

Article 30. Mental element / Élément psychologique

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

1. Sauf disposition contraire, nul n'est pénalement responsable et ne peut être puni à raison d'un crime relevant de la compétence de la Cour que si l'élément matériel du crime est commis avec intention et connaissance.

2. Il y a intention au sens du présent article lorsque :

(a) Relativement à un comportement, une personne entend adopter ce comportement;

(b) Relativement à une conséquence, une personne entend causer cette conséquence ou est consciente que celle-ci adviendra dans le cours normal des événements.

3. Il y a connaissance, au sens du présent article, lorsqu'une personne est consciente qu'une circonstance existe ou qu'une conséquence adviendra dans le cours normal des événements. « Connaitre » et « en connaissance de cause » s'interprètent en conséquence.

Introductory comments

Actus non facit reum nisi mens sit rea. Fault is an essential component of all criminal prosecution, although criminal law systems recognize a number of degrees or forms of it, such as negligence and recklessness. Crimes are usually analysed with respect to two elements, one of them mental (the *mens rea*), and the other material (the *actus reus*). But there is no parallel provision to article 30 in the *Rome Statute* dealing with the material element. It was not for want of proposals. Several were submitted in the course of the drafting of the *Statute*,¹ and a provision on the material element appeared in the final draft adopted by the Preparatory Committee.² According to Per Saland, who presided over the relevant negotiations at the Rome Conference, the *actus reus* provision was dropped because it was too difficult to reach agreement.³ Professor Roger S. Clark writes: 'Saland does not explain further how the issue became too hard and I have not found anything useful in the public record.'⁴

¹ See, e.g., 'Non Paper Sweden, General Rules of Criminal Law', 4 April 1996; Preparatory Committee 1996 Report, Vol. II, pp. 90–91; 'Chairman's Text', UN Doc. A/AC.249/1997/WG.2/CRP.5.

² *Ibid.*, Preparatory Committee Draft Statute, pp. 54–55.

³ Per Saland, 'International Criminal Law Principles', in Lee, *The Making of the Rome Statute*, pp. 189–216, at p. 205.

⁴ Roger S. Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the *Lubanga Dyilo* Confirmation Proceedings', (2008) 19 *CLF* 619, at p. 523, fn. 7.

Drafting of the provision

As with most of the other general principles in the *Rome Statute*, the issue of codifying the mental element of crimes did not arise until the General Assembly phase of the negotiations. Several draft texts were submitted during the sessions of the Preparatory Committee.⁵ According to the 1996 Report of the Committee:

A general view was that since there could be no criminal responsibility unless *mens rea* was proved, an explicit provision setting out all the elements involved should be included in the Statute. There was no need, however, to distinguish between general and specific intention, because any specific intent should be included as one of the elements of the definition of the crime.⁶

Aside from defining the nature of the mental element, using the classic criminal law notions of 'intention' and 'knowledge', there was much debate about, and many attempts to codify, the concept of 'recklessness'.⁷ At the third session of the Preparatory Committee, in February 1997, a text emerged that is essentially identical to article 30.⁸ Despite much continuing discussion, it remained unchanged in the final draft of the Preparatory Committee, where it was presented without square brackets or footnotes.⁹ However, a fourth paragraph was also proposed that concerned recklessness. Although part of the Preparatory Committee draft, it was in square brackets. A footnote indicated: 'Further discussion is needed on this paragraph.'¹⁰ A second footnote said: '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.'¹¹

At the Rome Conference, there were a few minor changes to the wording of the first three paragraphs of the draft provision, and to the title, which was 'Mens rea (mental elements)' in the Preparatory Committee's text. In the first paragraph, the phrase 'a person is only criminally responsible' was changed to 'a person shall be criminally responsible'. A reference to 'physical elements' was changed to 'material elements'. In paragraph 2(a), 'engage in the act [or omission]' was replaced with 'engage in the conduct'. The original version of paragraph 3 read: 'For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.' It was changed somewhat in the final version, although the modifications seem more formal than substantive. As for paragraph 4, dealing with recklessness, it was dropped entirely.¹²

Analysis and interpretation

The *Rome Statute* sets a demanding standard for the mental element, requiring in paragraph 1 of article 30 that '[u]nless otherwise provided' the material elements of the offence must be committed 'with intent and knowledge'.¹³ In two subsequent paragraphs, the

⁵ Preparatory Committee 1996 Report, Vol. II, pp. 92-93.

⁶ Preparatory Committee 1996 Report, Vol. I, para. 199.

⁷ *Ibid.*, para. 200.

⁸ 'Chairman's Text', UN Doc. A/AC.249/1997/WG.2/CRP.4.

⁹ Preparatory Committee Draft Statute, p. 55.

¹⁰ *Ibid.*, p. 56, fn. 18.

¹¹ Preparatory Committee Draft Statute, p. 56, fn. 189.

¹² 'Notes regarding articles 5, 22, X (former article 26) and 29 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 22 June 1998', UN Doc. A/CONF.183/DC/R.76.

¹³ UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 4.

Statute defines these concepts. A person has intent with respect to conduct when that person means to engage in the conduct. A person has intent with respect to a consequence when that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge is defined as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. Article 30 defines 'knowledge', adding that 'know and knowingly' shall be construed accordingly. However, 'know' and 'knowingly' are not otherwise used in either article 30 or, for that matter, elsewhere in the *Rome Statute*. The word 'known' appears in the command responsibility provision. The word 'knowledge' is employed in the *chapeau* of crimes against humanity.

A default rule: 'unless otherwise provided' (art. 30(1))

Article 30 begins with the words '[u]nless otherwise provided'. This makes article 30 a 'default rule',¹⁴ to be applied 'unless the *Rome Statute* or the Elements of Crimes require a different standard of fault'.¹⁵ The best example in the *Statute* itself of an exception to the general principle is article 28(1), on superior responsibility of military commanders, which sets a 'should have known' standard that manifestly falls below the knowledge requirement of article 30.¹⁶ The possibility of conviction of a military commander for crimes committed by subordinates where the commander 'should have known that the forces were committing or about to commit such crimes'¹⁷ is certainly in conflict with article 30, but is sheltered by the words 'otherwise provided'. Genocide is defined in article 6 as requiring an 'intent to destroy', which has been frequently described in the case law as a 'specific intent' or *dolus specialis* standard.¹⁸ Judges of the Court have also referred to certain war crimes and crimes against humanity, such as torture and pillage, as requiring a specific intent.¹⁹ The limitation of the defence of superior orders to cases that do not constitute 'manifest illegality' constitutes an exception to the general rule, in that it imposes an objective standard for the assessment of knowledge of illegality that may be at odds with that of the individual defendant.²⁰ Furthermore, exclusion of the defence of superior orders in cases of genocide and crimes against humanity constitutes a derogation from article 30.²¹

There are also examples of derogation from article 30 in the Elements of Crimes, for example, the norm by which the perpetrator of the genocidal act of transferring children 'should have known, that the person or persons were under the age of 18 years'.²² There is some academic debate as to whether the words 'unless otherwise

¹⁴ *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 136, 353.

¹⁵ *Ibid.*, para. 353.

¹⁶ *Ibid.*, para. 354.

¹⁷ *Rome Statute*, art. 28(a)(i).

¹⁸ *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 139. See this *Commentary*, art. 6.

¹⁹ *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 294, 320, 354, fn. 445.

²⁰ *Rome Statute*, art. 33(1)(c).

²¹ *Ibid.*, art. 33(2).

²² Elements of Crimes, Genocide by forcibly transferring children, art. 6(e), para. 6. Also: *ibid.*, War crime of improper use of a flag of truce, art. 8(2)(b)(vii)-1, para. 3; *ibid.*, War crime of improper use of a flag, insignia or uniform of the hostile party, art. 8(2)(b)(vii)-2, para. 3; *ibid.*, War crime of improper use of the distinctive emblems of the Geneva Conventions, art. 8(2)(b)(vii)-4, para. 3; *ibid.*, War crime of using, conscripting or

provided' encompass exceptions in the Elements rather than the *Rome Statute* itself.²³ The core of the argument that provisions of the Elements that depart from article 30 are unacceptable rests on the formulation of article 9 of the *Statute*, which says that the Elements of Crimes are to 'assist' the Court. Nevertheless, article 21 lists them as a source of applicable law, and to the extent that they are 'provided' by such a source, they may be deemed to be 'otherwise provided'. That provisions of the Elements of Crimes intentionally fall within the exceptions to article 30 is made abundantly clear in paragraph 32 of the general introduction to the Elements: '[w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element... intent, knowledge or both, set out in article 30, applies'. In *Bemba*, Pre-Trial Chamber III subscribed to the view by which exceptions in the Elements are permitted when it described the *mens rea* requirements of the *Statute* as follows: 'Consequently, it must be established that the material elements of the respective crime were committed with "intent and knowledge", unless the Statute or the Elements of Crimes require a different standard of fault.'²⁴

Dolus

The mental element has two components, namely intent (that is, a volitional element) and knowledge (that is, a cognitive element). Adopting terminology from continental legal doctrine, judges of the International Criminal Court have described these volitional and cognitive components as *dolus*. There are said to be three relevant forms of *dolus*: *dolus directus* in the first degree or direct intent; *dolus directus* in the second degree or oblique intention; and *dolus eventualis* or subjective or advertent recklessness. *Dolus directus* in the first degree (or direct intent) refers to knowledge by the offender that his or her acts or omissions will bring about the material elements of the crime and the carrying out of these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime. In other words, 'the suspect purposefully wills or desires to attain the prohibited result'.²⁵ The volitional dimension is predominant.

In *dolus directus* of the second degree, the cognitive element is more important. The offender need not have the actual intent or will to bring about the material elements of the crime, but must be aware that those elements will be the almost inevitable outcome of his or her acts or omissions.²⁶ In other words, the offender must be 'aware that [...the consequence] will occur in the ordinary course of events'.²⁷ In this context, the 'volitional element decreases substantially and is overridden by the cognitive element,

enlisting children, art. 8(2)(b)(xxvi), para. 3; *ibid.*, War crime of using, conscripting and enlisting children, art. 8(2)(e)(vii), para. 3.

²³ See, e.g., Kevin Jon Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute, A Critical Analysis', (2008) (6) *JICJ* 419, at pp. 435–436.

²⁴ *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 353. Also, para. 136. For further discussion of the issue, see this *Commentary*, art. 9.

²⁵ *Ibid.*, para. 358.

²⁶ *Ibid.*, para. 359.

²⁷ *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of the Charges, 29 January 2007, para. 351; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 530.

i.e. the awareness that his or her acts or omissions "will" cause the undesired proscribed consequence'.²⁸

As for the third form, *dolus eventualis*, which is akin to the common law concept of recklessness, Pre-Trial Chamber II has held that 'such concepts are not captured by article 30 of the Statute'. It said its conclusion was supported by the express language of the phrase 'will occur in the ordinary course of events', as it does not leave room for a lower standard than *dolus directus* in the second degree.²⁹ This conclusion is reinforced with reference to the *travaux préparatoires* of the Statute. According to Roger S. Clark, the drafters of the Statute 'were generally uncomfortable with liability based on recklessness or its civil law (near) counterpart, *dolus eventualis*'.³⁰ At the Rome Conference, '*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'.³¹ After analysing the *travaux*, Pre-Trial Chamber II concluded that 'the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations'.³²

The expression 'a consequence will occur' has been interpreted by Pre-Trial Chamber II:

Thus, the Chamber considers that, by way of a literal (textual) interpretation, the words '[a consequence] will occur' serve as an expression for an event that is 'inevitably' expected. Nonetheless, the words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as 'virtual certainty' or 'practical certainty', namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.³³

According to the Pre-Trial Chamber, it is a standard that is undoubtedly higher than that of *dolus eventualis*, which is foreseeability of the occurrence of the undesired consequences as a mere likelihood or possibility. Thus, 'had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words "may occur" or "might occur in the ordinary course of events" to convey mere eventuality or possibility, rather than near inevitability or virtual certainty'.³⁴

Material elements (art. 30(1))

The Rome Statute does not contain any parallel provision on the *actus reus* or material element of the crime.³⁵ The reference to 'material elements' in article 30(1) is perhaps the last remnant of the draft text on the subject. The final Preparatory Committee draft contained an *actus reus* article, but the Working Group was unable to reach consensus on its content,³⁶ essentially because of problems in defining the notion of omission.

²⁸ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 359.

²⁹ *Ibid.*, para. 360.

³⁰ Roger S. Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings', (2008) 19 CLF 619, at p. 525.

³¹ *Ibid.*, at p. 529.

³² Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 366.

³³ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 362 (reference omitted).

³⁴ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 363 (reference omitted).

³⁵ See the remarks above, under 'Introductory comments'.

³⁶ *Ad Hoc* Committee Report, Annex II, p. 58; Preparatory Committee 1996 Report, Vol. I, p. 45; Preparatory Committee 1996 Report, Vol. II, pp. 90-91; UN Doc. A/AC.249/1997/L.5, pp. 26-27; UN Doc.

The Coordinator of the Working Group made a proposal accompanied by a *nota bene*, saying: 'Another option could be to have no article dealing with omission. It seems that the substantive content of paragraph 2(a) is largely covered by whatever is stated in the definitions of the crimes, and paragraph 2(b) would to some extent be covered by article 28 on command responsibility at least if the approach is taken to state this as a responsibility rather than non-immunity.'³⁷ During the debates, he added that article 22(2) prohibiting analogies would ensure that judicial discretion on the subject of omissions was never abusive. A footnote to the Working Group's report stated: 'Some delegations were of the view that the deletion of article 28 required further consideration and reserved their right to reopen the issue at an appropriate time.'³⁸ Nothing more was heard of the subject.

Material elements are set out in the definitions of the crimes (arts. 6–8) and the Elements of Crimes. As paragraphs 2 and 3 of article 30 explain, they consist of 'conduct', 'consequence', and 'circumstance'. Both acts and omissions may constitute material elements.

Intent (art. 30(2))

An accused person has 'intent' in two situations. Where the crime requires 'conduct', the person must 'mean to engage in that conduct'. This is a relatively straightforward idea in criminal law, excluding unintentional conduct such as automatic or reflex behaviour, and 'accidents'. With respect to a crime of conduct, the accused is deemed to intend the conduct. As a general rule, the Prosecutor need not actually prove that the person intended the conduct, as this follows logically from proof of the conduct itself. The accused person may rebut what amounts to a logical presumption by proposing a defence, arguing that despite appearances the conduct was not in fact intentional. Classic examples of this include the defences of mental incapacity and intoxication, as well as mistake.³⁹

Intent is also relevant to crimes where the material element involves a consequence. The first crime listed in the *Rome Statute*, genocide by killing (art. 6(1)), requires a consequence because the victim must be dead. Article 30(2) establishes that where consequence is an element of the crime, the Prosecutor must establish that the accused 'means to cause that consequence or is aware that it will occur in the ordinary course of events'. Again, the *mens rea* is generally presumed, based upon proof of the actual acts or omissions of the accused, without the need for further evidence such as statements, psychological materials, and proof of motive. The reference to 'ordinary course of events' suggests that an objective rather than a subjective standard may be applied. In other words, the mental element of the accused will be assessed not in light of the individual's personal circumstances but rather against what an 'ordinary' person would have expected. Nevertheless, it is not enough 'to merely anticipate the possibility that his or her conduct would cause the consequence. This follows from the words "will occur"; after all, it does not say "may occur"'.⁴⁰

If there may be room for some debate about inclusion of recklessness within article 30, there can be none about negligence. In *Lubanga*, Pre-Trial Chamber I referred to

A/AC.249/1997/WG.2/CRP.5; UN Doc. A/AC.249/1998/L.13, pp. 58–59; Preparatory Committee Final Draft, pp. 54–55.

³⁷ UN Doc. A/CONF.183/C.1/WGPP/L.1, p. 2.

³⁸ UN Doc. A/CONF.183/C.1/WGPP/L.4/Add.1/Rev.1, p. 3, fn.3.

³⁹ See this *Commentary*, art. 32.

⁴⁰ Gerhard Werle, *Principles of International Criminal Law*, The Hague: Asser, 2005, at p. 104.

the 'should have known' requirement provided in certain provisions of the Elements of Crimes dealing with the age of persons recruited into armed forces. It described this as 'an exception to the "intent and knowledge" requirement embodied in article 30 of the Statute. Accordingly, as provided in article 30(1) of the Statute, it will apply in determining the age of the victims, whereas the general "intent and knowledge" requirement will apply to the other elements of the war crimes...'.⁴¹ According to Charles Garraway, when these negligence-based provisions of the Elements were being drafted, '[t]hose with reservations as to the *vires* of this provision were reassured by article 9(3) of the Statute providing that elements "shall be consistent" with the Statute. Any inconsistent element would be struck down by the judges.'⁴² But *Lubanga* suggests that they are not inconsistent with the *Statute*, not because they are consistent with article 30 but because they are 'otherwise provided'.

Knowledge (art. 30(3))

Where crimes involve a 'circumstance' or a 'consequence', the perpetrator must have knowledge of these elements. Some definitions of crimes require this explicitly. For example, the *chapeau* to the definition of crimes against humanity requires that the offender 'have knowledge of the attack', which must be widespread or systematic and directed against a civilian population.⁴³ Some of the definitions of war crimes also include an explicit knowledge element. An example is the war crime of launching an attack 'in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.⁴⁴ There is no shortage of examples where a knowledge element is obviously implicit. With respect to the crime of genocide of killing, the perpetrator must kill a member of a protected group with intent to destroy the national, ethnic, racial, or religious group.⁴⁵ Clearly, there must be knowledge not only that the group exists but also that the victim is a member of the group. Many of the war crimes provisions concern 'protected persons'; again, the offender must know the status of the victim.

The general norm concerning knowledge as a component of the mental element must be read with an eye to article 32 of the *Statute*, which governs the defence of mistake.

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⁴¹ *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of the Charges, 29 January 2007, para. 359.

⁴² Charles Garraway, 'Article 8(2)(b)(xxvi) – Using, Conscripting or Enlisting Children', in Lee, *Elements and Rules*, pp. 205–207, at p. 207.

⁴³ *Rome Statute*, art. 7(1).

⁴⁴ *Ibid.*, art. 8(2)(b)(iv).

⁴⁵ *Ibid.*, art. 6.

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