DOLUS EVENTUALIS AND THE ROME STATUTE WITHOUT IT?

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Article 30 of the Rome Statute of the International Criminal Court provides a general definition for the mental element required to trigger the criminal responsibility of individuals for serious violations of international humanitarian law. At first sight, it appears that the explicit words of Article 30 are sufficient to put an end to a long-lasting debate regarding the mens rea *enigma that has confronted the jurisprudence of the two ad hoc Tribunals for the last decade, but this is not true. Recent decisions rendered by the International Criminal Court evidence the discrepancy among the ICC Pre-Trial Chambers in interpreting the exact meaning of Article 30 of the ICC Statute. The paper challenges that dolus eventualis is one of the genuine and independent pillars of criminal responsibility that forms, on its own, the basis of intentional crimes, and suggests its inclusion in the legal standard of Article 30 of the ICC Statute.*

> Q. Prosecutor: Suppose that a high ranking military officer gets two conflicting opinions from different legal advisers in an equally high position in the ministry of defense. The first advises him that he may continue with his conduct while the other says he may not, then which advice does he abide by?
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> A. Defence: In such a case he can act no longer at all, because his attention has been drawn to the difference in the legal opinions. If he continues with

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performing the act and does it at his own risk, then in that risk he committed a wrong. In other words, if he acts, he acts on what is known in the Roman law as "dolus eventualis", an evil intention.

Q. Prosecutor: . . . this is a new and startling legal theory. Did you understand that?

A. Defence: Yes I understood.

Presiding Judge: Well, we have your position.[1]

1. INTRODUCTION

In January 2007, in the *Lubanga* case,[2] Pre-Trial Chamber I of the International Criminal Court ruled that Article 30 of the Rome Statute of the International Criminal Court (ICC Statute) encompasses the three degrees of dolus, namely, dolus directus of the first and second degrees and dolus eventualis. More recently, in September 2008 in the *Katanga and Ngudjolo Chui* case,[3] the Defense for the first accused contended that the Statute does not include the notion of dolus eventualis.[4] The Defense relied heavily on scholarly opinions in support of its submission. Faced by such a legal dilemma, Pre-Trial Chamber I, in the present case, 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 of the ICC Statute.[5] Whether Pre-Trial Chamber II of the ICC, in its coming decision on the confirmation of charges in the *Bemba* case, will adhere to the interpretation given to Article 30 by the Pre-Trial Chamber I in the *Lubanga* case or will

1. Closing Statement of the Defence, Part 5, 25 March 1947, United States v. Erhard Milch (Milch Case) in 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10, at 748–53 (1949).

2. Prosecutor v. Lubanga, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges (Jan. 29, 2007).

3. Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-1/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

4. Id., Defence Written Observations Addressing Matters That Were Discussed at the Confirmation Hearing, ¶ 31 (July 28, 2008).

5. Id., Decision on the Confirmation of Charges, ¶ 531.

rule out the notion of dolus eventualis from the ambit of Article 30 is still to be seen.[6]

This paper examines the different degrees of intentionality under Article 30 of the ICC Statute and whether the mental element as provided for in this provision encompasses the triplet forms of dolus, namely, dolus directus of the first and second degree and dolus eventualis. The paper concludes that dolus eventualis is one of the genuine and independent pillars of criminal responsibility that forms, on its own, the basis of intentional crimes, and suggests its inclusion in the legal standard of Article 30 of the ICC Statute.

2. BACKGROUND ON THE *LUBANGA* AND *KATANGA* DECISIONS

On January 29, 2007, Pre-Trial Chamber I (PTC I) of the ICC rendered its decision confirming the charges against Thomas Lubanga Dyilo.[7] 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.[8] 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, PTC I devoted a lengthy discussion regarding the mens rea standards under Article 30 of the Statute. This will be examined and discussed in the following sections of this paper.

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6. By the time this article was sent to the publisher for the editing process, Pre-Trial Chamber II of the ICC rendered its decision in the *Bemba* case affirming that there is no room for the notion of dolus eventualis under Article 30 of the ICC Statute. See Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Confirmation of Charges, ¶¶ 360–69 (June 15, 2009).

7. *Lubanga*, Decision on the Confirmation of Charges.

8. See ICC Stat. arts. 8(2)(b)(xxvi), 8(2)(e)(vii).

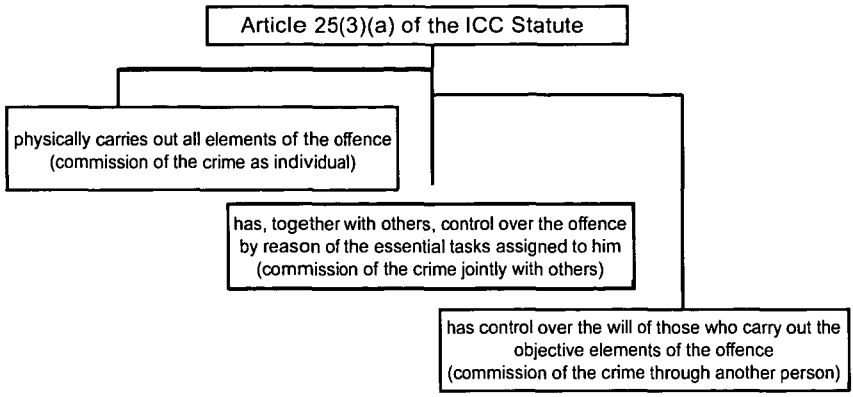

Chart 1

On September 26, 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.[9] The PTC I analyzed principal responsibility under Article 25(3)(a) of the ICC Statute based on the *Lubanga* Decision on the Confirmation of Charges.

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 organization, their authority within the organization, and the factual circumstances enabling near-automatic compliance with their orders.[10]

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9. 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 (crimes against humanity). The Chamber confirmed the following war crimes committed during an attack on Bogoro village, on or about February 24, 2003: (1) Using children under the age of fifteen to take active part in the hostilities; (2) directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities; (3) wilful killings; (4) destruction of property; (5) pillaging; (6) sexual slavery; and (7) rape. The Chamber also confirmed the following crimes against humanity: (1) murder; (2) rape; and (3) sexual slavery.

10. *Katanga & Ngudjolo Chui*, Decision on the Confirmation of Charges, ¶¶ 534, 538.

In examining the subjective elements of the war crime of pillaging, the PTC I stated: "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."[11] 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.[12] When it comes to the elusive concept of dolus eventualis the Chamber cautiously abstained from entering into any discussion regarding this standard of mens rea, stating that "there is no need for the present Decision to discuss whether the concept of *dolus eventualis* has a place within the framework of article 30 of the ICC Statute because the Chamber will not rely on this concept for the mental element in relation to the crimes charged."[13] Not surprisingly, the Defense for the first accused (Katanga) requested leave to appeal the Pre-Trial Chamber's Decision on the Confirmation of Charges.[14] The third issue for which leave to appeal has been requested relates to the PTC I distinction between the notion of dolus directus of the second degree and dolus eventualis, and the fourth pertains to 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 Article 30 of the ICC Statute.[15] The Defense contended that the introduction of dolus eventualis through the back door 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.[16]

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11. *Lubanga*, Decision on the Confirmation of Charges, ¶¶ 331–332.

12. As for 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," (¶ 346); as for the war crime of inhumane acts, the PTC I found that this offense encompasses *dolus directus* of the first and second degree (¶ 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" (¶ 372).

13. *Katanga & Ngudjolo Chui*, Decision on the Confirmation of Charges, ¶ 531.

14. Id., Defence Application for Leave to Appeal the Decision on the Confirmation of Charges (Oct. 6, 2008).

15. Id.

16. Id., ¶ 23.

3. THE MEANING OF INTENT AND KNOWLEDGE UNDER ARTICLE 30 OF THE ICC STATUTE

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 offense were committed with intent and knowledge. This is the plain meaning of the first paragraph of Article 30 of the ICC Statute: "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."[17]

The term "intent" as set out in Article 30 has two different meanings, depending upon whether the material element relates to conduct or consequence. A person has intent in relation to conduct, if he "means to engage in the conduct,"[18] 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."[19]

3.1. Direct intent or dolus directus of the first degree

In the *Lubanga* case, the first test ever of Article 30, 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.[20] 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) 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 possess a level of intent that it called dolus directus of the first degree.[21]

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

17. Rome Stat. art. 30.
18. Rome Stat. art. 30(2)(a).
19. Rome Stat. art. 30(2)(b).
20. *Lubanga*, Decision on the Confirmation of Charges, ¶ 351.
21. Id.

cause such result.[22] 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."[23] *Absicht*, or dolus directus of first degree, in German criminal law is also identical to "direct intent" as defined in Article 30(2)(b) of the ICC Statute. *Absicht* is defined as a "purpose bound will."[24] In this type of intent, the actor's will is directed toward the accomplishment of that result.[25]

3.2. Indirect intent, oblique intent, or dolus directus of the second degree

Article 30(2)(b) of the ICC Statute 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."[26] In the *Lubanga* case the PTC I asserted that Article 30 encompasses other aspects of dolus, namely dolus directus of the second degree.[27] 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.[28]

This degree of mens rea is akin to "knowledge" or "awareness" rather than intent *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

22. Model Penal Code, § 2.02(2)(a)(i), developed by the American Law Institute, 1962.

23. United States v. Bailey, 444 U.S. 394, 399 (1980); see also United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978).

24. Volker Krey, Deutsches Strafrecht: Allgemeiner Teil, Teil 2 [German Criminal Law: The General Part, Part 2] 109 (2003).

25. Peter Cramer, Vorsätzliches und Fahrlässiges Handeln, in Strafgesetzbuch Kommentar 263 (Adolf Schönke & Horst Schröder eds., 1997). Karl Lackner, Strafgesetzbuch 95 (1991). For more details on *Vorsatz* in German criminal law, in the English language, see Mohamed Elewa Badar, Mens Rea—Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals, 5 Int'l Crim. L. Rev. 203 (2005).

26. ICC Stat. art. 30(2)(b).

27. *Lubanga*, Decision on the Confirmation of Charges, ¶ 352.

28. Id.

ordinary course of events." The essence of the narrow distinction between acting intentionally and acting knowingly with regard to the consequence element is the presence or absence of a positive desire or purpose to cause that consequence.

The plain meaning of Article 30(2) 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 who he knows are in the building, is said to intend the killing of the civilians (Article 8(2)(a)(i) of the ICC Statute) if the building is in fact destroyed and the civilians are killed.[29] Yet according to the plain meaning of paragraph 2(b) of Article 30, a result foreseen as virtually certain is an intended result and there is no need to prove a volitional element on the part of the accused.[30] Such an interpretation would run contrary to the plain meaning of the chapeau element of Article 30 of the ICC Statute according to which individual criminal responsibility for serious crimes over which the Court has jurisdiction requires proof of both cognitive and volitional elements. In addition, the evolutionary developments of the law of mens rea in the jurisprudence of the ad hoc Tribunals demand that for the imposition of criminal responsibility for serious violations of international humanitarian law both cognitive and volitional component must be incorporated in the legal standard.[31]

4. IS THERE ROOM FOR DOLUS EVENTUALIS UNDER ARTICLE 30 OF THE ICC STATUTE?

While some legal scholars view the second alternative of intent as excluding concepts of dolus eventualis or recklessness,[32] others advocate the

29. As suggested by Gerhard Werle & Florian Jessberger, "Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law, 3 J. Int'l Crim. Just. (2005) 35, 41 n.34.

30. For common law jurisprudence see R. v. Woollin, (1999) 1 A.C. 82, 96.

31. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶ 41 (July 29, 2004). Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, ¶ 279 (June 30, 2006).

32. Roger Clark, Elements of Crimes in Early Decisions of Pre-Trial Chambers of the International Criminal Court, N.Z. Y.B. Int'l L. (2009) (forthcoming) ("But *dolus eventualis*

inclusion of recklessness and dolus eventualis in the legal standard of Article 30.[33]

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 carries out the conduct that results in the proscribed

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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."); Kai Ambos, Critical Issues in the Bemba Confirmation Decision, 22 Leiden J. Int'l L. (2009) (forthcoming) ("While I concur with the exclusion of *dolus eventualis* (contrary to the Lubanga Pre-Trial Chamber) and recklessness from Article 30 *in the result*—in fact, I have argued earlier that in case of *dolus eventualis* a perpetrator is not aware, as required by Article 30(2)(b), that a certain consequence will occur in the ordinary course of events . . ."); Kai Ambos, General Principles of Criminal Law in the Rome Statute, 10 Crim. L.F. 1, 21–22 (2001); Kai Ambos, Internationales Strafrecht § 7 margin 67, and n.297 (2008); Kai Ambos, Der Allgemeine Teil des Volkerstrafrechts, § 21, p. 757 (2002); Antonio Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, 10 Eur. J. Int'l L. 153, 158 (1999) ("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."); Johan D. Van der Vyver, The International Criminal Court and the Concept of Mens Rea in International Criminal Law, 12 Miami Int'l & Comp. L. Rev. 57, 64–65 (2004) ("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 & Jessberger, supra note 29, 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."). See also Kevin J. Heller, The Rome Statute in Comparative Perspective, in The Stanford Handbook of Comparative Law (Kevin J. Heller & Markus Dubber eds., forthcoming 2009).

33. Donald K. Piragoff & Darryl Robinson, Article 30: Mental Element, in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 849, 860–61 (Otto Triffterer ed., 2d ed. 2008); Hans H. H. Jescheck, The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute, 2 J. Int'l Crim. Just. 38, 45 (2004). Ferrando Mantovani, The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer, 1 J. Int'l Crim. Just. 26, 32 (2003) ("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*)").

consequence.[34] Rather, the prosecution must demonstrate that the perpetrator foresees the consequence of his conduct as being *certain* unless extraordinary circumstances intervene.[35] Professor Kai Ambos in his observations on the *Bemba* confirmation decision emphasized that the interpretation of the notion of dolus eventualis by the Pre-Trial Chamber "is by no means the only one" and that "there are other more cognitive concepts of dolus eventualis requiring awareness or certainty as to the consequence" and "these may indeed be included in Article 30."[36]

4.1. Incorporating dolus eventualis in Article 30 by the *Lubanga* Pre-Trial Chamber

In the *Lubanga* case, PTC I of the ICC asserted that the insertion of "intent" and "knowledge" in a conjunctive way, as set out in Article 30, requires proof of the existence of a "volitional element" as well as a cognitive element on the part of the suspect.[37] Aware that the jurisprudence of the two ad hoc Tribunals has recognized 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),[38] the ICC Pre-Trial Chamber went further, assuring that the volitional element mentioned above also encompasses other aspects of dolus, namely dolus eventualis.[39] 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

34. See Otto Triffterer, The New International Criminal Law—Its General Principles Establishing Individual Criminal Responsibility, in The New International Criminal Law, 639, 706 (Kalliopi Koufa ed., 2003).

35. Albin Eser, Mental Elements—Mistake of Fact and Mistake of Law, in 1 The Rome Statute of the International Criminal Court: A Commentary 889, 915 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002) [hereinafter Eser, Mental Elements] ("the perpetrators being aware that the action will result in the prohibited consequence . . . with certainty. . . .").

36. Kai Ambos, Critical Issues in the Bemba Confirmation Decision, supra note 32.

37. *Lubanga*, Decision on the Confirmation of Charges, ¶ 351.

38. See Mohamed Elewa Badar, Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 6 Int'l Crim. L. Rev. 313 (2006).

39. *Lubanga*, Decision on the Confirmation of Charges, ¶ 352.

such an outcome by reconciling himself or herself with it or consenting to it."[40] 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.[41]

It is obvious that the degree of awareness in element (i) of the above quoted judgment, awareness of substantial *likelihood*, does not reach the standard of knowledge as set out in Article 30(3) of the ICC, awareness that a consequence will occur in the ordinary course of events (virtual certainty), and accordingly is not sufficient to trigger the criminal responsibility for crimes under the jurisdiction of the Court. Perhaps for that reason the Chamber made it clear that a volitional element, element (ii), is required in addition to the cognitive element, element (i), and that both elements constitute the requisite components of the notion of dolus eventualis.

The Chamber went further, asserting that

> 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.[42]

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40. Id., ¶ 352 (emphasis added, footnotes omitted).
41. Id., ¶¶ 353–354.
42. Id., ¶ 355.

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.[43]

Whether the approach adopted by the PTC I, the inclusion of dolus eventualis under the realm of Article 30 of the ICC, is supported by the *travaux préparatoires* of Article 30 is the first stage of our inquiry.

4.2. Do the travaux préparatoires support the inclusion of dolus eventualis in Article 30?

4.2.1. The Ad Hoc Committee on the Establishment of an International Criminal Court

By its resolution 49/53 of December 1994, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court.[44] Pursuant to that resolution, the Ad Hoc Committee during April and August 1995 conducted a review of the major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the Commission in its forty-sixth session.[45] As far as substantive issues were concerned, many delegations expressed support for the idea of inclusion in the Statute of provisions on general principles of criminal law, including provisions on mens rea.[46]

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43. Id. at n.438.

44. See the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, ¶¶ 1–2, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995) [hereinafter Ad Hoc Committee Report]. Pursuant to paragraph 2 of that resolution, the Ad Hoc Committee was open to all member states of the United Nations or members of the specialized agencies.

45. For the text of, and commentary to, draft articles 1 to 60 and annexes thereto as well as three appendixes related to the draft statute for an international criminal court, see [1994] 2 Y.B. Int'l L. Comm'n, pt. 2, at 26–74.

46. Ad Hoc Committee Report, supra note 44, ¶¶ 87–89.

4.2.2. The Siracusa Draft

In June 1995, a committee of experts, acting in their individual capacity, assembled at the International Institute of Higher Studies in Criminal Sciences (ISISC) in Siracusa with the purpose of contributing an alternative and supplemental text to the International Law Commission's 1994 Draft Statute for an International Criminal Court.[47] On July 15, 1995, the so-called 'Siracusa Draft' was presented to the Ad Hoc Committee on the Establishment of an International Criminal Court. On March 15, 1996, an updated version of the Siracusa Draft (Updated Siracusa Draft) was presented to the Preparatory Committee.[48] Part three of the Siracusa Draft, entitled "Jurisdiction and Substantive Crimes," drew attention to the fact that in drafting the "Special Part" for a statute of the International Criminal Court two methodological approaches can be followed. The first is to refer to the crimes within the subject matter jurisdiction of the Court by name and not to define them.[49] The second approach is "to define the crimes with some degree of specificity, leaving room, however, for jurisprudential development by the Court."[50] According to the Siracusa Draft, the former approach "has the potential of violating the principles of legality in international criminal law and in many legal systems," whereas the latter can satisfy the principles of legality if the following conditions are met:

> the Statute's definitions [of the four crimes in question] are clear, unambiguous and sufficient as to inform a potential violator of the prohibited conduct, and of the nature and extent of the criminal charges he would face; and to provide the legal basis upon which the Court . . . can adjudicate the accused's guilt or innocence.[51]

As for the General Part, it was contended that Article 33 of the Commission's 1994 draft Code (Applicable Law) should not be interpreted

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47. (Unpublished) Draft Statute for an International Criminal Court-Alternative to the ILC 1994 Draft prepared by a Committee of Experts, Siracusa/Freiburg, July 1995.

48. 1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa Draft) prepared by a Committee of Experts. Submitted by Association Internationale de Droit Pénal *et al.*, Done in Siracusa/Freiburg/Chicago, March 15, 1996.

49. Updated Siracusa Draft at 22.

50. Id.

51. Id. at 23.

to permit the Court to substitute the laws of any nation for a proper general part of an applicable substantive criminal law.[52] Yet, the Siracusa Draft suggested the inclusion of a general provision, Article 33-7, on the mental element, which states: "Unless otherwise provided for, crimes under this Statute are punishable only if committed with knowledge *or* intent, whether general or specific or as the substantive crime in question may specify."[53] Hence, either knowledge or intent is sufficient to trigger the criminal responsibility for individuals under this draft provision.

4.2.3. The Freiburg Draft of 1996

In the same manner, the 1996 Freiburg Draft prepared by a working group of the Siracusa Committee presented a general rule on mens rea.[54] The working group made two fundamental proposals: first, that "criminal responsibility [for international crimes] cannot be based on strict liability," and secondly that "unless provided for otherwise, [international crimes] are punishable only if committed intentionally."[55]

4.2.4. The 1996 Report of the Preparatory Committee

In its resolution 50/46 of December 11, 1995, the General Assembly decided to set up a preparatory committee for the establishment of an international criminal court. By resolution 51/207 of December 17, 1996, the General Assembly reaffirmed the mandate of the Preparatory Committee (PrepCom), and decided that it should continue its meetings during 1997 and 1998 in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to the diplomatic conference of plenipotentiaries. During its meetings at the United Nations Headquarters in 1996, there was general agreement among the delegations that the crimes within the subject matter jurisdiction of the Court "should be

52. Id., at 69, Commentary on Article 33 of 1994 draft Code (Applicable Law).

53. Id., at 74 (emphasis added).

54. Freiburg Draft of February 1996, art. 33(f) (originally unpublished). The Draft was published as an annex in Otto Triffterer, Acts of Violence and International Criminal Law, 4 Croatian Annual 872 (1997). All references to the Freiburg Draft are quoted and cited in Eser, Mental Elements, supra note 35, at 895 n.25.

55. Quoted in Eser, Mental Elements, supra note 35, at 895.

defined with clarity, precision and specificity required for criminal law in accordance with the principle of legality (nullum crimen sine lege)."[56] In discussing issues related to substantive criminal law, several delegations held the view that it would be more useful to include in the Statute an explicit provision on the mental element "since there could be no responsibility unless *mens rea* was proved."[57] The distinction between general and specific intention was considered useless, "because any specific intent should be included as one of the elements of the definition of the crime."[58] Other culpability levels such as recklessness and gross negligence were subject to different views as to whether these standards of mens rea should be included in the Statute.[59] Motives were seen as being relevant at the sentencing stage, rather than a constituent element of a crime.[60] The 1996 PrepCom's report includes three different proposals regarding the mens rea of crimes, which read as follows:

Article H
Mens Rea
Mental elements of crime

Proposal 1

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].[61]
2. For the purpose 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;

56. Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. I (Proceedings of the Preparatory Committee During March–April and August 1996), ¶¶ 52–53, U.N. GAOR, 51st Sess., Supp. No. 22, U.N. Doc. A/51/22 (1996), reprinted in M. Cherif Bassiouni, International Criminal Court: Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference, 383–84 (1998) [hereinafter Bassiouni Compilation].

57. Id., ¶ 199 (emphasis added).

58. Id.

59. Id.

60. Id.

61. Brackets in original.

(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 Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means:
   (a) To be aware that a circumstance exits or a consequence will occur; or
   (b) [To be aware that there is a substantial likelihood that a circumstance exits and deliberately to avoid taking steps to confirm whether that circumstances exits][to be wilfully blind to the fact that a circumstance exits or that a consequence will occur.][62]
4. For the purpose 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 exits 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 exits or that the consequence will occur.][63]

This proposal includes a note that reads as follows:

[Note. The concepts of recklessness and dolus eventualis should be further considered in view of the seriousness of the crimes considered. Therefore, paragraph 4 would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly. It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex. It was questioned whether it was necessary in paragraph 1 to make reference to general and specific intent, as in either case the general rule would be that intent or knowledge is required. Likewise it was noted that any reference to "motive" should not be included; if relevant, motive or purpose would be an integral element of the definition of a crime.]

62. Brackets in original.
63. Brackets in original.

Proposal 2

At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

Proposal 3

Moral element

There cannot be a crime without the intention to commit it.[64]

Proposal 1, as set out in article H of the 1996 PrepCom's report, was adopted by the Committee at its February 1997 session with a footnote that reads "[a] view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through *negligence*, in which case the offender shall be liable only when so prescribed by the statute."[65]

4.2.5. The Zutphen Draft Statute, January 1998

Proposal 1 of the 1996 PrepCom was also adopted by a Working Group who participated at the intersessional meeting that took place in Zutphen,[66] with a nota bene that reads "[t]he inclusion of the notion of recklessness should be re-examined in view of the definition of crimes."[67]

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64. Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II (Compilation of Proposals), 92–93, U.N. GAOR 51st Sess., Supp. No. 22, U.N. Doc. A/51/22 (1996), reprinted in Bassiouni Compilation, supra note 56, at 383–84. The same document is reprinted in M. Cherif Bassiouni, 2 The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute 226–27 (2005).

65. Decisions Taken by the Preparatory Committee at Its Session Held 11 to 21 February 1997, at 27–28, U.N. Doc. A/AC.249/1997/L.5 (1997), reprinted in Bassiouni Compilation, supra note 56, at 361.

66. At the initiative of the Chairman of the Preparatory Committee, an intersessional meeting took place in Zutphen, The Netherlands, from January 19 to 30, 1998, the purpose of which was to facilitate the work of the last session of the Preparatory Committee (March–April 1998 session).

67. Draft Report of the Intersessional Meeting from 19 to 30 January 1998, in Zutphen, The Netherlands, art. 23[H] of the Draft Statute for the International Criminal Court at 59–60, U.N. Doc. /AC.249/1998/L.13 (1998), reprinted in Bassiouni Compilation, supra note 56, at 179–80.

4.2.6. PrepCom Draft Statute, April 1998

At its sixtieth meeting, on April 3, 1998, the PrepCom adopted the text of a draft statute on the establishment of an international criminal court,[68] and the draft final act.[69] Article 29 of the draft statute for an international criminal court, entitled "Mens rea (mental elements)," reproduces the text of proposal 1 of article H of the 1996 PrepCom report.[70] A set of 116 draft articles with a preamble prepared by the PrepCom were submitted to the Diplomatic Conference.[71]

4.2.7. The Committee of the Whole

At the Committee of the Whole's first meeting[72] on June 16, 1998, Mr. Saland of Sweden, introducing part 3 of the draft statute, entitled "General principles of criminal law," suggested the adoption of article 29 as it stood in the PrepCom's 1998 draft statute. Saland recommended the deletion of paragraph 4 "since it proposed a definition of 'recklessness'—a concept which appeared nowhere else in the Statute and was therefore superfluous."[73] At its ninth meeting, the Chairman stated that the Committee of the Whole agreed to the deletion of paragraph 4 of article 29.[74] During the Committee's twenty-fifth meeting, the delegation of Azerbaijan expressed

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68. U.N. Doc. A/AC.249/1998/CRP.6–18 (1998).

69. U.N. Doc. A/AC.249/1998/CRP.19 (1998).

70. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, pt. 1, art. 29 Mens rea (mental elements), at 65–66, U.N. Doc. A/CONF.183/2/Add.1 (April 14, 1998), reprinted in Bassiouni Compilation, supra note 56, at 44–45.

71. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Diplomatic Conference), Rome, Italy, June 15–July 17, 1998, U.N. Doc. A/CONF.183/1 through 12 and A/CONF.183/INF/1 through 11.

72. The Committee of the Whole is the main committee of the Diplomatic Conference, in which all participating states were presented and through which all negotiations on substantive issues were conducted. See The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results, at xxii (Roy S. Lee ed., 1999).

73. Summary Records of the 1st Meeting of the Committee of the Whole, U.N. Doc. A/CONF 183/C.1/SR.1 (June 16, 1998), reprinted in M. Cherif Bassiouni, 3 The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference 71, ¶ 24 (2005) [hereinafter Bassiouni, Summary Records].

74. U.N. Doc. A/CONF 183/C.1/SR.9 (June 22, 1998) reprinted in Bassiouni, Summary Records, supra note 73, at 159, ¶ 4.

their concerns regarding the terminology used in the Statute. They noted that adjectives such as "wilfully," "intentionally," and "knowingly" were used interchangeably, whereas each term should have its own meaning.[75]

4.2.8. The Preparatory Committee

At its sixtieth meeting, on April 3, 1998, the Preparatory Committee adopted the text of a draft statute on the establishment of an international criminal court and the draft final act.[76] The former contains a general provision on the mental element of crimes:

Article 29
Mens rea (mental elements)

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 and knowledge.
2. For the purpose 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 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 Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.
4. For the purpose 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 circumstances 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.][77]

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75. U.N. Doc. A/CONF 183/C.1/SR.25 (8 July 1998), reprinted in Bassiouni, Summary Records, supra note 73, at 272, ¶ 61.

76. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, U.N. Doc. A/CONF.183/2/Add.1, reprinted in Bassiouni Compilation, supra note 56, at 7.

77. Brackets in original.

N.B. The inclusion of the notion of recklessness should be re-examined in view of the definition of crimes.[78]

Based on the *travaux préparatoires* of Article 30 of the ICC Statute, it is obvious that the notion of dolus eventualis was last discussed in the 1996 Report of the Preparatory Committee and since then had vanished from all the subsequent reports and Statute drafts. As noted by Ambos, while the *travaux préparatoires* confirm a restrictive approach as to Article 30 of the ICC Statute, "they are only a supplementary means of interpretation and thus not decisive in the light of a clear or different literal interpretation."[79] He asserted that "the literal interpretation, in turn, is predicated on the conceptual understanding of dolus eventualis" and that there are several cognitive concepts of dolus eventualis requiring awareness or certainty as to the consequence and these may indeed be included in Article 30.[80]

There are a number of questions that remain unresolved: Could dolus eventualis substitute intent under Article 30 of the ICC Statute? Since intent under Article 30 means actual knowledge, and since this standard of knowledge can by itself trigger the criminal responsibility for intentional crimes under the ICC Statute, is it possible for dolus eventualis to play the same role? While the knowledge standard under this concept does not reach virtual certainty, it does include a volitional element of acceptance. What are the contours of dolus eventualis?

5. THE CONTOURS OF DOLUS EVENTUALIS IN COMPARATIVE CRIMINAL LAW

5.1. 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: "A person who participates in a crime shall bear its penalty, even though the resulting crime is not the one he has initially intended, so long the crime that actually took place is a *probable result* of his instigation, agreement, or assistance."

78. Draft Article 29, supra note 70, at 65–66, reprinted in Bassiouni Compilation, supra note 56, at 44–45.

79. Kai Ambos, Critical Issues in the Bemba Confirmation Decision, supra note 32.

80. Id.

On December 25, 1930, the Egyptian Court of Cassation issued a judgment that stirred many scholars' debates given its difference from the conventional opinion widely adopted by the jurisprudence and judiciary in France in viewing dolus eventualis.[81] It rather adopted the idea of "acceptance" as an essential element in the concept. The Egyptian Court of Cassation decided that

> (1) *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 appreciates the unintended purpose. As a result of this intention, it becomes irrelevant whether the consequence takes place or not.
>
> (2) 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.
>
> (3) The key issue for deciding 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 this act goes beyond its original purpose to perform another criminal consequence 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.
>
> (4) Based on the above, 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.[82]

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81. Egyptian Court of Cassation, Series of Legal Principles, pt. 2, princ. 135, at 168.

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

In his treatise on *Dolus Eventualis*, Professor Abou el Magd Aly Eisa found that dolus eventualis is one of the genuine and independent pillars of criminal responsibility that forms, on its own, the basis of intentional crime.[83] In the words of Eisa:

> [Dolus eventualis] is the same as the direct criminal intent as they share the same nature and essence. Both are based on the same elements, namely will and knowledge. *Knowledge* in the *dolus eventualis* is mixed with suspicion and hence it takes the form of inconclusive expectation of the criminal consequence. *Will*, on the other hand, appears in its weakest form represented in the perpetrator's acceptance of the consequence or his indifference towards it. In fact, indifference towards the criminal consequence means in reality—as we see it—accepting this consequence and reconciling oneself with it. The expectation on which the *dolus eventualis* is based on is the actual expectation that can not be substituted by its probability or necessity or both; otherwise it would be subsumed under unintentional errors. In addition, the criterion governing the *dolus eventualis* is a subjective criterion; in other words, the expected consequence is the one anticipated by the perpetrator according to his own perspective upon attempting to commit the crime even if his perspective was counter to the reality.[84]

Professor Mohamed Mohie el-Din Awad differentiates between the probable or likely consequence from dolus eventualis. He considers the former a crime that goes beyond the perpetrator's intent.[85] He views dolus eventualis as requiring both expectation and acceptance on the part of the defendant: "[I]f the perpetrator expects the consequence and regards it equal whether it happens or not though he hopes it would not happen, but he accepts its occurrence for this is better to him than not perpetrating or discontinuing the crime, the perpetrator shall be held responsible."[86] Both scholars are of the opinion that there is no basis for holding the perpetrator responsible for the probable or likely consequence of his act within the dolus eventualis theory.[87]

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83. Abou el-Magd Aly Eisa, al Qasd al Gena'ī al-Ehtemaly: Derasah Tā'sileyah Tahlileya Muqaranah [Dolus Eventualis: Analytical and Comparative Study] 667 (1988).

84. Id.

85. Mohamed Mohie el-Din Awad, al Qanoun al Gena'ī, Mabade'oh al Asaseyah wa Nazariatoh al Ammah fi al Shari'a al Islameyah [General Principles of Criminal Law and Its General Theories in Islamic Shari'a] 231 (1981), cited in Eisa, supra note 83, at 472.

86. Mohie el-Din Awad, supra note 85, at 231, cited in Eisa, supra note 83, at 472.

87. Eisa, supra note 83, at 473.

5.2. France

In France, neither statute nor case law provides any general definition of intention, and it has been left to academics to analyze its meaning.[88] In French criminal law, a distinction is made between two forms of intent, namely, *dol général* and *dol special.* The term *dol* in French criminal law means the deliberate intention to commit a wrong and involves both "knowledge" that something is prohibited and the "deliberate willingness" to carry out the proscribed conduct. The classic definition of *dol général* is provided by Emel Garçon, the eminent nineteenth century legal scholar: "*L'intention, dans son sens juridique, est la volonté de commettre le délit tel qu'il est déterminé par la loi; c'est la conscience, chez le coupable, d'enfreindre les prohibitions légales* . . . According to Garçon, *dol général* encompassed two mental elements: *la conscience* (awareness) and *la volonté* (willingness/desire). This definition of *dol général* was accepted by subsequent French legal scholars. The element of conscience, in French criminal law, simply refers to the accused's knowledge that he or she is breaking the law. With regard to the element of "desire," it is interpreted as simply referring to the accused's willingness to commit the wrongful act and not the desire to accomplish the result of the act in question.

French law also recognizes two other forms of *dol,* namely, *dol direct,* where the forbidden conduct or the prohibited consequence is desired, and *dol indirect,* where according to Professor Jean Pradel:

> the agent knows that his voluntary act will cause (certainly or almost certainly) a consequence that is not truly desired. Our case law without saying so expressly, accepts this notion and assimilates *dol indirect* and *dol direct*; so a murder may exist by reason of the knowledge that the blows could result in death as well as in the desire to produce the precise result, which is the extinction of a life.[89]

French writers also recognize the concept of *dol éventuel,* which is where the defendant merely foresees the possibility of the result but he or she

88. Article 121-3 of the French Penal Code states: "There is no felony or misdemeanour in the absence of an intent to commit it."

89. Jean Pradel, Droit pénal général § 502 (14th ed. 2002), translated and quoted by J.R. Spencer, Intentional Killings in French Law at 3, a study submitted to the U.K. Law Commission as a part of a paper entitled The Law of Murder: Overseas Comparative Studies, available at http://www.lawcom.gov.uk/murder.htm.

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 form or one of its aggravated forms.[90] Under the new French Criminal Code,[91] however, *dol éventuel* may amount to a lesser fault and it is treated as an aggravating factor in relation to involuntary murder and nonfatal offenses against the person.[92] It can also constitute an offense under Article 223-1 of the new Criminal Code.[93]

5.3. 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.[94]

Article 43 of the Italian Penal Code recognizes what is termed *preterintenzione*, a form of constructive intention whereby a person who intends to produce one outcome is deemed to have intended a more serious outcome even if he cannot be proved to have realized the risk of that serious

90. On French criminal law see John Bell, Sophie Boyron & Simon Whittaker, Principles of French Law (1998); Brice Dikson, Introduction to French Law (1994); Emile Garçon, Code pénal annoté (1901); Catherine Elliot, The French Law of Intent and Its Influence of the Development of International Criminal Law, 11 Crim. L. F. 36 (2000); R. Merle & A. Vitue, Traité de Droit Pénal (1997).

91. Entered into force on March 1, 1994.

92. See articles 221-3, 222-19, 222-20, and 223-1 of the new French Criminal Code.

93. Article 223-1 of the new Criminal Code states: "The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of 15,000."

94. See Finbarr McAuley & J. Paul McCutcheon, Criminal Liability 301–03 (2000).

outcome.[95] This is known in French criminal law as *dol dépassé* where the result that is caused goes beyond the intention and foresight of the defendant.[96] In Egyptian criminal law it is also known as *al-garima al-motā'adyet el-qasd.*

5.4. 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.[97] All forms of intention are assessed subjectively and dolus eventualis is a sufficient form of mens rea for all crimes based on intention.[98] 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].

In a recent judgment, *Van Aardt v. The State*,[99] 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 Court refers to Holmes' observation on the mens rea requisite for murder in the case of *S v. Sigwahla*:[100]

> 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

95. Id.

96. Catherine Elliot, French Criminal Law 72–73 (2001).

97. Jonathan Burchell, Chapter 13: Criminal Law, in Introduction to the Law of South Africa 463 (C.G. Van der Merwe & J. E. Plessis eds., 2004).

98. Id.

99. S C van Aardt v. The State (179/2008) [2008] ZASCA 169 (2 December 2008) (S. Afr.).

100. S v. Sigwahla 1967 (4) SA 566 (A) (S. Afr.).

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.[101]

5.5. Germany

In the German legal system dolus eventualis occurs in situations in which the offender does not aim for the materialization of the elements of the offense or does not foresee the fulfilment of the elements as virtually certain but he or she considers it to be possible.[102]

German literature, as well as courts, treated dolus eventualis differently according to various theories. As 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, 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.'"[103]

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101. Id. at 570.

102. Cramer & Sternberg-Lieben, Vor § 15, in Schonke & Schroder, Strafgesetzbuch Kommentar [Commentary on German Criminal Law], margin 72 (T. Enckner et al. eds, 27th ed., 2006).

103. Michael Bohlander, Principles of German Criminal Law 64–5 (2009).

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."[104]

The following are some of the theories propounded by academic commentators and courts.

5.5.1 The Consent and Approval Theory

This theory is applied by the courts,[105] and is usually referred to as the "theory on consent and approval" (*Einwilligungs—und Billigungstheorie*).[106] The majority of German legal scholars who subscribe to this theory use a slightly different definition for dolus eventualis. They are of the opinion that the offender must "seriously consider" (*ernstnehmen*) the result's occurrence and must "accept the fact" that his conduct could fulfill the legal elements of the offence.[107] Another way of putting the point is to say the offender must "reconcile himself" (*sich abfinden*) to the prohibited result.[108] If, to the contrary, the offender is "confident" (*vertrauen*) and has reason to believe that the result—though he foresees it as a possibility—will not occur, he lacks dolus eventualis and acts only negligently.[109]

The prevailing opinions, as well as the courts' view, show that in the case of dolus eventualis, both knowledge and wilfulness must be present. As for the requisite component of knowledge, however, it is sufficient that the offender foresee the consequences as possible; as for the component of wilfulness, the offender has to approve the result or reconcile himself to the result. The BGH went on drawing the lines between *bedingter Vorsatz* or dolus eventualis and *bewusster Fahrlässigkeit* or conscious negligence, assuring that the perpetrator who trusts in the non-occurrence of the undesired result is merely acting with conscious negligence and not with dolus eventualis.[110]

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104. Id. at 64.

105. BGHSt 36, 1, 44, 99; BGH NStZ (Neue Zeitschrift fuer Strafrecht) 1999, 507; BGH NStZ 2000, 583.

106. Johannes Wessels & Werner Beulke, Strafrecht: Allgemeiner Teil 76 (2002).

107. Claus Roxin, Strafrecht: Allgemeiner Teil 376 (1997).

108. Id.

109. Id.

110. Id.

5.5.2 The 'Indifference Theory (*Gleichgültigkeitstheorie*)

According to the indifference theory, the volitional element of dolus eventualis is present if the offender is indifferent to the occurrence of the result that he foresees as possible.[111] This theory could be seen as similar to the "consent and approval" theory. In the Leather Belt Case,[112] however, the application of the indifference theory would lead to the acquittal of the defendants as far as murder (intentional killing) is concerned. This is because the defendants were not indifferent to the death of the victim O; to the contrary, the death of O was highly undesired.

5.5.3 The Possibility Theory

The possibility theory requires that the offender recognize a substantial or a considerable possibility that the result could materialize.[113] In other words, if the defendant foresees or recognizes the result as "concretely possible," he acts with dolus eventualis.[114] The upholders of the possibility theory argue that the envisaged possibility of a prohibited result as such should have halted the offender from acting. If he still decides to act, he should be punished for intentional conduct. Hence, pursuant to the possibility theory, *Vorsatz* cannot be understood as acting with both knowledge

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111. The indifference theory is supported by Cramer & Sternberg-Lieben, supra note 102, at 268.

112. The facts of the case can be summarized as follows: A and B intended to steal O's money and in order to avoid O's resistance, they tried to drug him; however, this method did not work. Hence, they decided to strangle O with a leather belt in order to prevent him from fighting. For fear of killing O, they first tried to stun him, hitting him using a sandbag in order to make him unconscious. When this failed, they strangled O with the belt until he could not move anymore. While doing so, they realized that O could be strangled to death. This insight appeared unpleasant to them; however they wanted to "put him out of action" at all costs. The BGH affirmed A's and B's intent to kill in the type of dolus eventualis. The Court ruled that dolus eventualis requires that the offender "foresees" the consequences "as possible" (*für möglich halten*) and "approves them" (*billigen, billigend in Kauf nehmen*). The BGH opined that both A and B accepted the fact that O could die while strangling him and therefore approved this result.

113. Eberhard Schmidhäuser, Strafrecht: Allgemeiner Teil 89 (1975); Günther Jakobs, Strafrecht: Allgemeiner Teil 269, 270 (1991).

114. See Theodor Lenckner, § 15 in Strafgesetzbuch: Kommentar 240 (Adolf Schönke & Horst Schröder eds., 1997); Heinrich Jescheck & Thomas Weigend, Lehrbuch des Strafrechts: Allgemeiner Teil 302 (1996).

and wilfulness. Rather, it eliminates the volitional component. However, it is doubtful whether the volitional element is dispensable. Firstly, *Vorsatz* should comprise two components, an intellectual and a volitional component. Secondly, according to this theory, there are no border lines to be drawn between dolus eventualis and conscious negligence. The following case will illustrate this matter:

> X is driving his car on a country road. In spite of low visibility due to fog, he overtakes a truck. While doing so he is fully aware that his overtaking is grossly contrary to road traffic regulations as well as daredevil and perilous. Despite his awareness of the risk, X seriously trusts in his conduct not resulting in accident. However, when overtaking he causes a serious traffic accident in which an oncoming motorcyclist is killed. Did X commit manslaughter?[115]

According to the possibility theory, X is seen to have possessed the intent to kill (dolus eventualis) since he has realized the possibility of the result's occurrence.[116] X had seriously trusted the nonoccurrence of the result (the death of another person), and thus had not accepted this fatal result, he is still considered to possess the intent to kill (dolus eventualis) according to the possibility theory.

5.5.4 The Probability Theory

Unlike the possibility theory, the probability theory requires awareness of a higher degree of risk—the defendant must have considered the prohibited result to be likely and probable.[117] According to this theory, an offender acts with dolus eventualis if he foresees that the occurrence of the prohibited result is probable.[118] The probability theory excludes the volitional element as an essential component of *Vorsatz* and is therefore subject to the same criticism as the possibility theory. The probability theory has also been criticized for using a very vague criterion. "Probable" is defined to be "more than possible, but less than predominantly

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115. Krey, supra note 24, at 125.

116. Id.

117. Wessels & Beulke, supra note 106, at 74.

118. Hellmuth Mayer, Strafrecht: Allgemeiner Teil 121 (1967); see also Jakobs, supra note 113, at 270.

probable."[119] The definition reveals its vagueness; nevertheless, the probability theory would lead to the same conclusion adopted by the BGH in the Leather Belt Case.

Having discussed some of the theories related to the notion of dolus eventualis it is worth noting that German courts, following the tradition of the *Reichsgericht* and the jurisprudence of the 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."[120] 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 from the evidence about the external conduct of the defendant.[121] 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."[122]

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 border line between dolus eventualis and advertent or conscious negligence.

5.6. Islamic Jurisprudence

Islamic tradition, like other major religious traditions, does not consist of, or derive from, a single source. Sharia is based on a variety of sources.

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119. Mayer, supra note 118, at 121.

120. Bohlander, supra note 103, at 65 (footnotes omitted).

121. Id., with reference to BGHSt 46, 35.

122. Id., with reference to BGHSt 36, 1.

These sources are categorized by Muslim scholars into primary and supplementary sources.[123] The Koran is the fundamental and original source of the Sharia; the Sunna is considered the second primary source and as such is next in importance to the Koran.[124] After the Prophet's death (632 C.E.), the need for a continuing process of interpretation of the Koran became more acute.[125] This led to the development of supplemental sources of law to apply whenever the two primary sources were silent on a given question.[126] *Ijtihad*[127] (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: the *Hanafi*, 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.[128]

Although Muslim jurists did not identify a theory for dolus eventualis, they mentioned the hypotheses that, if united, specified, and formulated, would establish one of the most up-to-date 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 criminally liable for intentional crimes.[129] Thus, for example, we read in *Al*

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123. Mohamed Abou-Zahra, 1 al-Jarīma wa-al- uqūba fi al-fiqh al-Islīmī [Crime and Punishment in Islamic Jurisprudence] at 155 (1998).

124. Abd al-Qādir Awda, al-Tashrī al-Jinā'ī al-Islāmī muqāranan bi-l-qānūn al-wad'ī [Islamic Criminal Law], pt. 2, at 144 (2001).

125. On the rules of interpretation see Mohammad Hashim Kamali, Principles of Islamic Jurisprudence 117–86 (2003).

126. Abdullah Saad Alarefi, Overview of Islamic Law, 9 Int'l Crim. L. Rev. (2009) (forthcoming).

127. *Ijtihād* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth. In the words of an eminent scholar: "*Ijtihād* is the most important source of Islamic law next to the Qur'ān and the *Sunnah*. The main difference between *ijtihād* and the revealed source of the *Shariah* lies in the fact that *ijtihād* is a continuous process of development whereas divine revelation and prophetic legislation discontinued after the demise of the Prophet." See *Mohammad Hashim Kamali*, Principles of Islamic Jurisprudence 468–500 (2003).

128. Id.

129. Ahmad Fathy Bahnasy, al-Masūleya al-Jenāe'īah fi al-Fiqh al-Islāmī: Derāssa Feqheīa Muqāranah [Criminal Responsibility in Islamic Jurisprudence] at 151 (2d ed. 1969).

Mughni: "If someone deliberately creates a hole in a ship loaded with people—an act which usually sinks a ship—and if those aboard the ship die in it because they are in a deep sea or because they cannot swim, retaliation shall be imposed on that person. He shall further compensate for the ship, what it carries in terms of money and people."

The established jurisprudence of the Supreme Federal Court of the United Arab Emirates (UAE) recognizes different degrees of mental states other than the one of actual intent, or, using the language of *Lubanga* PTC I, dolus directus of the first degree, to trigger the criminal responsibility of intentional crimes. Most notably the UAE adheres to Malik's school of thought according to which in murder cases it is not a condition sine qua non to prove the intent of murder on the part of the defendant; it is sufficient, however, to prove that the act was carried out with the purpose of assault and not for the purpose of amusement or discipline. A practical example is set forth in one of al-Maliki's jurisprudence sources: if two people fought intentionally and one of them was killed, retaliation should be imposed on the person who survived.[130]

6. DISTINGUISHING DOLUS EVENTUALIS FROM DOLUS DIRECTUS OF THE SECOND DEGREE

Based on the above survey one can conclude that 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). This correlation is inevitable, indispensable, and imperative and must always exist; consequently, this type of intent was termed an intent of imperative consequences.[131] 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.[132]

For detailed information on the concept of criminal intent in Islamic Jurisprudence see Mohamed Elewa Badar, The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach (2010) (forthcoming).

130. Supreme Federal Court of the UAE, Appeal 52, judicial year 14, hearing Jan. 30, 1993.

131. Eisa, supra note 83, at 313–14.

132. Id.

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.[133] 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 event 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.[134] Parity between both types is justified by the fact that the direction of a will toward an incident is imperatively a direction toward any act known to be indispensably related thereto.[135] Moreover, there is 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, though rather nonabsolute, 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 and indirect intent (dolus directus of the first and second degree) represented in the cognitive element (knowledge/awareness) and the volitional element (will or acceptance).[136]

7. 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

133. Id.
134. Id. at 314.
135. Id.
136. Id.

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.[137]

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 gaol 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 toward the criminal consequence that may result from the act.
(f) The expression "reconciling himself with the consequences or paying no heed whether those consequences occur or do not occur" is meant to highlight that we favor 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 makes the act no longer intentional; it may however be considered mistaken conduct.[138]

137. Id., at 669.
138. Id. at 669–70.

8. A PLEA TO THE INTERNATIONAL CRIMINAL COURT

Based on this 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 foresees that his act may result in an illegitimate consequence that he reconciles himself to because of some ulterior motive.

In order not to undervalue people's lives and interests, particularly in contemporary armed conflicts where civilians and their properties become the main targets, and in order to guarantee that patterns of behavior are legitimate and consistent with the social norms, it becomes inevitable to adopt the concept of dolus eventualis as the basis of intentional crimes under the ICC Statute, particularly in cases where there is 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.[139]

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 strong as in dolus directus, and since the punishment should range from strong to weak according to the gravity of the crime, the honorable 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.

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139. Id. at 673. It is doubtful whether the notion of dolus eventualis vis-à-vis Article 30 of the ICC Statute is included in the agenda of the first Review Conference of the Rome Statute, which will be held in Kampala, Uganda, during the first semester of 2010, as it is stated that the Conference should be an opportunity for stock-taking and not necessarily one for amending the Statute.