow distinction between acting intentionally and knowingly with regard to the consequence element is the presence or absence of a positive desire or purpose to cause that consequence.

In the criminal law of England, as well as in other Common law jurisdictions, the terms ‘knowingly’ or ‘knowledge’ can be seen as playing the same role in relation to circum-

24 Decision on the Confirmation of Charges, *Thomas Lubanga Dyilo*.

25 *Ibid.*, para. 351.

26 *Ibid.*

27 Model Penal Code, § 2.02(2)(a)(i).

28 *United States v. Bailey et al.*, 444 U.S. 394; 100 S. Ct. 624; 62 L. Ed. 2d 575; U.S. Lexis 69, November 7, 1979, Argued, January 21, 1980, Decided, at 632. See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978).

29 Cramer and Sternberg-Lieben ‘Vor § 15’ in T. Lenckner et al., *Schönke & Schröder Strafgesetzbuch Kommentar* (27th ed., Munich: Verlag C. H. Beck, 2006), margin 65.

30 Decision on the Confirmation of Charges, *Thomas Lubanga Dyilo* para. 352.

31 *Ibid.*

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stances as intention plays in relation to consequence.<sup>32</sup> Logically speaking, there is no offence which requires the prosecution to prove that the accused, in the true sense, intended a particular circumstance to exist at the time he or she carries out his or her act.<sup>33</sup> If the accused intends a circumstance to exist, it means that he or she hopes it exists or will exist. In England, statutory offences constituted upon proof that a particular circumstance exists often include an express requirement of knowledge as to this circumstance.<sup>34</sup> In this kind of legislation, the requirement of knowledge is generally interpreted as applying to all the circumstances of the offence in question, unless the statute makes the contrary meaning plain.<sup>35</sup> That is not to say that the word ‘knowingly’ is incapable of applying to consequences. Where ‘knowingly’ appears, courts will normally construe it as applying to all the elements necessary for the *actus reus*. The following case is illustrative on this matter. In *Westminster City Council v. Croyalgrange Ltd and Another*,<sup>36</sup> D was charged of knowingly using, causing or permitting the use of any premises as a sex establishment without a licence, contrary to the Local Government (Miscellaneous provisions) Act 1982. Apparently, in this case there were two relevant circumstances: (1) the premises were being used as a sex establishment; and (2) this use was not in accordance with the licence. In this case, the House of Lords concluded that knowledge of both circumstances was necessary. The concept of ‘wilful blindness’ was considered by Lord Bridge to be an alternative to actual knowledge:

[...] it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed.<sup>37</sup>

The plain meaning of Article 30(2) ICCSt. makes it clear that once the prosecution demonstrates that an accused, in carrying out his conduct, was aware that the proscribed consequence would occur, unless extraordinary circumstances intervened, he is said to have intended that consequence. Thus, a soldier who aims to destroy a building, while not wishing to kill civilians whom he knows are in the building, is said to intend the killing of the civilians (Article 8[2][a][i] ICCSt.) if the building is in fact destroyed and the civilians are killed.<sup>38</sup> Hence, a result foreseen as virtually certain is an intended result.<sup>39</sup>

Another question which remains unsettled is whether knowledge under Article 30 ICCSt. encompasses the common law notion of “wilful blindness” or “wilfully shutting one’s eyes to the obvious”. This concept first originated in England in *R. v. Sleep* (1861).<sup>40</sup> Since then, English courts have extended the meaning of knowledge to cover

32 P. Murphy and E. Stockdale (eds.), *Blackstone’s Criminal Practice* (Oxford: Oxford University Press, 2002), 27.

33 R. Heaton, *Blackstone’s Criminal Law*, (London: Blackstone Press, 1996), 63.

34 An example of an express requirement of knowledge is the offence of knowingly possessing explosives, Explosive Substances Act 1883 section 4.

35 G. Williams, *Text Book of Criminal Law*, (2nd ed., London: Stevens & Sons, 1983), 123.

36 *Westminster City Council v. Croyalgrange Ltd and Another* [1986] 2 All ER 353 (HL).

37 *Ibid.*, at 359, per Lord Bridge.

38 As suggested by G. Werle and F. Jessberger, “Unless Otherwise Provided” – Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’, 3 *Journal of International Criminal Justice* (2005) 35–55, at 41 fn. 34.

39 *R. v. Woollin*, [1999] 1 A. C. 82, 96.

40 *R. v. Sleep* [1861] C. C. R. All ER (Reprinted) 248, 252. In this case, the Court for the Consideration of Crown Cases Reserved (C. C. R.) held that ‘[t]he jury have not found, either that the prisoner knew that these goods were Government stores, or that he wilfully shut his eyes to the fact.’ *Ibid.*, at 252 per Willes, J.

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cases of ‘wilful blindness’ or ‘second degree knowledge’.<sup>41</sup> In *Westminster CC v. Croyalgrange Ltd*, Lord Bridge stated that:

[...] it is always open to the tribunal of fact, when knowledge on the part of the defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed.<sup>42</sup>

Professor Glanville Williams gave the doctrine an accurate but a narrower definition:

A court can properly find wilful blindness only where it can almost be said that the defendant *actually* knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.<sup>43</sup>

Hence, wilful blindness applies only when D is virtually certain that the fact exists. To put it differently, if D deliberately ‘shuts his eyes’ to the obvious, because he ‘doesn’t want to know,’ he is taken to know.<sup>44</sup> Most notably, English courts that accepted the concept of wilful blindness adopted the same approach that such blindness constitutes actual knowledge, or a substitute for actual knowledge.<sup>45</sup> Any attempts to stretch the wilful blindness doctrine by accepting some lesser degree of knowledge instead of actual knowledge would blur the distinction between ‘wilful blindness’ and ‘recklessness’.

In *Griffiths*,<sup>46</sup> a case of handling stolen goods knowing or believing them to be stolen, the English Court of Appeal implicitly distinguished between ‘wilful blindness’ and ‘recklessness’:

To direct the jury that the offence is committed if the defendant, *suspecting* that the goods were stolen, deliberately shut his eyes to the circumstances as an alternative to knowing or believing the goods were stolen is a misdirection. To direct the jury that, in common sense and in law, they may find that the defendant *knew* or *believed* the goods to be stolen because he deliberately closed his eyes to the circumstances is a perfectly proper direction.<sup>47</sup>

Thus, English courts considered the word ‘suspecting’ as a lesser degree of knowledge that does not satisfy the threshold of actual knowledge, nor it can be considered the right test to establish ‘wilful blindness’ on the part of the defendant. Professor Glanville Williams remarkably observed that “the word ‘knowing’ in a statute is very strong”. He contended, ‘[t]o know that a fact exists is not the same as taking the chance whether it exists or not.’<sup>48</sup>

It is worth noting that Canadian Courts have paid more attention in distinguishing ‘wilful blindness’ from ‘recklessness’. The ruling of the Supreme Court of Canada in *Sansregret* is illustrative in this matter.<sup>49</sup> This was a case of rape. Considering all the evidence, the Supreme Court found that

41 The phrase ‘knowledge of the second degree’ was coined by Devlin J in *Roper v. Taylor’s Central Garages* [1951] 2 TLR 284. The term ‘connivance’ was considered as best calculated to describe the second sort of knowledge which carries with it criminal liability. See Edwards, ‘The Criminal Degrees of Knowledge’, 17 *Modern Law Review* (1954) 294–320, at 298.

42 *Westminster City Council v. Croyalgrange Ltd and another* [1986] 2 All ER 353 at 359 (HL).

43 Williams, *The General Part*, *supra* note 14, at 57, 159 (emphasis added).

44 Williams, *Text Book of Criminal Law*, *supra* note 35, at 125.

45 See *Roper v. Taylor’s Central Garage (Exeter) Ltd* (1951) 2 TLR 284, K. B.

46 *Leslie George Griffiths v. R.* [1974] 60 Cr App R 14 (CA).

47 *Leslie George Griffiths v. R.* [1974] 60 Cr App R 14, at 18 (CA) (emphasis added).

48 Williams, *Text Book of Criminal Law*, *supra* note 35, at 126.

49 *Sansregret* [1985] 45 C.R. (3d) 193 S.C.R., cited in D. Stuart, *Canadian Criminal Law, A Treatise*, (4th ed., Canada: Thomson Canada Limited, 2001), 230.



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the accused had been *wilfully blind* as to the nature of B's consent. He had been aware of the likelihood of the victim's reaction to his threats. To proceed with intercourse in such circumstances constituted self-deception to the point of wilful blindness.<sup>50</sup>

The Supreme Court found that because the accused had believed that the consent had been freely given and not procured by threat, there could be no room for recklessness, but the conviction could nevertheless be based on wilful blindness. In drawing the distinction between wilful blindness and recklessness, the Supreme Court stated:

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger of risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.<sup>51</sup>

The Supreme Court agreed with the narrow scope given to this concept by Glanville Williams. Despite its clarity, the law of *Sansregret* has been criticised on the basis that the doctrine of wilful blindness might become a test of objective negligence.<sup>52</sup> Since then, most Canadian courts have been rigorous in ensuring that the test remains subjective. The Ontario Court of Appeal in *Duong* emphasised such position:

Wilful blindness refers to a state of mind which is aptly described as deliberate ignorance. . . . Actual suspicion, combined with a conscious decision not to make inquiries which could confirm that suspicion, is equated in the eyes of the criminal law with actual knowledge. Both are subjective and both are sufficiently blameworthy to justify the imposition of criminal responsibility.<sup>53</sup>

While some legal scholars view the second alternative of intent as excluding concepts of *dolus eventualis* or recklessness,<sup>54</sup> others advocate the inclusion of recklessness and *dolus eventualis* in the legal standard of Article 30.<sup>55</sup> As far as the drafting history is concerned, Professor Roger Clark noted that

50 *Ibid.*

51 45 C. R. (3d) 193 at 206, quoted in Stuart, *Canadian Criminal Law*, *supra* note 49, at 230.

52 Stuart, *Canadian Criminal Law*, *supra* note 49, at 231.

53 *Duong*, [1998] 15 C. R. (5th) 209 (Ont. C. A.) at 402, cited in Stuart, *Canadian Criminal Law*, *supra* note 49, at 231.

54 A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *European Journal of International Law* (1999) 144–171, at 153–54: 'While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute.'; J. D. Van der Vyver, 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law', 12 *Miami International and Comparative Law Review* (2004) 57–149, at 64–5: 'Antonio Cassese has criticized the ICC Statute for not recognizing "recklessness" as the basis of liability for war crimes. However, if one takes into account the resolve to confine the jurisdiction of the ICC to "the most serious crimes of concern to the international community as a whole," it is reasonable to accept that crimes committed without the highest degree of *dolus* ought as a general rule not to be prosecuted in the ICC.'; Werle and Jessberger, *supra* note 38, at 53: 'the requirements of the perpetrator's being aware that the consequence will occur in the ordinary course of events or of the perpetrator's meaning to cause that consequence (Article 30(2)(b) ICCSt.) excludes both forms of subjective accountability. It thus follows from the wording of Article 30(2)(b) that recklessness and *dolus eventualis* do not meet the requirement.'

55 D. K. Piragoff and D. Robinson, 'Article 30 – Mental Element', in Otto Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (2nd ed., Munich: C. H. Beck, 2008) 849–861, at 860; H. H. Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute', 2 *Journal of International Criminal Justice* (2004) 38–55, at 45. F. Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer',

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*dolus eventualis* fell out of the written discourse before Rome. Recklessness, in the sense of subjectively taking a risk to which the actor's mind has been directed, was ultimately to vanish also from the Statute at Rome, with again only an implicit decision as to whether it was appropriate for assessing responsibility.<sup>56</sup>

Professor Otto Triffterer has suggested that since Article 30(2)(b) explicitly states 'will occur' and not 'might occur', it would not be enough to prove that the perpetrator is aware of the *probability* of the consequence and nevertheless carrying out the conduct which results in the proscribed consequence.<sup>57</sup> As for the meaning of "will occur" as provided for in Article 30(2)(b) ICCSt. Triffterer had this to say: 'Though only "will occur" is mentioned in article 30, wouldn't it be enough that the perpetrator is aware that a consequence might occur and nevertheless engages in taking action tending in that direction, thereby accepting its consequences? Though this then is the typical notion of recklessness in common law countries, it may well be sufficient for *dolus eventualis* in some civil law countries.'<sup>58</sup>

Professor Albin Esser viewed the phrase "will occur in the ordinary course of events" as requiring the prosecution to demonstrate that the perpetrator foresees the consequence of his conduct as being *certain* unless extraordinary circumstances intervene.<sup>59</sup>

### 4. Dolus Eventualis, Recklessness, Article 30 and the Lubanga Decision

Aware that the jurisprudence of the two *ad hoc* Tribunals has recognised other degrees of culpable mental states than that of direct intent (*dolus directus* of the first degree) and indirect intent (*dolus directus* of the second degree),<sup>60</sup> the ICC PTC I went further, assuring that the volitional element mentioned above also encompasses other aspects of *dolus*, namely *dolus eventualis*.<sup>61</sup> Arguably, the PTC I reached its conclusion that *dolus eventualis* has a place within the framework of Article 30 based on its understanding of the notion of 'criminal intent' as recognized in civil law jurisdictions rather than stretching the phrase 'aware that it will occur in the ordinary course of events' to include this form of *dolus*. In this regard, it is worth pointing out that in the penal codes of countries which adhere to the Romano-Germanic legal traditions it is rare to find an explicit mention of the notion of *dolus eventualis* though courts and scholars recognise it as a part and parcel of the criminal intent which is sufficient to trigger the criminal responsibility for intentional crimes. The issue of whether *dolus eventualis* has a definite meaning and components in national jurisdictions will be dealt with in detail in the following section.

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1 *Journal of International Criminal Justice* (2003) 26–38, at 32: '... the ICC Statute's provision on the mental element (Article 30) appears to limit itself to intent (*dolus*) alone, thereby excluding negligence (*culpa*). Using ambiguous and psychologically imprecise wording ... It ... does include intent and recklessness (*dolus eventualis*) ...'

56 Clark, *supra* note 21, at 301.

57 See O. Triffterer, 'The New International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility', in K. Koufa (ed.), *The New International Criminal Law* (Athens: Sakkoulas Publications, 2003) 639–727, at 706.

58 *Ibid.*

59 A. Esser, 'Mental Elements-Mistake of Fact and Mistake of Law', in A. Cassese *et al.*, (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, (Oxford: Oxford University Press, 2002) 889–948, at 915: '... the perpetrators being aware that the action will result in the prohibited consequence ... with certainty ...'

60 M. E. Badar, 'Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia', 6 *International Criminal Law Review* (2006) 313–348.

61 *Lubanga* Decision on the Confirmation of Charges, *supra* note 1, para. 352.

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According to the Pre-Trial Chamber *dolus eventualis* applies in situations in which the suspect ‘(a) is aware of the risk that the objective elements of the crime *may* result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.’<sup>62</sup> The Pre-Trial Chamber found it necessary to distinguish between two types of scenarios regarding the degree of probability of the occurrence of the consequence from which intent can be inferred:

Firstly, if the risk of bringing about the objective elements of the crime is *substantial* (that is, there is a likelihood that it “will occur in the ordinary course of events”), the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

(i) the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and

(ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness.

Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions.<sup>63</sup>

However, in situations where the suspect’s mental state ‘falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realisation of the objective elements, and hence would not meet the “intent and knowledge” requirement embodied in article 30 of the Statute.’<sup>64</sup>

As for the exclusion of the concept of recklessness from the realm of Article 30 of the ICC Statute the PTC I had this to say:

The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.<sup>65</sup>

It is significant in this regard to recall Professor Antonio Cassese’s concerns, almost eight years prior to the Lubanga decision, regarding the exclusion of the notion of recklessness by the drafters of the Rome Statute:

While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute. One fails to see why, at least in the case of war crimes, this last mental element may not suffice for criminal responsibility to arise. Admittedly, in the case of genocide, crimes against humanity and aggression, the extreme gravity of the offence presuppose that it may only be perpetrated when intent and knowledge are present. However, for less serious crimes, such as war crimes, current international law must be taken to allow for recklessness: for example, it is admissible to convict a person who, when shelling a town, takes a high an unjustifiable risk that civilian will be killed – without, however, *intending*, that they be killed – with the result that the civilians are, in fact, thereby killed.<sup>66</sup>

Professor 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.<sup>67</sup>

62 *Ibid.*, para. 352 (emphasis added, footnotes omitted).

63 *Ibid.*, paras. 353–354.

64 *Ibid.*, para. 355.

65 *Lubanga* Decision on the Confirmation of Charges, *supra* note 1, footnote 438.

66 Cassese, ‘Some Preliminary Reflections’, *supra* note 54, at 153–154.

67 *Ibid.*, at 154.

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However, it would be a profound mistake to draw from Cassese's hypothetical example that those persons will escape justice by claiming that their main aim was merely shelling a military objective and that they lack any intention regarding the killing of civilians. In such situations, those actors can incur criminal responsibility under the concept of *dolus eventualis* if the prosecution succeeds in demonstrating that in shelling the towns, it was probable that those civilians would be killed and that the actors accept such a result.

Professor Kai Ambos views Article 30 ICCSt. to exclude the notions of *dolus eventualis* and recklessness:

'Certainly, reckless conduct cannot be the basis of responsibility since a corresponding provision was deleted [during the drafting of Art. 30 ICCSt]. 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 . . . However, [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."<sup>68</sup>

Professors Roger Clark and Gerhard Werle adopt the same view of Ambos assuring that 'Article 30 of the ICC Statute leaves no room for *dolus eventualis* or recklessness' though the subject is still highly disputed.<sup>69</sup> Professor Joachim Vogel notes that the main reason of such confusion 'is that intent and knowledge are defined in Art. 30(2)&(3) of the Statute of the ICC under clear influence of the common law principles, but in a manner that is a compromise and therefore not consistent and not without overlaps, and applies to *dolus eventualis* in the German understanding (awareness that a circumstance exists or a consequence will occur in the ordinary course of events.'<sup>70</sup>

Since there is a lack of consensus among legal scholars on whether *dolus eventualis* or recklessness falls under the realm of Article 30 ICCSt and since the Lubanga decision assertion is not legally binding on the ICC Trial Chambers and that the last word on that issue will be for the ICC Appeal Chamber it is significant in this regard to elaborate on the meaning and the contour of recklessness and *dolus eventualis* from a comparative criminal law perspective.

## 5. The meaning of Recklessness in the Model Penal Code

No aspect of the Model Penal Code has had greater influence on the direction of American criminal law than § 2.02 of the Code, which provides general rules for the definition of liability.<sup>71</sup> It is considered 'the single most important provision of the

68 K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10 *Criminal Law Forum* (1999) 1–32, at 21–22.

69 G. Werle, *Principles of International Criminal Law* (The Hague: T. M. C. Asser, 2005) 113–114; Roger Clark, 'Elements of Crimes in Early Decisions of Pre-Trial Chambers of the International Criminal Court', *New Zealand Yearbook of International Law* (2009) (forthcoming): 'But *dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus. If it is to be read into the Statute, it is in the teeth of the language and history.'

70 J. Vogel, 'Vor § 15', in H. W. Lauffhütte et al. (eds.), *Strafgesetzbuch Leipziger Kommentar* (12th ed., Berlin: De Gruyter, 2007), margin 95.

71 Joshua Dressler, *Understanding Criminal Law*, (3rd ed., United States: Mathew Bender & Company, 2001), 137.

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Code',<sup>72</sup> and the most significant and enduring achievement of the Code's drafters.<sup>73</sup> 'General Requirement of Culpability', as provided for in § 2.02, has been described as the representative of the modern American culpability scheme.<sup>74</sup> This Section articulates the Code's fundamental requirement that unless some element of mental culpability is proved with respect to each material element of the offence, no valid criminal conviction may be obtained.<sup>75</sup> Thus, the minimal statement is that one may not be convicted of a crime 'unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offence.'<sup>76</sup> Accordingly, the Code eliminated ill-defined and confusing culpability terms and replaced them with four carefully defined hierarchical levels.<sup>77</sup> Each of these levels of culpability is defined to each of the 'material element' of the offence which may involve conduct, attendant circumstances, and/or result.<sup>78</sup> Thus, the Model Penal Code firmly establishes the concept of 'element analysis' in place of 'offence analysis.' The former concept requires the Prosecution to prove that the defendant carried out the material elements of the offence with a culpable state of mind.

Generally speaking, recklessness is the most common level at which criminal liability attaches, and it is considered the 'default' requisite mental state in many jurisdictions when

72 H. L. Packer, 'The Model Penal Code and Beyond', 63 *Columbia Law Review* (1963) 594–607 at 601. R. M. Perkins, 'A Rationale of Mens Rea', 52 *Harvard Law Review* (1939) 905–923; F. J. Remington & O. L. Helstad, 'The Mental Element in Crime – A Legislative Problem', *Wisconsin Law Review* (1952) 644–678, at 648–49.

73 See P. H. Robinson, 'A brief History of Distinctions in Criminal Liability', 31 *Hastings Law Journal* (1980) 815–853, at 815–821 (describing the advances made by the drafters of the Model Penal Code and outlining the distinctions among the Code's culpability terms.) *Contra* see P. Brett, *An Inquiry into Criminal Guilt* (Sydney: The Law Book Co. of Australia, 1963) 70–85 (arguing that culpability should be a simple judgment of moral blameworthiness made by a jury, not the result of codification efforts); E. S. Binavince, 'The Structure and Theory of the German Penal Code', 24 *American Journal of Comparative Law* (1976) 594–601, at 600 (complimenting the drafters of the German Penal Code for abandoning the effort to define culpability terms because such definition curtails the dynamic quality of the law).

74 Robinson, *ibid.*, at 815.

75 *Model Penal Code and Commentaries*, at 229. § 2.02 (1) of the MPC which entitled 'Minimum Requirements of Culpability' reads as follows: 'Except as provided in Section 2.05, a person is not guilty of an offence unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offence.'

76 Model Penal Code, § 2.02(1). The only exception of this general requirement is the narrow allowance for offences of strict liability in § 2.05 of the Code, limited to cases where the most severe sentence that may be imposed is a fine.

77 'The definition of the further elements of culpability was the hardest drafting problem in the framing of the Code. American law has employed an abundance of *mens rea* terms, such as general and specific intent, malice, wilfulness, wantonness, recklessness, scienter, criminal negligence, and the like . . . clarification was essential and it was attempted by a bold submission in the draft.' See H. Wechsler, 'Codification of the Criminal Law in the United States' ■: The Model Penal Code, 68 *Columbia Law Review* (1968) 1425–1456, at 1436; see also S. H. Kadish, 'Codifiers of the Criminal Law: Wechsler's Predecessors', 78 *Columbia Law Review* (1978) 1098–1144, at 1143 (crediting the drafters of the Model Penal Code with dispersing 'the obscurantist cloud that hung for so long on the central *mens rea* issues in criminal law').

78 § 1.13(9) of the Model Penal Code defines an 'element of an offence' to include conduct, attendant circumstances or results that are included in the description of the offence; that establish the required kind of culpability; that negate an excuse or justification for an offence; that negate a defence under the statute of limitations; or that establish jurisdiction or venue. § 1.13(10) of the Model Penal Code defines the concept of 'material element' to include all elements except those that relate exclusively to statute of limitation, jurisdiction, venue, and the like. The 'material elements' of offences are thus those characteristics (conduct, circumstances, result) of the actor's behaviour that, when combined with appropriate level of culpability, will constitute the offence in question.

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a statute is silent with regard to the mental state required for a crime.<sup>79</sup> The term recklessness, as used in the Code, involves conscious risk creation, an element which differentiates it from acting either purposely or knowingly. It is a state of mind distinct from intent.<sup>80</sup>

Under the Model Penal Code, recklessness, however, resembles acting knowingly in that a state of awareness is involved, but the awareness is of risk, that is, of a probability less than substantial certainty.<sup>81</sup> Recklessness also shares some attributes with negligence. Both concepts require the existence or creation of a substantial and unjustifiable risk that circumstances exist or that a result will occur. But the reckless actor must subjectively believe that he is creating a substantial risk. In terms of the gravity of the culpability involved, recklessly falls between knowingly and negligently.

The Code provides that a person acts ‘recklessly’ if (1) he ‘consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct.’<sup>82</sup> According to the Code, a 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.’<sup>83</sup>

Recklessness as provided for in § 2.02(2)(c) has both subjective and objective aspects. The risk of which the actor is aware must be substantial and unjustifiable in order for the recklessness judgment to be made.<sup>84</sup> It is immaterial whether the risk relates to the nature of the actor’s conduct, to the existence of the attendant circumstances, or to the result that may ensue.<sup>85</sup> In *United States v. Albers*,<sup>86</sup> it was held that a finding of recklessness may only be made when persons disregard a risk of harm of which they are aware.<sup>87</sup>

### A. Conscious disregard – the subjective component of recklessness

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 a reckless actor from a negligent one.<sup>88</sup> The negligent actor is a person who fails to perceive a risk that he ought to perceive. The reckless actor is a person who perceives or is conscious of the risk but disregards it.<sup>89</sup> Hence, in many offences where the law provides that recklessness is the minimum level of culpability, negligence will not suffice. Accordingly, “the distinction between ‘conscious disregard’ and ‘failure to perceive’ will often signify the difference between conviction and acquittal.”<sup>90</sup>

79 A. C. Michaels, ‘Acceptance: The Missing Mental State’, 71 *Southern California Law Review* (1998) 953–1036, at 959.

80 *U. S. v. Trinidad-Aquino*, 259 F.3d at 1146.

81 *Model Penal Code and Commentaries*, § 2.02 Comment at 236.

82 *Model Penal Code*, § 2.02(2)(c).

83 *Model Penal Code*, § 2.02(2)(c).

84 *Model Penal Code and Commentaries*, § 2.02 Comment at 237.

85 *Model Penal Code and Commentaries*, § 2.02 Comment at 236–37.

86 *United States v. Albers*, 226 F. 3d 989, 995 (9th Cir. 2000).

87 *United States v. Albers*, 226 F. 3d 989, 995 (9th Cir. 2000), citing *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994) (emphasis added); see also *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001).

88 D.M. Treiman, ‘Recklessness and the Model Penal Code’, 9 *American Journal of Criminal Law* (1981) 281–386, at 351.

89 *Ibid.*

90 *Ibid.*

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Even though the Model Penal Code does not define the meaning of the term ‘conscious disregards’, the Commentary of the Code, in a comparison made between knowledge and recklessness, assists in clarifying the meaning of that term:

Recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty; the matter is contingent from the actor’s point of view.<sup>91</sup>

## **B. Substantiality and unjustifiability of the risk**

According to the Code, in order to trigger the criminal liability for recklessness, the risk of which the actor consciously disregards must be substantial and unjustifiable. The drafters of the Code assured that the threshold test should be conjunctive rather than disjunctive. The reason is ‘even substantial risks may be created without recklessness when the actor seeks to serve a proper purpose.’<sup>92</sup> These two adjectives describing the risk shed more heat than light ‘for these are terms of degree, and the acceptability of a risk in a given case depends on a great many variables.’<sup>93</sup> Accordingly, the drafters of the Code were of the opinion that some standard is needed for determining how substantial and how unjustifiable the risk must be in order to warrant a finding of culpability.<sup>94</sup> The Commentary of the Code states that a trier of fact is asked to perform two distinct functions:

First, it is to examine the risk and the factors that are relevant to how substantial it was and to the justifications for taking it. In each instance, the question is asked from the point view of the actor’s perceptions, i. e., to what extent he was aware of risk, of factors relating to its substantiality and of factors relating to its unjustifiability. Second, the jury is to make the culpability judgment in terms of whether the defendant’s conscious disregard of the risk justifies condemnation. Considering the nature and purpose of his conduct and the circumstances known to him, the question is whether the defendant’s disregard of the risk involved a gross deviation from the standard of conduct that a law-abiding person would have observed in the actor’s situation.<sup>95</sup>

## **C. Recklessness vis-à-vis § 2.02(7)**

The commentary of the Code claimed that § 2.02(7) described ‘reckless’ rather than ‘knowing conduct’. As a comment to the Code notes, whether § 2.02(7) should be considered a knowledge or recklessness standard presents a ‘subtle but important question.’<sup>96</sup> One scholar, however, argued that § 2.02(7) defines a hybrid mental state that falls somewhere between knowledge and recklessness.<sup>97</sup> In an attempt to draw the border lines between the two concepts, one scholar pointed out that:

Guided by the intuition that some mental states should be treated no differently from actual knowledge, the Model Penal Code drafters formulated § 2.02(7) as a definition of knowledge of fact. This decision is justified by the high level of certainty that § 2.02(7) requires. Recklessness by contrast, “requires a conscious of something far less than certainty or even probability.”<sup>98</sup>

<sup>91</sup> *Model Penal Code and Commentaries*, § 2.02 Comment at 236.

<sup>92</sup> *Model Penal Code and Commentaries*, § 2.02 Comment at 237.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Model Penal Code and Commentaries*, § 2.02 Comment at 248.

<sup>97</sup> R. Charlow, ‘Willful Ignorance and Criminal Liability’, 70 *Texas Law Review* (1992) 1351–1430, at 1429.

<sup>98</sup> J. L. Marcus, ‘Model Penal Code Section 2.02(7) and Willful Blindness’, 102 *Yale Law Journal* (1993) 2231–2258, at 2239.

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A further distinction is that mistaken belief negates culpability under § 2.02(7) but does not negate recklessness.<sup>99</sup> The following example is illustrative on that matter. D believes the gun he points at his friend is empty (because his parents told him that the gun was rarely loaded). D pulls the trigger; the gun fires, causing his friend's death. D couldn't be convicted of knowingly shooting his friend because he was not aware of high probability that the gun was loaded, and he actually believed the gun to be empty. D could be, however, convicted for recklessness because he consciously disregarded a substantial and unjustifiable risk that the gun was loaded.<sup>100</sup>

#### **D. Reckless homicide manifesting extreme indifference to human life**

The Model Penal Code includes a form of recklessness as a sufficient mental state of murder. Pursuant to § 210.2(b) of the Model Penal Code, criminal homicide constitutes murder when it is 'committed recklessly under circumstances manifesting extreme indifference to the value of human life.'<sup>101</sup> Reading § 210.2(1)(b) in conjunction with § 2.02(2)(c) (the general definition of recklessness), 'reckless murder' may be defined as the conscious disregard of a substantial and unjustifiable risk that death will result from the actor's conduct. The risk must be of such a nature and degree that, given the nature and purpose of the actor's conduct and the circumstances known to him, his disregard involves a 'gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.'<sup>102</sup>

By demonstrating such indifference to the value of human life, the reckless killer, therefore, deserves to be bracketed with a killer who kills purposely or knowingly. The standard, set out in § 210.2, is subjective; it does not extend to inadvertent risk-taking. The Code provision makes clear that 'inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder.'<sup>103</sup> Hence, negligent creation of homicidal risk, though sufficiently extreme, may not support liability for murder.

The Commentary of the Model Penal Code reemphasized that the concept adopted in § 210.2(1)(b), which includes – within the murder category – cases of homicide caused by extreme recklessness, though without purpose to kill, reflects the common law and much pre-existing statutory treatment. In order to sustain this position, the drafters referred to the following cases:

- On the third try, the defendant shot his friend dead in a game of Russian roulette. The Court affirmed the conviction for murder, despite ample evidence that the defendant had not desired to kill his friend.<sup>104</sup>
- The defendant shot V dead. The defendant claimed he intended to shoot over V's head in order to scare him. The Court held that, even crediting this assertion, the jury could find the defendant guilty of murder on the grounds that his act showed

<sup>99</sup> *Ibid.*, at 2240.

<sup>100</sup> *Ibid.*

<sup>101</sup> Model Penal Code, § 210.2(1)(b). The second sentence of subsection (1)(b) reads as follows: 'Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.'

<sup>102</sup> Model Penal Code, § 2.02(2)(c).

<sup>103</sup> *Model Penal Code and Commentaries*, § 210.2 Comment at 27–28.

<sup>104</sup> *Commonwealth v. Malone*, 354 Pa. 180, 188, 47 A.2d 445, 447 (1946) quoted in *Model Penal Code and Commentaries*, § 2.02 Commentary at 23.



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‘such a reckless disregard for human life as was the equivalent of a specific intent to kill.’<sup>105</sup>

- A defendant fired several shots into a house which he knew to be occupied by several persons. He was convicted of murder on the grounds that his conduct was ‘imminently dangerous’ and ‘evinced a wicked and depraved mind regardless of human life.’<sup>106</sup>

To sum up, under § 210.2(1)(b), the actor must perceive and consciously disregard the risk of death of another before the conclusion of recklessness indifference can be drawn.<sup>107</sup>

## 6. The Contour of *Dolus Eventualis* in Comparative Criminal Law

### A. Egypt

The Egyptian Penal Code does not set general principles for *dolus eventualis*, except when it tackles the accomplice liability in Article 43 of the penal code which stipulates: ‘He who participates in a crime shall bear its penalty, even though the resulting crime is not the one he has in advance intended, as long as the crime that actually took place is a *probable result* for his instigation, agreement, or assistance.’ On 25 December 1930, the Egyptian Court of Cassation issued a judgment in case no. 1835 (judicial year 47).<sup>108</sup> The Court adopted the idea of ‘acceptance’ as an essential element in the concept. The Egyptian Court of Cassation decided that

*dolus eventualis* substitutes intent, in the strict sense of the word, in establishing the element of intentionality. It can only be defined as a secondary uncertain intention on the part of the perpetrator who expects that his act may go beyond the purpose intended to realize another purpose that was not intended initially but nevertheless performs the act and thus realizes the unintended purpose. As a result of this intention, it becomes irrelevant whether the consequence takes place or not. The purpose of formulating the definition in this way is to clarify that intention must be present in all circumstances, to include all forms of such intention and to exclude other cases where the intention is not established, in a bid to calling for caution in order not to confuse premeditation with mere error. The practical key to knowing if *dolus eventualis* is established or not is to ask the question: while undertaking the intended act, did the perpetrator want to do it even if the act goes beyond its original purpose to the criminal act that actually happened and was not originally intended? If the answer is yes, *dolus eventualis* is established. If the answer is no, then the whole matter is nothing more than an error that may be punishable or not depending on whether the conditions establishing an error are present. Answering the question, of course, relies on such evidence as confession, proofs or presumptions. Therefore, *dolus eventualis* is not established in the following scenario: X intends to kill Y by poisoning a piece of sweets and offering it to Y. Y keeps the piece of sweets that Z finds, eats and accordingly dies. In this case, the accused shall be punished for the attempted murder of Y and shall not be punished for killing Z under the pretext of *dolus eventualis*. This is because the secondary intention is not established; only the focused intention is established, and that is fulfilling the original purpose and it does not go beyond to any other criminal purpose.<sup>109</sup>

105 *Myrick v. State*, 199 Ga. 244,249, 34 S. E.2 d 36, 40 (1945), quoted in *Model Penal Code and Commentaries*, § 2.02 Commentary at 23.

106 *Hill v. Commonwealth*, 239 Ky. 646, 40 S. W.2 d 261 (1931) quoted in *Model Penal Code and Commentaries*, § 2.02 Commentary at 23.

107 *Contra* see the discussion that took place in the recent UK Law Commission Report on Homicide in which a proposal to assign a culpable state of ‘reckless indifference’ to the crime of second degree murder was subject to criticism by judges and academic scholars. See the UK Law Commission Report on Murder, Manslaughter and Infanticide, Project 6 of the Ninth Programme of Law Reform: Homicide (Law Com. No 304) paras. 2.99–2.107, at 38–39, available at <http://www.lawcom.gov.uk> (last assessed 1 April 2009).

108 Series of Legal Principles decided by the Egyptian Court of Cassation, Part II, Principle no. 135, at 168.

109 Judgment, Egyptian Court of Cassation, Case No. 1853/Judicial Year 47, 25 December 1930.

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## B. France

In French criminal law, neither statute nor case-law provides any general definition of intention, and it has been left to academics to analyse its meaning.<sup>110</sup> In French criminal law, a distinction is made between two forms of intent, namely, *dol général* and *dol special*. French scholars also recognise the concept of *dol éventuel*, which is where the defendant merely foresees the possibility of the result but he or she does not desire its occurrence. However, this form of *dol* does not amount to *dol special* and hence is not a mental state that will support a conviction for *meurtre*, whether in its simple or one of its aggravated forms.<sup>111</sup> Under the new French Criminal Code,<sup>112</sup> however, *dol éventuel* may amount to a lesser fault and it is treated as an aggravating factor in relation to involuntary murder and non-fatal offences against the person.<sup>113</sup>

## C. Italy

*Dolus eventualis* is recognized under the Italian criminal law as *dolo eventuale*. Pursuant to Article 43 of the Italian *Codice Penale*, all serious crimes require proof of the mental element known as *dolo*, which means that the prohibited result must be both *preveduto* (foreseen) and *voluto* (wanted). Yet, a result may be *voluto* even though it is not desired if, having contemplated the possibility of bringing it about by pursuing a course of conduct, the perpetrator is prepared to run the risk of doing so (*dolo eventuale*). Even a small risk may be *voluto* if the defendant has reconciled himself to, or accepted it as a part of the price he was prepared to pay to secure his objective.<sup>114</sup>

## D. South Africa

In South African criminal law, an amalgam of Roman-Dutch and English law, fault may take two broad forms, namely, intention (*dolus*) or negligence (*culpa*). Intention is divided into four standards, namely, *dolus directus*, *dolus indirectus*, *dolus eventualis* and *dolus indeterminatus*.<sup>115</sup> All forms of intention are assessed subjectively and *dolus eventualis* is a sufficient form of *mens rea* for all crimes based on intention.<sup>116</sup> A clear statement on the definition of intention is given in the Draft Criminal Code of South Africa: A person has intention to bring about a result of his conduct if (a) it is his aim to bring about the result [*dolus directus*]; (b) he knows that his conduct would of necessity bring about the result [*dolus indirectus*]; (c) he foresees the possibility of the result flowing from his conduct and reconciles himself to this possibility [*dolus eventualis*].

110 Article 121–3 of the French Penal Code states: ‘There is no felony or misdemeanour in the absence of an intent to commit it.’

111 On French criminal law see J. Bell, S. Boyron and S. Whittaker, *Principles of French Law*, (1998); B. Dikson, *Introduction to French Law*, (1994); E. Garçon, *Code pénal annoté* (1901); C. Elliot, ‘The French Law of Intent and Its Influence of the Development of International Criminal Law’, 11 *Criminal Law Forum* (2000) 35–46.

112 Entered into force on 1 March 1994.

113 See Articles 221–3, 222–19, 222–20 and 223–1 of the new French Criminal Code.

114 See F. McAuley and J. P. McCutcheon, *Criminal Liability* (London: Sweet & Maxwell, 2000) 301–303.

115 J. Burchell, ‘Chapter 13 – Criminal Law’ in C. G. Van der Merwe and J. E. Plessis, *Introduction to the Law of South Africa*, (The Hague: Kluwer Law International, 2004), 463.

116 *Ibid.*

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In a very recent judgment, *SC van Aardt v. The State*,<sup>117</sup> the Supreme Court of Appeal of South Africa reached a verdict of murder upon proof of *dolus eventualis* on the part of the accused. The Supreme Court of Appeal refers to Holmes JA observation on the *mens rea* requisite for murder in the case of *S v. Sigwaha*:<sup>118</sup>

1. The expression ‘intention to kill’ does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.

2. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.

## E. Germany

In the German legal system *dolus eventualis* occurs in situation in which the offender does not aim for the materialisation of the elements of the offence or does not foresee the fulfilling of the elements as virtually certain but he or she considers it to be possible.<sup>119</sup>

German literature, as well as courts, treated *dolus eventualis* differently according to various theories. As remarkably noted by Professor Michael Bohlander ‘they range from theories that decline to entertain, to differing degrees, any volitional element for example from the mere awareness of a possibility of the result occurring, to its probability’<sup>120</sup>, the requirement that D must envisage an unreasonable risk, or a manifestation of avoidance efforts, to those that require a volitional element, again to differing degrees, such as the approval theories which make the mental consent of the offender to the result, should it occur, the decisive parameter, to those that let an attitude of reckless indifference suffice, in other words if D says ‘I could not care less’.<sup>120</sup> What is common to all of them is that the defendant ‘must have been aware of the fact that his actions may lead to an offence being committed.’<sup>121</sup>

It is worth pointing out that German courts, following the tradition of the *Reichsgericht* and the jurisprudence of the Federal Supreme Court of Justice (*BGH*), ‘adhere to a somewhat watered-down approval theory, yet the approval does not need to be explicit and the offender need not *morally* approve of the result – it is sufficient if he or she accepts it nevertheless in order to reach his or her ulterior goal.’<sup>122</sup> Most notably in the more recent case law, German courts have put strong emphasis on distinguishing between the essence of the cognitive and volitional elements and inferring their existence

117 *Stephanus Cornelius van Aardt v. The State*, Case No. 179/08 [2008] ZASCA 169 (2 December 2008).

118 *S v. Sigwaha*, 1967 (4) SA 566 (A).

119 Cramer and Sternberg-Lieben ‘Vor § 15’ in T. Lenckner et al., *Schönke & Schröder Strafgesetzbuch Kommentar* (27th ed., Munich: Verlag C. H. Beck, 2006), margin 72.

120 Bohlander, *supra* note 11, at 4–65.

121 *Ibid.*

122 *Ibid.*, at 65, footnotes omitted.

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from the evidence about the external conduct of the defendant.<sup>123</sup> The Federal Supreme Court has adopted the approach that if the defendant ‘is acting in an objectively highly dangerous situation and still goes ahead with his or her plans without being able to claim realistically that nothing bad will happen, the volitional element may be more easily inferred than in less clear-cut situations, where the danger is not readily recognisable.’<sup>124</sup>

In light of the aforementioned, we might conclude that in the German legal system acting with *dolus eventualis* requires that the perpetrator perceive the occurrence of the criminal result as possible and not completely remote, and that he endorses it or at least makes peace with the likelihood of it for the sake of the desired goal. 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, he is prepared to accept such a result. The volitional element (acceptance) denotes the borderline between *dolus eventualis* and advertent or conscious negligence.

## 7. Islamic Jurisprudence

Islamic tradition, like other major religious traditions, does not consist of, or derive from, a single source. *Sharī‘ah* is based on a variety of sources. These sources are categorised by Muslim scholars into primary and supplementary sources.<sup>125</sup> The *Qur’an* is the fundamental and original source of the *Sharī‘ah*; the *Sunnah* is considered the second primary source and is as such next in importance to the *Qur’ān*.<sup>126</sup> After the Prophet’s death (632 C.E.), the need for a continuing process of interpretation of the *Qur’ān* became more acute.<sup>127</sup> This led to the development of supplemental sources of law to apply whenever the two primary sources were silent on a given question. *Ijtihād*<sup>128</sup> (independent interpretation) was needed to answer new questions – and new issues that necessitated new thought and laws – resulting from the expansion of Islam into new societies and cultures. This exercise of *Ijtihad* during the eighth and ninth centuries led to the development of four schools of jurisprudence. These schools are the *Hanafī*, the *Maliki*, the *Shafai* and the *Hanbali*. They were named respectively after the four founders and are followed today by the vast majority of Sunni Muslims.<sup>129</sup>

Although Muslim jurists did not identify a theory for *dolus eventualis*, they mentioned the hypotheses which if united, specified and formulated, would establish one of the most updated theories of that notion. In his treatise *Criminal Responsibility in Islamic Jurisprudence*, Professor Ahmad Fathy Bahnasy quoted various views of Muslim jurists where conditional intent or *dolus eventualis* was deemed sufficient to hold a person

123 *Ibid.*, with reference to 46 *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt), at 35.

124 *Ibid.*, with reference to 36 *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt), at 1.

125 M. Abou-Zahra, *al-Jarīma wa-al- uqūba fi al-fiqh al-Islāmī*, vol. 1, (Cairo: Dār el-Fikr al-Arabī, 1998).

126 Abd al-Qādir Awda, *al- Tashrī al- Jinā‘ī al-Islāmī muqāranan bi-l-qānūn al-wad‘ī*, (Cairo: Dar al-Sherūk, 2001) vol. 1, part 2, at 144.

127 On the Rules of Interpretation see M. H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Text Society, 2003) 117–186.

128 *Ijtihad* is a technical term of Islamic law that describes the process of making a legal decision by an independent interpretation of the legal sources, the *Qur’an* and the *Sunnah*. The opposite of *ijtihad* is *taqlid*, Arabic for ‘imitation’. For a detailed consideration of *Ijtihad*, see Kamali, *ibid.*, at 60.

129 *Ibid.*

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criminally liable for intentional crimes.<sup>130</sup> Thus, for example, we read in *Al-Mogtabi* that Ibn Abdeen has said the intent of killing is not a precondition for murder. If the offender sought to injure only man's hand (*i.e.*, had no intent to kill) and injures his neck (*i.e.* the man dies), this shall be deemed intentional murder; and if he injures another person's neck (*i.e.*, someone else dies), this shall be deemed accidental homicide.<sup>131</sup> This means, according to Professor Bahnasy, that if the offender thought to merely injure a person's hand, it is imperative that he expects in his conditional intent (*dolus eventualis*) that he may injure this person's neck, causing his death. Thus, it shall be deemed intentional murder.<sup>132</sup>

## 8. Distinguishing Dolus Eventualis from Dolus Directus of the Second Degree

In *dolus directus* of the second degree there must be a correlation between the desired consequence (*dolus directus* of the first degree) and the pertinent consequence (*dolus directus* of the second degree).<sup>133</sup> This correlation is inevitable, indispensable and imperative and must always exist; consequently, this type of intent is termed an intent of imperative consequences.<sup>134</sup> Yet, if we were faced with a result that was an inevitable and indispensable consequence of the first, where the occurrence of the first would mean a definite occurrence of the second, then, for the second result, this will be considered as a *dolus directus* of the second degree.<sup>135</sup>

On the other hand, if the second consequence, sequential to the first, was expected by the perpetrator to potentially ensue, then, even under the highest degree, we would be faced with *dolus eventualis*.<sup>136</sup> In other words, if the second consequence had multiple probabilities where its occurrence as a consequence of the first was questionable, with the assumption that the perpetrator was not surprised by it in the occasion it did occur, then this will be considered as *dolus eventualis*.

In terms of legal value, there exists no difference between both types of *dolus directus* of the first and second degree; intentionality is present in both.<sup>137</sup> Parity between both types is justified by the fact that the direction of a will towards an incident is imperatively a direction towards any act known to be indispensably related thereto.<sup>138</sup> Moreover, there also exists no difference in terms of legal value between both types of *dolus directus* and *dolus eventualis* on which premeditated crimes are based by reason of existence of both the potential contemplation of the consequence, but rather non-absolute, and the acceptance of its occurrence. These two factors are considered the elements of criminal intent in its general form as well as of direct intent, with both its types, represented in knowledge and will.<sup>139</sup>

130 A.F. Bahnasy, *al-Masûleya al-Jenâe' iah fi al-Fiqh al-Islâmî: Derâssa Feqheia Muqâranah*, (Cairo: al-Halaby Publisher, 2nd ed., 1969) 151.

131 *Ibid.*, at 153.

132 *Ibid.*

133 Abou el-Magd Aly Eisa, *al Qasd al Gena'i al-Ehtemaly: Derasah Tâ'sileyah Tahlileyah Muqararah*, (Conditional Intent: Analytical and Comparative Study), (Cairo: Dar al-Nahda al-Arabia, 1988), 314.

134 *Ibid.*, 313–14.

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*, at 314.

138 *Ibid.*

139 *Ibid.*

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## 9. A Proposed Definition for *Dolus Eventualis*

Since criminal intent is generally defined as the perpetrator's 'knowledge' of the elements of the crime as prescribed by law and his 'will' to implement those elements, and based on the definition given to that notion by the Egyptian Court of Cassation in its ruling in case no. 1835 (judicial year 47), discussed above, Professor Eisa proposed the following definition for *dolus eventualis*:

It is a form of criminal intent which satisfies the threshold for the mental element of intentional crimes. It is an unfocused intent that occurs when the perpetrator foresees the possibility that the consequence of his act exceeds the goal he intended – whether legitimate or illegitimate – to another unlawful goal which he did not intend initially, and nevertheless performs the act, reconciling himself with the consequences . . .<sup>140</sup>

Professor Eisa went further clarifying each element of his proposed definition for the notion of *dolus eventualis*:

- a) Describing it as 'intent' means that the element of *will* has supreme importance in its formation while calling it 'unfocused' is intended to distinguish between this type of intent and *dolus directus* which is focused directly upon implementing the illegitimate consequence.
- b) Saying that it 'occurs to the perpetrator' refers to the fact that this intent was not originally leading to the criminal consequence that resulted from his act;
- c) The statement 'foresees the possibility that the consequence of his act exceeds the goal he intended . . .' is meant to show that it is important to be a realistic foresight and hence it cannot be replaced by a possible or necessary foresight. This also shows the importance of realistic foresight as a basis for intention. In addition, the statement refers to the fact that it is a subjective foresight as the focus is on the perpetrator's personality when performing his act. It should not also be conclusive or inevitable while it can be only possible. This is considered an accurate definition of the criterion and amount of the foresight required to build the concept of *dolus eventualis*.
- d) Describing the original act as 'legitimate or illegitimate' is meant to confirm the independence of *dolus eventualis* as well as the fact that it does not need to be preceded by another criminal intent in order to have a predetermined crime.
- e) The statement 'to another unlawful goal which he did not intend initially, and nevertheless performs the act' confirms the reliance on what revolves in the perpetrator's mind concerning his attitude towards the criminal consequence that may result from the act.
- f) The expression 'reconciling himself with the consequences' is meant to highlight that we favour the theory of consent which is considered a crucial element for establishing *dolus eventualis* on the part of the accused. Failing to prove this element of acceptance the act will no longer be intentional; it may however be considered mistaken conduct.<sup>141</sup>

## 10. General Remarks

Based on this comparative survey it is evident that *dolus eventualis* is a form of intent that has its distinctive identity. It is considered the basis of the mental element in intentional crimes, which stands independently from any other criminal intent that precedes or supports it. The perpetrator's intent may be legitimate at the beginning, but then he

<sup>140</sup> *Ibid.*, at 669.

<sup>141</sup> *Ibid.*, at 669–670.

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foresees that his act may result in an illegitimate consequence that he reconciles himself with due to some ulterior motive.

The test set out by the Egyptian Court of Cassation in the case discussed above is useful in this regard. According to the Court the practical key to knowing if *dolus eventualis* is established or not is to ask the following question: while undertaking the intended act, did the perpetrator want to do it even if the act goes beyond its original purpose to the criminal act that actually happened and was not originally intended? If the answer is in the affirmative, *dolus eventualis* is established. If the answer is negative, then the whole matter is nothing more than an error that may be punishable or not depending on whether the conditions establishing an error are present.

In order not to undervalue people's lives and interest, particularly in contemporary armed conflicts where civilians and their properties become the main targets and in order to guarantee that patterns of behaviour are legitimate and consistent with the social norms, it becomes inevitable, for all the aforementioned reasons, to adopt the concept of *dolus eventualis* as the basis of intentional crimes under the Rome Statute of the International Criminal Court. Particularly in cases where there are clear evidence from which the Court can infer the perpetrator's acceptance of the illegitimate consequences of his act or his underestimation of the gravity of such consequences. Hence, *dolus eventualis* should not be regarded in the same manner as unintentional errors which differ in their nature, method and essence.<sup>142</sup>

As for estimating the sentence of the perpetrator who commits his crime based on *dolus eventualis*, since the "will" in this type of intent is not as serious as in *dolus directus*, and since the punishment should range from strong to lenient according to the gravity of the crime the honourable judges of the International Criminal Court may use their discretionary power accorded to them by the Statute.

Adopting the concept of *dolus eventualis* puts things on the right track and acknowledges criminal responsibility based on the accurate balance between guilt and punishment, so each degree of guilt has a corresponding punishment. This guarantees that justice among people prevails. This is considered the noblest aim sought by the Islamic *Sharī'ah* as God commands Prophet Muhammad in the Holy *Qur'an*: '...If you judge, judge between them with justice ...' (Quran 5:42).

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142 *Ibid.*, at 673.