

## **Mens rea – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals\***

MOHAMED ELEWA BADAR\*\*

*“There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness. Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principal of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.”*

Joel Bishop, *A Treatise on Criminal Law*, 1865.

\* The present study is a part of the author’s Ph.D. thesis entitled “Towards a Unified Concept for Mens rea in International Criminal Law.”

\*\* Judge, Ministry of Justice, Egypt; Resident Representative of the International Institute of Higher Studies in Criminal Sciences (ISISC) (Siracusa-Italy) for the Interim Training for the Afghan Judiciary, Kabul, Afghanistan; Lecturer in international human rights law & international criminal law, Kabul University, Faculty of Law and Political Sciences; Senior Prosecutor, Public Prosecution Office, Ministry of Justice, Egypt (1997–2001); Captain (Police Investigator), Public Property Investigation Department, Ministry of Interior, Egypt (1991–1997).

Ph.D. candidate in International Criminal Law, The Irish Centre for Human Rights, National University of Ireland, Galway, (2002–2005); LL.M. in International Human Rights, The Irish Centre for Human Rights, NUI, Galway, 2001; Diploma in International Legal Relations, Ain Shams University, Cairo, 1999; LL.B. & Bachelor of Police Sciences, Police Academy, Police College, Cairo, 1991.

The author would like to express his sincere gratitude to his Excellency Mahmoud Abou El Leil Egyptian Minister of Justice, and his Excellency Attorney General of Egypt for facilitating the way to pursue his postgraduate studies. I want to acknowledge my very special debt to Nora Karsten, Assessor in Law, Federal Republic of Germany, for her valuable translation assistance. Special thanks for Noelle Higgins, Lecturer in Law, NUI-Galway for her great efforts editing this work. The author wishes to thank Prof. Dr. Michael Bohlander of the University of Durham for his valuable comments on an early draft of this study. The author would like to thank Dr. Iognaid G. Muircheartaigh, the President of National University of Ireland, Galway, and Professor William Schabas the Director of the Irish Centre for Human Rights, for offering him a Ph.D. scholarship to pursue his academic preparation. My gratitude goes to Prof. William Schabas of the Irish Centre of Human Rights, Professor Cherif Bassiouni of De Paul University, Professor Sharon Williams of the Osgoode Hall Law School, York University, and Professor Otto Triffterer of the University of Salzburg, for their kind support and encouragement since my early arrival in the international field, and as always my gratitude goes to Patricia Gawenda & Mariam Elewa. The author may be contacted at: Mohamed.Elewa@nuigalway.ie.

## Introduction

Even though international criminal law is an autonomous area of law and its terms are to be construed accordingly, the proper interpretation and appropriate application of international criminal law often requires a comparative analysis of national legal systems. The two *ad hoc* Tribunals have consistently referenced national approaches to a variety of legal issues to support their findings on issues of both substantive and procedural international criminal law.<sup>1</sup> Among these issues was the identification of the mens rea required for triggering the criminal responsibility for serious violations of international humanitarian law. It is a general principle of law that the establishment of criminal culpability requires an analysis of both actus reus, the material element of a crime, and mens rea, the mental element of a crime.<sup>2</sup> The jurisprudence of the Tribunals mirrors the difficulty of identifying the various forms and shades of mens rea in international criminal law. One reason for this is the lack of a general definition of the issue in either the Nuremberg and Tokyo Charters,<sup>3</sup> or the Statutes of the two *ad hoc* Tribunals.<sup>4</sup> As a result of the general uncertainty regarding the definition of various categories of mens rea and the absence of a customary rule regarding these issues, the drafters of the Rome Statute decided to include a special provision on the subject.<sup>5</sup> However, it is doubtful

<sup>1</sup> In examining the issue of whether a standard of *mens rea* that is lower than ‘direct intent’ may apply in relation to “ordering” under Article 7(1) of the ICTY Statute the Appeals Chamber of the Yugoslav Tribunal deems it useful to consider the approaches of national jurisdiction, see *Prosecutor v. Tihomir Blaškić* (Case No. IT-95-14-A), Judgment, 29 July 2004, paras. 34–42; In order to facilitate a better understanding of the concept of complicity the Yugoslav Tribunal refers to four national legal systems namely; the former Yugoslavia, France, Germany, and England, see *Prosecutor v. Milomir Stakić*, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002, paras. 54–59; In determining that duress is not a defence to a charge of crimes against humanity and war crimes, the Yugoslav Tribunal considered in some detail the authorities in customary international law, the post World WarII military tribunals, general principles of law recognised by civilised nations, and the position in a variety of civil law and common law systems, see *Prosecutor v. Erdemović*, (Case No. IT-96-22-A), Judgment, 7 October 1997, paras. 40–61.

<sup>2</sup> While the terminology utilised varies, these two elements have been described as “universal and persistent in mature systems of law”. See *Prosecutor v. Delalić et al.*, (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 424 (also known as *Čelebići*), quoting *Morissette v. United States* (1952) 342 U.S. 246.

<sup>3</sup> Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the major War Criminals of the European Axis, Aug 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, 19 January 1946, T.I.A.S. No. 1589.

<sup>4</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827; Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955.

<sup>5</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (17 July, 1998), entered into force 1 July 2002, Art. 30 provides as follows:

that this provision, which is described in article 30 of the Rome Statute, adequately covers all the significant variations of subjective elements of international crimes.<sup>6</sup> As Professor *Cassese* suggests, coming to grips with the present dilemma requires that one must start from the assumption that what matters is to identify the possible existence of general rules of international law or principles common to the major legal systems of the world.<sup>7</sup> Both the Yugoslav and Rwanda Tribunals have adopted this view. In determining the requisite mens rea of international crimes, judges, prosecutors, and defence lawyers of the two *ad hoc* Tribunals often based their arguments on a comparison of the world's major criminal law systems and on a systematic analysis of the existing case law.<sup>8</sup>

It follows that different legal systems require different standards of mens rea. Accordingly, what may occur is a breakdown in communication between different modes of legal analysis. French criminal system, for example, distinguishes two components of mens rea, “*la conscience*” and “*la volonté*”, both of which are said to be required for both “general intent” and “special intent”.<sup>9</sup> Similarly, German, Austrian and Swiss law also require two components for

“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 purpose 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 the consequence or is aware that it will occur in the ordinary course of events. 3. For the purpose of this article, ‘knowledge’ means awareness that a circumstance exist or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”

<sup>6</sup> See *Antonio Cassese*, *International Criminal law*, (Oxford, New York: Oxford University Press, 2003) 159–60. Professor Schabas noted that “article 30 of the Rome Statute is not only confusing and ambiguous, it is also superfluous, and that judges of the International Criminal Court, like their colleagues at the ICTY, would easily have understood the mental element of crimes without them having to be told.” *William A. Schabas*, ‘Mens rea and the International Criminal Tribunal for the Former Yugoslavia’, 37 *New England Law Review* (2003) 1015, 1024.

<sup>7</sup> *Cassese*, *International Criminal law*, *ibid*.

<sup>8</sup> See the thorough and systematic analysis of civil and common law jurisdictions with regard to the mens rea required for recklessness or *dolus eventualis* as adopted by Blaškić’s Defence in *Prosecutor v. Tihomir Blaškić*, (Case No. IT-95-14-A), Appellant’s Appeal Brief, 14 January 2002, Section VIII, pp. 128–132 (on file with the author); In *Jelisić*, the Office of the Prosecutor (OTP) argued that the concept of *dolus specialis*, which is a civil law term used to describe the mens rea of a crime, set too high a standard, and could not be equated with the common law concepts of “specific intent” or “special intent”, as a consequence, the OTP undertaken a comparative analysis with respect mens rea standards in both civil and common law systems, *Prosecutor v. Jelisić*, (Case No. IT-95-10-A), Prosecution’s Appeal Brief (Redacted Version), Section IV entitled “Mens rea Standards in Comparative Law”.

<sup>9</sup> See *Catherine Elliott*, ‘The French Law of Intent and Its Influence on the Development of International Criminal Law’, 11 *Criminal Law Forum* (2000) 35, 36–38.

*mens rea* “*wissen*” and “*wollen*”. These two components form at least three different kinds of *mens rea*, in descending order of seriousness, *absicht* (intention in the strict sense), *dolus indirectus* (indirect intent) and *bedingter vorsatz* (*dolus eventualis*) (conditional intent).

Common law systems, however, have their own baggage. Both the English and United States criminal law recognize three basic mental attitudes which constitute the core of the overarching concept of *mens rea*, namely: intention; recklessness; and criminal negligence.<sup>10</sup>

More than a decade has passed since the establishment of the two *ad hoc* Tribunals, however, the jurisprudence of both Tribunals evidence the inconsistency regarding the requisite *mens rea* standards for serious violations of international humanitarian law.<sup>11</sup>

Hence, a survey of the attitude taken towards the definition of the major facets of *mens rea* by the world major legal systems is of great significance with regard to the establishment of a unified concept for *mens rea* in international criminal law.

The purpose of this study is to illustrate and discuss the mental elements of criminal offences in German criminal law. Particularly, this study aims to familiarize judges, prosecutors, and defence lawyers coming from different schools of law and seated at international criminal tribunals with such a fundamental concept in German criminal law.

Section I of this study will examine some of the major judgments of the two *ad hoc* Tribunals where both Tribunals refers to national jurisdictions in order to clarify the *mens rea* required for the imposition of criminal responsibility for serious violations of international humanitarian law. Section II is a brief outline of the structure of the criminal offence in German criminal law. This is necessary since German criminal law does not follow the “offence analysis”

<sup>10</sup> The Model Penal Code (MPC) limits the number of *mens rea* terms to four: purpose, knowledge, recklessness, and negligence. For a thorough analysis of the MPC see *Paul H. Robinson & Jane A. Grall*, ‘Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond’, 35 *Stanford Law Review* (1997) 681, 719–24. But for a critique view of the Model Penal Code’s *mens rea* see *Kenneth W. Simons*, ‘Should the Model Penal Code’s *Mens rea* Provisions be Amended’ 10 *Ohio State Journal of Criminal Law* (2003) 179.

<sup>11</sup> See for example the conclusion reached by *Blaškić* Appeals Chamber at para. 43 where it “considers that none of the Trial Chamber . . . articulations of the *mens rea* for ‘ordering’ under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct.” The Appeals Chamber emphasized that mere knowledge of risk does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. *Prosecutor v. Tihomir Blaškić*, supra note 1, para. 41. For the erroneous interpretation of *mens rea* standard for ‘ordering’ adopted by *Blaškić* Trial Chamber see *Prosecutor v. Tihomir Blaškić*, (Case No. IT-95-14-T), Judgment, 3 March 2000, paras. 562, 592, 653, 738, and 741.

scheme known in common law countries, but is based upon a three stage structure of the criminal offence. In Section III, the concept of intention (*Vorsatz*) in German criminal law is thoroughly discussed and analysed. This includes the discussion of *dolus directus* (first and second degree) as well as of *dolus eventualis*. Emphasis is put on the differentiation between *dolus eventualis* and negligence, since it reflects a highly debated issue in German criminal law. The concept of negligence will be outlined in Section IV.

Given the fact that the German criminal law recognizes that mistake of law and mistake of fact (*Tatbestandsirrtum, Verbotsirrtum*) is not a separate doctrine, but part and parcel of the basic analysis of mens rea, these two basic types of mistake will be addressed in Section V. This includes the discussion of *error in persona vel obiecto* and *aberratio ictus*. Finally, the conclusion will be supported by some remarks and recommendations regarding the German law of intent and its influence on the development of international criminal law.

## I. *Mens rea* standards under the jurisprudence of the two *ad hoc* Tribunals

### A. Wilfulness as a starting point

As a starting point of the discussion, and due to the lack of a ‘mental element’ provision in the Statutes of the two *ad hoc* Tribunals, it seems appropriate to look at offences provided for in these Statutes which in their language contain a ‘mental element’.<sup>12</sup> In *Čelebići*, the Prosecution’s position was that the *mens rea* element of “wilful killing” and “murder” as provided for in article 2(a) of the ICTY Statute is established where the accused possessed: (a) the intent to kill, or (b) inflict grievous bodily harm on the victim. The Prosecution argues that the word “wilful” must be interpreted to incorporate reckless acts as well as a specific desire to kill, whilst excluding mere negligence.<sup>13</sup> More particularly, the Prosecution contends that, while the accused’s acts must be “inten-

<sup>12</sup> Art. 2 of the ICTY Statute, ‘Grave Breaches of the Geneva Conventions of 1949’ reads as follows:

“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:

(a) wilful killing; [ . . . ]”

<sup>13</sup> See *Prosecutor v. Delalić et al.* (Case No. IT-96-21-T), Prosecutor’s Response to the Pre-Trial Briefs of the Accused, 14 April 1997, Section 5 ‘Mens rea’, (on file with the author).

tional”, the concept of intention can assume different forms, including both “direct” and “indirect intention” to commit the unlawful act.<sup>14</sup> Such “indirect intention” incorporates the situation where the accused commits acts and is reckless to their consequences and where death is foreseeable.<sup>15</sup> The Prosecution argued that these various forms of intention are not all defined identically in national criminal systems, and it relies on a statement by Professor *Cherif Bassiouni*:

“The customary practise of states, evidenced by international and national military prosecutions, reveals that murder is not intended to mean only those specific intentional killings without lawful justification. Instead, state practice views murder in its *largo sensu* meaning as including the creation of life endangering conditions likely to result in death according to reasonable human experience. This standard was used in war related cases involving mistreatment of prisoners of war and civilians. Notwithstanding the technical differences in the definitions of various forms of intentional and unintentional killing in the world’s major criminal justice systems, the widespread common understanding of the meaning of murder includes life-endangering conditions likely to result in death according to the known and foreseeable expectations of a reasonable person in the same circumstances.”<sup>16</sup>

Adopting a narrower definition of intent, the Defence argues that the mens rea element of the offence of “wilful killing” requires a showing by the Prosecution that the accused had the “specific intent” to cause death by his actions.<sup>17</sup> The Defence submits that the words “reckless” and “intent” are mutually exclusive, and that “in the common law tradition offences requiring intent are typically

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, citing *M. Cherif Bassiouni*, *Crimes Against Humanity in International Criminal Law*, (Boston: Martinus Nijhoff Publishers, 1992) 290–91. In support of this argument, the Prosecution relies on the Commentary to article 85 of Additional Protocol I which defines ‘wilfully’ in the following terms:

“the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them (‘criminal intent’ or ‘malice aforethought’); this encompasses concepts of ‘wrongful intent’ or ‘recklessness’, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.”

See *Claude Pilloud, Jean De Preux, Yves Sandos et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Geneva, (Martinus Nijhoff Publishers, 1987) Art. 85 of the Additional Protocol I.

<sup>17</sup> *Prosecutor v. Delalić et al.*, *supra* note 2, para. 427.

to be distinguished from those where mere recklessness will suffice.”<sup>18</sup> This, in the view of the Defence, is the preferable construction of the *mens rea* requirement for wilful killing or murder under the Geneva Conventions and Additional Protocol I.

This semantic approach for the *mens rea* concept adopted by both the Prosecution and the Defence was criticized by the *Čelebići* Trial Chamber:

“A simple semantic approach, or one which confines itself to the specificities of particular national jurisdictions, can only lead to confusion or a fruitless search for an elusive commonality. In any national legal system, terms are utilised in a specific legal context and are attributed their own specific connotations by the jurisprudence of that system. Such connotations may not necessarily be relevant when these terms are applied in an international jurisdiction.”<sup>19</sup>

Notwithstanding the above statement, the *Čelebići* Trial Chamber examined the scope of the term “wilful killing” and its relationship to “murder” by analysing different approaches of national jurisdictions:

“At common law, the term ‘malice’ is often utilised to describe the necessary additional element that transforms a homicide from a case of ‘manslaughter’ to one of ‘murder’. Yet again, however, there is a strong danger of confusion if such terminology is transposed into the context of international law, without explanation of its exact meaning. ‘Malice’ does not merely refer to ‘ill-will’ on the part of the perpetrator of the killing, but extends to his intention to cause great bodily harm or to kill without legal justification or excuse and also denotes a wicked and corrupt disregard of the lives and safety of others. In most common law jurisdictions, the *mens rea* requirement of murder is satisfied where the accused is aware of the likelihood or probability of causing death or is reckless as to the causing of death.”<sup>20</sup>

The Trial Chamber went further examining the requisite *mens rea* of murder in different common law countries:

“In Australia, . . . knowledge that death or grievous bodily harm will *probably* result from the actions of the accused is the requisite test.”<sup>21</sup>

<sup>18</sup> *Ibid.* In this regard, the Defence cites the English case of *R v. Sheppard* [1981] AC 394 HL, and quotes the statement made by Lord Diplock therein, that “[t]he primary meaning of ‘wilfully’ is ‘deliberate’” *R v. Sheppard* [1981] AC 394 HL, p. 418.

<sup>19</sup> *Prosecutor v. Delalić et al.*, supra note 2, para. 431.

<sup>20</sup> *Ibid.*, para. 434.

<sup>21</sup> *R v. Crabbe* (1985) 58 ALR 417. Cf. the previous view that the possibility of death or grievous bodily harm might be sufficient, *Pemble v. the Queen*, (1971) 124 CLR 107.

Under Canadian law, the accused is required to have a simultaneous awareness of the probability of death and the intention to inflict some form of serious harm,<sup>22</sup> and this is also the position in Pakistan.<sup>23</sup>

Most notably, “knowledge” which is not a notion familiar to civil law countries, is considered by some of the common law countries like the UK as having the same value and intensity as intent. To put it differently, a statute may require knowledge by requiring intention, but it may also require knowledge by explicitly employing that word, or one of its grammatical variants.<sup>24</sup> The offence of knowingly possessing explosives is an example of an express requirement of knowledge.<sup>25</sup> Professor *Glanville Williams* observed that in such legislation, the requirement of knowledge is generally interpreted as applying to all the circumstances of the offence, unless the statute makes the contrary meaning plain.<sup>26</sup> Hence, and as remarkably observed by Professor *Cassese*, in some common law countries, “Knowledge” denotes two different forms of mental states, depending on the contents of the substantive penal rule at stake:

“(i) if the substantive penal rule prescribes the existence of a particular fact or circumstance for the crime to materialize, knowledge means awareness of the existence of this fact or circumstance; (ii) if instead the substantive criminal rule focuses on the result of one’s conduct, then knowledge means (a) awareness that one’s actions is most likely to bring about the harmful result, and nevertheless (b) taking the high risk of causing that result.”<sup>27</sup>

Once again, the *Čelebići* Trial Chamber continued its survey regarding a unified definition for the requisite mens rea of murder by referring to civil law countries:

“The civil law concept of *dolus* describes the voluntariness of an act and incorporates both direct and indirect intention. Under the theory of indirect intention (*dolus eventualis*), should an accused engage in life-endangering behaviour, his killing is deemed intentional if he “makes peace” with the likelihood of death. In many civil law jurisdictions the foresee-

<sup>22</sup> Canadian Criminal Code, RSC 1985, Art. 229.

<sup>23</sup> Criminal Code, s. 300.

<sup>24</sup> *Glanville Williams*, Textbook of Criminal Law, 2nd ed., (London: Stevens & Sons, 1983) 123–24.

<sup>25</sup> Explosive Substances Act 1883 s. 4.

<sup>26</sup> *Glanville Williams*, Textbook of Criminal Law, supra note 24, (footnotes omitted).

<sup>27</sup> *Cassese*, International Criminal law, supra note 6, p. 164.

ability of death is relevant and the possibility that death will occur is generally sufficient to fulfil the requisite intention to kill.”<sup>28</sup>

Finally, the Trial Chamber analysed the term ‘wilful’ and reached the conclusion that it is a form of intent that includes ‘recklessness’ as understood in common law jurisdictions but excludes ordinary negligence.<sup>29</sup> Yet, recklessness or *dolus eventualis* are sufficient mens rea standards to trigger the criminal responsibility for murder or wilful killing as provided for in the Geneva Conventions and Art. 2 of the ICTY Statute.

## B. Specific intent or *dolus specialis*

International rules may require a special intent (*dolus specialis*, *dolus aggrávé*) for particular classes of crimes. One understanding of special intent is related to the degree or intensity of the requisite mens rea. This sense is given to the term by the *Akayesu* Trial Judgment: “Specific intention, required as a constructive element of a crime, . . . demands that the perpetrator *clearly seeks* to produce the act charged.”<sup>30</sup> The *Akayesu* Trial Chamber evidently assigned a higher degree of mens rea to the term than mere knowledge. However, the term *dolus spécial*, which was used by the Trial Chamber in the original French passage in *Akayesu* and to which all-subsequent decisions refer, is not unambiguous under French law. To the majority of scholars, it appears to mean “*l’intention d’atteindre un certain résultat prohibé par la loi pénale*”, i.e. the intention to achieve a certain result prohibited by law.<sup>31</sup> Specific intent can thus

<sup>28</sup> See *Prosecutor v. Delalić et al.*, supra note 2, para. 435. In this case the Trial Chamber made references to the commentary on criminal codes related to civil law countries namely: Belgium, Germany, and Italy.

<sup>29</sup> In determining the meaning of the terms utilised in the ICTY Statute the Trial Chamber followed Fletcher analysis: “the method of analysing ordinary usage invites us to consider what these terms mean as they are used, not what they mean when wrenched out of context and defined for the purposes of legal analysis.” See *George Fletcher*, *Rethinking Criminal Law*, (Boston: Little, Brown and Company, 1978) 451.

<sup>30</sup> *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 498 (English Translation). However, the same Trial Chamber in para. 520 contradict itself by adopting a different standard of the mens rea of genocide: “[w]ith regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy . . . a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.”

<sup>31</sup> The *Akayesu* Trial Chamber cited the following publications: *F. Desportes and F. Le Gunehec*, *Le Nouveau Droit Pénal*, Tome 1, *Droit pénal général*, 3rd ed. (1996), 364; M.L. Rassat, *Droit pénal général*, 2nd edition (1999), 353, who specifically distinguishes between “*dolus spécial*” and “*l’exigence d’un but particulier*” (the requirement of a particular goal); *C. Elliot*, ‘The French Law of Intent and Its Influence on the Development of International Criminal Law’,

be equated with the common law term of purpose or the civil law concept of *dolus directus* in the first degree (*Absicht*).<sup>32</sup>

In the *Jelisić* Appeal, the Prosecution argued that the concept of *dolus specialis*, which is a civil law term used to describe the mens rea of a crime, set too high a standard, and could not be equated with the common law concepts of “specific intent” or “special intent.”<sup>33</sup> The Appeals Chamber dealt with the matter rather laconically, saying simply that the Trial Chamber had used the term *dolus specialis* as if it meant “specific intent.” The Appeals Chamber referred to “specific intent” to describe “the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such” or, in other words, the normative requirement set out in the chapeau of the definition of genocide.<sup>34</sup> In *Sikirica*, the Trial Chamber criticised the Prosecutor for introducing a debate about theories of intent for the crime of genocide, noting that the matter should be resolved with reference to the text of the provision:

“The first rule of interpretation is to give words their ordinary meaning where the text is clear. Here, the meaning of intent is made plain in the chapeau to Article 4(2). Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent.”<sup>35</sup>

It is very difficult, however, to say which meaning the two *ad hoc* Tribunals assign to the term. It seems from the case law that the ICTR has been inclined to favour the first approach and have given the term an intensity-related thrust. As ICTR judgments specifically used the term *dol spécial*, and since ICTR jurisprudence generally appears to be strongly influenced by civil law and French law in particular, it might be argued that they intended to give it the same meaning as (the majority) under French law (the intention to achieve a certain result prohibited by law). The jurisprudence of the ICTY is less clear.

11 Criminal Law Reform (2000) 35, 41. Elliot assigns to *dol special* the meaning of intent towards the result of the act and defines additional aims as *dol aggravé*.

<sup>32</sup> For more on *dolus directus* of the first degree see section III (A) of the present study.

<sup>33</sup> *Prosecutor v. Jelisić*, (Case No. IT-95-10-A), Prosecution’s Appeal Brief (Public Redacted Version), para. 4.22; See also *Prosecutor v. Sikirica et al.*, (Case No. IT-95-8-I) Judgement on Defence Motions to Acquit, 3 September 2001, para. 142.

<sup>34</sup> *Prosecutor v. Jelisić*, (Case No. IT-95-10-A), Judgement, 5 July 2001, para. 51.

<sup>35</sup> *Prosecutor v. Sikirica et al.*, Judgement on Defence Motions to Acquit, *supra* note 33, para. 60.

In *Jelisić*, the Appeals Chamber seems to have adopted the view that the term (specific intent) or *dolus Specialis* does not imply any higher degree of the requisite intent as such.<sup>36</sup> It asserts that it only used the term to refer to “genocidal intent” and did not attribute to it as requiring that the perpetrator seeks to achieve the destruction.<sup>37</sup> The *Jelisić* Appeals Chamber applied the definition adopted in *Akayesu* and on the face of it equalled “specific intent” with purpose. The same approach was taken by the Trial Chamber in *Krstić*.<sup>38</sup>

Thus, it is submitted that, for the sake of consistency, the term “specific intent” should be used as signifying “purpose”. The common law concept “specific intent” should be referred to as “ulterior intent” or “surplus intent”.<sup>39</sup>

### C. Recklessness or *dolus eventualis*

As far as recklessness is concerned, the Appeals Chamber of the ICTY has recently discussed and analysed the exact contents of the concept. In *Blaskić*, the Appellant submitted that the Trial Chamber in defining the mens rea standard required for a conviction for planning, instigating, and ordering, erroneously adopted an “indirect intent” standard.<sup>40</sup> The Appellant contended that “indirect intent,” for the Trial Chamber, appeared to be synonymous with the common law concept of recklessness and/or the civil law concept of *dolus eventualis*.<sup>41</sup> In order to sustain its arguments, the Appellant undertook a thorough analysis of both Common and Civil law jurisdictions with regard to this issue.<sup>42</sup>

Facing the Appellant’s systematic analysis, the Appeals Chamber deemed it useful to consider the approaches of national jurisdictions in order to adopt the requisite mens rea for ‘ordering’ as provided for in article 7(1) of the ICTY Statute:

“In common law systems, the *mens rea* of recklessness is sufficient to ground liability for serious crimes such as murder or manslaughter . . .

<sup>36</sup> *Prosecutor v. Jelisić*, Judgment, supra note 34, paras. 43, 51.

<sup>37</sup> *Ibid.*, paras. 45, footnote 81.

<sup>38</sup> *Prosecutor v. Radislav Krstić*, (Case No. ICTY-IT-98-33), Judgment, Aug. 2, 2001, para. 571.

<sup>39</sup> The term “surplus of intent” was first used by the Yugoslav Trial Chamber in *Prosecutor v. Milomir Stakić*, (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 520.

<sup>40</sup> *Prosecutor v. Tihomir Blaškić*, (Case No. IT-95-14-A), Appellant’s Brief on Appeal, 14 January 2002, p.130. Reference has been made by the Appellant with regard to para. 278 of the Judgment rendered by *Blaškić* Trial Chamber.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, pp. 130–132.

According to the Model Penal Code . . . the degree of risk involved must be substantial and unjustifiable; a mere possibility of risk is not enough.”<sup>43</sup>

Examining some of the major common law jurisdictions the Appeals Chamber concluded that the adequate mens rea of recklessness required (1) the awareness of a risk that the result or consequence will occur or will probably occur, and (2) the risk must be unjustifiable or unreasonable. Mere possibility of a risk that a crime or crimes will occur as a result of the actor’s conduct generally does not suffice to trigger criminal responsibility.<sup>44</sup>

The Appeals Chamber went further examining the concept of *dolus eventualis* in Civil law systems, finding that this standard of intent may constitute the requisite mens rea for serious crimes. In French law, this concept has been characterized as taking of a risk and the acceptance of the eventuality that harm may result, even though the harm in question was not desired by the accused.<sup>45</sup> The Appeals Chamber went on to examine the concept in other civil law countries:

“In Italian law, the principle is expressed as follows: the occurrence of the fact constituting a crime, even though it is not desired by the perpetrator, is foreseen and accepted as a possible consequence of his own conduct. The German Federal Supreme Court . . . has found that acting with *dolus eventualis* requires that the perpetrator perceive the occurrence of the criminal result as possible and not completely remote, and that he endorse it or at least come to terms with it for the sake of the desired goal. It has further stated that in the case of extremely dangerous, violent acts, it is obvious that the perpetrator takes into account the possibility of the victim’s death and, since he continues to carry out the act, accepts such a result. The volitional element denotes the borderline between *dolus eventualis* and advertent or conscious negligence.”<sup>46</sup>

<sup>43</sup> *Prosecutor v. Tihomir Blaškić*, Appeals Judgment, supra note 1, para. 34. The Appeals Chamber referred to the definition of recklessness as provided for in the Model Penal Code: “a conscious disregard of a substantial and unjustifiable risk that the material element exists or will result from [the actor’s] conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” However, it is to be noted that the requirement that the defendant “consciously disregard a substantial and unjustifiable risk” under the MPC is ambiguous. The MPC recognizes a reckless actor as a person who must be aware of “substantial and unjustifiable” risk; are these conjunctive or disjunctive requirements? What type or degree of consciousness is required? Of what, precisely, must the actor be aware? For a critique opinion on “recklessness as defined in the MPC see *Kenneth Simons*, ‘Should the Model Penal Code’s Mens rea Provision be Amended’, supra note 10, p. 179.

<sup>44</sup> *Prosecutor v. Tihomir Blaškić*, Appeals Judgment, supra note 1, para. 38.

<sup>45</sup> *Ibid.*, para. 39.

<sup>46</sup> *Ibid.*

Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considered mere knowledge of any kind of risk, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. To put it differently, an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.<sup>47</sup> Finally, the Appeals Chamber in para. 42 concluded:

“A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.”

These wordings of the Appeals Chamber coincide with the “consent and approval theory” as recognized by both German literature and jurisprudence.<sup>48</sup> However, the question of the immediacy of the risk, the degree of foresight or the assessment of the probability of the risk remains to be resolved.

Having examined the attitude followed by the two *ad hoc* Tribunals in defining the various degrees of *mens rea* in comparative law. The following sections will be an attempt to elaborate on the concepts of mental element in German criminal law.

## II. The German concept of crime

German criminal law, similar to most civil law systems recognizes intent as being made up by two separate components: “*wissen*” and “*wollen*”, an “intellektuelle komponente” and a “voluntative komponente”.<sup>49</sup> Moreover, German criminal law distinguishes between intention in the broad sense (*Vorsatz*) and negligence (*Fahrlässigkeit*). It is difficult, however, to find a notion of *mens rea* in German criminal law as it is known in common law countries. The reason is that, subjective elements are not integrated in a unified concept of *mens rea*, but are discussed separately.

<sup>47</sup> *Ibid.*, para. 41.

<sup>48</sup> See Section III(C)(1) of the present study. For a Common law perspective see *Alan C. Michaels*, ‘Acceptance: The Missing Mental State’, 71 *Southern California Law Review* (1998) 953.

<sup>49</sup> “Voluntative” is not a term in English usage and translation seems to be difficult, but the German concepts (*wissen* and *wollen*) seems at least to close to “awareness” and “desire”. See *Roger S. Clark*, ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences’, 12 *Criminal Law Forum* (2002) 291, 302.

In German criminal law, the *mens rea* concept cannot be explained properly without regard to the three stage structures of criminal offence.<sup>50</sup> German criminal law strictly differentiates between three stages of valuation of a criminal offence, namely: *Tatbestand* (the legal elements of the offence);<sup>51</sup> *Rechtswidrigkeit* (unlawfulness/wrongfulness/illegality); and *Schuld* (culpability).<sup>52</sup> Accordingly, and in order to be punishable, a given conduct must fulfil the legal elements of an offence (*Tatbestand*); be unlawful (*Rechtswidrigkeit*), and there must be guilt on the part of the defendant (*Schuld*).<sup>53</sup>

#### A. *Tatbestand* or the legal elements of the offence

The first stage *Tatbestand* or the legal elements of the offence encompasses both the objective and the subjective elements of the offence. Yet, a defendant fulfils the legal elements of a criminal offence if his conduct corresponds with the statutory definition of an act prohibited by the *StGB* (Criminal Code).<sup>54</sup> For instance, section 212 of the *StGB* (regarding manslaughter) stipulates that “[w]hoever intentionally kills another human being [. . .], or section 223 of the *StGB* (regarding bodily injury) “[w]hoever physically mistreats or injures the health of another person intentionally [. . .].”<sup>55</sup> At this stage, it is to be evaluated whether or not both the objective and the subjective legal elements of a criminal offence prohibited by a statutory provision of the *StGB* are fulfilled.

<sup>50</sup> See in general *Volker Krey*, *Deutsches Strafrecht: Allgemeiner Teil* (German Criminal Law: The General Part), (Stuttgart: Kohlhammer, vol. 1, 2001) 3–25.

<sup>51</sup> *Tatbestand* is the shortened form of the German legal term *Straftatbestand* which means the sum of legal elements constituting the criminal offence in question.

<sup>52</sup> These three-stage structures of the criminal offence in German Criminal Law were firstly proposed by *Franz von Liszt* in his classical *Lehrbuch* of 1881. *Liszt* suggested a three-sectional concept of a crime: first there had to be an act, second that this act must be unlawful, and finally that the unlawful act must be characterized as culpable. The same idea was developed by *Ernst Beling*, (*Die Lehre vom Verbrechen*, 1906; *Die Lehre vom Tatbestand*, 1930). According to *Liszt* and *Beling*, the criterion for differentiating between unlawfulness and *mens rea* was the purely formal separation of the objective and the subjective elements of the criminal act. See also *Hans-Heinrich Jescheck*, ‘The Doctrine of Mens rea in German Criminal Law: Its Historical Background and Present Statute’, 8 *Comparative and International Law Journal of Southern Africa* (1975) 112, 114–15.

<sup>53</sup> *Werner F. Ebke* and *Matthew W. Finkin*, *Introduction to German Law*, (The Hague, London and Boston: Kluwer Law International, 1996) 387. For further analysis with regard to the three stage structure of criminal offence, see *Naucke*, ‘An Insider’s Perspective on the Significance of German Criminal Theory’s General System for Analyzing Criminal Acts’, *Brigham Young University Law Review* (1984) 305.

<sup>54</sup> *Volker Krey*, *Deutsches Strafrecht: Allgemeiner Teil*, supra note 50, p. 9.

<sup>55</sup> It is to be noted that every provision of the Special Part (*Besonderer Teil*) of the *StGB* has to be read in conjunction with the General Part (*Allgemeiner Teil*) of the *StGB*.

Most notably, the subjective elements of *Tatbestand* comprise (1) *Vorsatz* (intent in a broad sense)<sup>56</sup> and (2) “further mental elements” (“*besondere subjektive Tatbestandsmerkmale*”). Each of these subjective elements will be examined and discussed in detail.<sup>57</sup>

### B. *Rechtswidrigkeit* or (unlawfulness/wrongfulness/illegality)

The second stage *Rechtswidrigkeit* or unlawfulness is an inquiry to ascertain the presence of any grounds of legal justification. Another way of putting the point is to ask: do grounds of legal justification intervene? If this question is answered in the negative, the act is proved to be unlawful. If the answer is in the affirmative, the act is considered as lawful despite its fulfilment of the *Tatbestand*.<sup>58</sup> This concept of ‘illegality’ is useful since it requires analysis of conduct suspected to be criminal (as long as the conduct in question satisfies the requirement of statutory *actus reus* and *mens rea*) from the standpoint of its potential ‘legality’. Thus, an official executioner satisfies the above mentioned requirements of murder (the objective and subjective elements) yet is exempt from punishment because his conduct is not ‘illegal’.<sup>59</sup> Most notably, *Tatbestand* (the fulfilment of the legal elements of the offence) and *Rechtswidrigkeit* (the unlawfulness of the act) have to be distinguished; both are different stages of valuation within the three stage structure of criminal offences. This unlawfulness (*Rechtswidrigkeit*) is not part of the objective elements of the offence and as a consequence, there is no need for *mens rea* evaluation at the present stage. Hence, the defendant could not claim that he lacks knowledge of unlawfulness (consciousness of the wrongful character

<sup>56</sup> It is to be noted that *Vorsatz* in the broad sense is the generic term for different types of mental status, namely, *Absicht* or *dolus directus* first degree; *dolus directus* second degree; and *dolus eventualis*. *Vorsatz* translates roughly to intent, but in order to avoid any misunderstanding of that word and other key mental state definitions with Common law doctrine, it is desirable to leave the German legal terms such as “*Absicht*” and “*Vorsatz*” as they stand in their ordinary language without being translated into the English language.

<sup>57</sup> The main focus of this study is to discuss the *mens rea* concept in German criminal law and not the objective elements or the *actus reus* (*Der objektive Tatbestand*) of the crime, however, the objective elements of a crime can be defined as a components of the following elements: (1) act; (2) circumstances; (3) consequences. For more details on the objective element of crime in the German criminal law see *Volker Krey*, *Deutsches Strafrecht: Allgemeiner Teil, Teil II*, (German Criminal Law The General Part, vol. II), Stuttgart: Kohlhammer, 2003, pp. 27–101; *Ebke and Finkin*, *Introduction to German Law*, supra note 53, pp. 387–8; *Theodor Lenckner*, in: *Schönke and Schröder*, *Strafgesetzbuch Kommentar*, (München: Beck’sche Verlagsbuchhandlung, 2001)165.

<sup>58</sup> *Volker Krey*, *Deutsches Strafrecht: Allgemeiner Teil, ibid.*, at 11.

<sup>59</sup> *Paul K. Ryu*, ‘Discussion of Structure and Theory’, 24 *The American Journal of Comparative Law* (1976) 602, 607.

of the act).<sup>60</sup> Thus, *error iuris* (the error as to the prohibited nature of the act), does not affect the perpetrator's intent.<sup>61</sup> According to German criminal law system, the above two stages, namely, *Tatbestand* and *Rechtswidrigkeit* constitute the criminal wrong (*Unrecht*). Hence, if the requirements of these two stages are fulfilled, an act is considered illegal. The defendant, however, cannot be held criminally liable for such an act, unless culpability (*Schuld*) is proven on his part.<sup>62</sup>

### C. *Schuld* or (culpability)

At the *Schuld* stage (guilt or culpability stage), it is to be questioned whether the defendant can be blamed or personally reproached with the conduct "*die Frage, ob dem Täter die rechtswidrige tat persönlich vorzuwerfen ist*".<sup>63</sup> That is to say intentional conduct is not more than an indication for the culpability of an offender. It is not a matter of responsibility for one's immoral conduct or evil character, but a matter of guilt for the individual act (*Einzeltatschuld*).<sup>64</sup> Thus, there could be criminal wrong without culpability, but no culpability could be proven without fulfilment of the legal elements of the criminal offence "*Auch stehen Unrecht und Schuld nicht beziehungslos nebeneinander, denn es gibt zwar Unrecht ohne Schuld, nicht aber umgekehrt strafrechtliche Schuld ohne kriminelles Unrecht.*"<sup>65</sup> Another way of putting the point is, even if it is proved that the defendant acted intentionally *vorsätzlich* culpability still has to be proved on his part.<sup>66</sup>

Strictly speaking, in German criminal law culpability requires blameworthiness on the part of the offender.<sup>67</sup> This blameworthiness required that the defendant could have avoided the criminal offence at hand.<sup>68</sup> This was the

<sup>60</sup> *Krey*, Deutsches Strafrecht: Allgemeiner Teil, vol. 2, supra note 57, at 137.

<sup>61</sup> *Ibid.* For more details regarding mistake of fact and mistake of law see section V of the present study.

<sup>62</sup> *Johannes Wessels & Werner Beulke*, Strafrecht Allgemeiner Teil (Heidelberg: Müller Verlag, 2002) 125.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Krey*, Deutsches Strafrecht: Allgemeiner Teil, vol. 2, supra note 57, at 13; *Jescheck & Weigend*, Lehrbuch des Strafrechts. Allgemeiner Teil, (1996) at 423; *Theodor Lenckner*, in *Adolf Schönke & Horst Schröder* (eds.), Strafgesetzbuch: Kommentar (München: Beck'sche Verlagsbuchhandlung, 1997) 192.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Wessels & Beulke*, Strafrecht Allgemeiner Teil, supra note 62, at 125.

<sup>67</sup> See *Jescheck & Weigend*, Lehrbuch des Strafrechts. Allgemeiner Teil, (Berlin: Duncker & Humblot 1996), § 38 I, at 407; for critical remarks see *Lenckner*, in: *Schönke/Schröder*, Strafgesetzbuch. Kommentar, supra note 57, p. 195; *Wessels & Beulke*, § 10, at 137.

<sup>68</sup> *Krey*, Deutsches Strafrecht: Allgemeiner Teil, vol. 2, supra note 57, at 13.

view adopted by the Federal Supreme Court of Justice (*Bundesgerichtshof*—BGH):

“Punishment requires culpability. Culpability means blameworthiness (*Schuld ist Vorwerfbarkeit*). The dishonourable condemnation of culpability denotes that the perpetrator is reproached with having acted unlawfully . . . although he could have acted lawfully, i.e. he could have decided in favour of the law”.<sup>69</sup>

Hence, within the context of *Schuld*, “intent has a connotation distinctive from that within the context of the *actus reus* or *Tatbestand*, where it figures as its steering factor.”<sup>70</sup> At this stage, intent includes a consciousness of “surrounding circumstances” (*begleitende Umstände*), the various factors that give each concrete criminal act its distinctive mark.<sup>71</sup>

Yet, one might deduce that since culpability requires blameworthiness,<sup>72</sup> mere intention with reference to the conduct is not sufficient to trigger the criminal culpability for intentional offences. That is to say, *Vorsatzschuld* is not just the intention to kill or to harm, etc.; it also includes blameworthiness or knowledge that the conduct is illegal. Thus, it has to be proved that the offender was capable of gaining insight into the unlawfulness of his conduct and was capable of behaving in accordance with this insight. Accordingly, the corresponding culpability in the form of intent (*Vorsatzschuld*) has to be proved.<sup>73</sup> Thus, *Vorsatzschuld* is considered the corresponding mental element of culpability (in case of intentional wrongdoing).<sup>74</sup>

To the extent that the defendant must actually know he is acting in an immoral way, this statement is certainly questionable. From a common law perspective, if the above statement means that in addition to intention there must be blame, and blame in the sense of actual knowledge of wrong is excluded, what does the statement mean?<sup>75</sup> Jerome Hall an eminent common law commentator had this to say:

<sup>69</sup> BGH St 2, 194 200 (GS) quoted and translated by Krey, *Deutsches Strafrecht: Allgemeiner Teil*, vol. 2, supra note 57, at 15.

<sup>70</sup> Paul Ryu, ‘Discussion of Structure and Theory’, supra note 59, at 608.

<sup>71</sup> *Ibid.*

<sup>72</sup> BGHSt 2, 194 (201) (*Bundesgerichtshof* = Federal Supreme Court; official collection of judgments, vol. 2, p. 194 at p. 201).

<sup>73</sup> In case of negligence, culpability in the form of negligence (*Fahrlaessigkeitsschuld*) has to be proved on the part of the accused.

<sup>74</sup> Wessels & Beulke, *Strafrecht Allgemeiner Teil*, supra note 62, at 46–8.

<sup>75</sup> Jerome Hall, ‘The New German Penal Code: Comment on Structure and Theory’, 24 *The American Journal of Comparative Law* (1976) 615, 618.

Plainly, if one knows only that a certain act was intentional, he is in no position to make any judgment of blame; to do that, one must find the defendant guilty of causing a proscribed harm and, also, exclude the doctrines of excuse and justification.<sup>76</sup>

The foregoing analysis of the three-stage structures of the criminal offence reveal that in the German criminal law system, the state of mind of the defendant has to be evaluated mainly at two stages, namely, *Tatbestand* and *Schuld*.<sup>77</sup> Therefore, the mental elements of criminal wrong have to be distinguished from elements of culpability. This is the prevailing opinion nowadays.<sup>78</sup>

The following section will discuss in depth different categories of the subjective elements of the intentional offences (*Vorsatz* or *dolus*) namely: intent in the strict sense (*Absicht*); indirect intent (*dolus indirectus*); and (c) conditional intent (*dolus eventualis* or *Bedingter Vorsatz*).

### III. *Vorsatz* or *dolus* in German criminal law

As mentioned above, under German criminal law, all offences can only be committed with intention "*Vorsatz*", unless the law expressly threatens negligent acts with punishment.<sup>79</sup> Similar to most of the civil/continental law countries, *StGB* does not define *Vorsatz* nor does it give a definition for negligence (*Fahrlässigkeit*).<sup>80</sup> The "*Reichsgericht*" (Court of the *Reich*), however, coined the short formula saying that "*Vorsatz ist Wissen und Wollen*" (intention is knowledge and wilfulness).<sup>81</sup> This general guideline on the meaning of *Vorsatz* is still valid nowadays, though sometimes criticized as "inexact".<sup>82</sup>

<sup>76</sup> *Ibid.*

<sup>77</sup> Most notably, in 1924, *Edmund Mezger* suggested that the objective and material content of unlawfulness (*Rechtswidrigkeit*) couldn't be defined independently of the mental state of the offender. For more on the theory of the subjective element of unlawfulness see *Jescheck*, 'The Doctrine of Mens rea in German Criminal Law: Its Historical Background and Present Statute', supra note 52, p. 116.

<sup>78</sup> See *Claus Roxin*, *Strafrecht Allgemeiner Teil*, (Beck'sche Verlagsbuchhandlung: Muenchen 1997) 257. Formerly, however, *Vorsatz* has been considered to be a legal element of culpability (*Schuld*) only and has been discussed exclusively at this third stage. For different theories see *Wessels and Beulke*, *Strafrecht Allgemeiner Teil*, supra note 62, at 44.

<sup>79</sup> See § 15 *dStGB*. Most notably *Vorsatz* can also be interpreted in conjunction with §§ 16, 17 *dStGB*; see *Cramer & Sternberg-Lieben*, in *Schönke & Schröder*, *Strafgesetzbuch: Kommentar*, (Beck'sche Verlagsbuchhandlung: Muenchen, 2001) 244, 247.

<sup>80</sup> *Fahrlässigkeit* translates very roughly as negligence, but unlike the Model Penal Code negligence, it also includes some cases in which the defendant is aware of the risk.

<sup>81</sup> RGSt 51, 305, 311; 58, 247 (Official Collection of the Judgments of the *Reichsgericht* 'Court of the Reich').

<sup>82</sup> *Wessels & Beulke*, *Strafrecht Allgemeiner Teil*, supra note 62, at 71.

Generally speaking *Vorsatz* consists of two components: *wissen* and *wollen*. The former is the cognitive component, while the latter presents the volitional component.<sup>83</sup> *Vorsatz* requires present and real knowledge (*wissen*) of the physical legal elements of the offence on the part of the perpetrator; mere potential knowledge is not sufficient.<sup>84</sup> That is not to say, that the perpetrator has to make conscious reflections about the physical legal elements of the offence, co-consciousness is sufficient.<sup>85</sup> This co-consciousness may be present in two forms, (1) co-consciousness based on awareness, and (2) co-consciousness based on the knowledge of the accompanying circumstances.<sup>86</sup>

Yet, *wissen* requires that the perpetrator at the time of committing the offence is aware of all the objective elements constituting the offence in question.<sup>87</sup> In addition to this cognitive element, the perpetrator has to carry out the prohibited act with the required intent of the crime in question.

It is generally accepted in German jurisprudence that there are three different forms of *Vorsatz*: *Absicht* or purpose (intent in the narrow sense or *dolus directus* of first degree); knowledge (*dolus directus* of second degree); and *bedingter Vorsatz* (*dolus eventualis*).<sup>88</sup> The third form of intent (*bedingter Vorsatz*) is similar to the common law notion of recklessness, but it is more restricted in a way that the perpetrator need not only be aware of the risk but must also accept the possibility that the criminal consequence occurs.<sup>89</sup> Each of these forms will be examined accordingly.

<sup>83</sup> *Welzel*, *Das Deutsche Strafrecht*, (Berlin: de Gruyter 1969) 64; *Karl Lackner*, *Strafgesetzbuch* (München: Beck'sche Verlagsbuchhandlung, 1991) 87; *Claus Roxin*, *1 Strafrecht Allgemeiner Teil*, (München: Beck'sche, 1997) 364; *Peter Cramer*, 'Vorsätzliches und Fahrlässiges Handeln', in *Adolf Schönke & Horst Schröder* (eds.), *Strafgesetzbuch Kommentar* (München: Beck'sche Verlagsbuchhandlung 1997) 248.

<sup>84</sup> *Krey*, *Deutsches Strafrecht. Allgemeiner Teil*, vol. 2, supra note 57, at 109.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Knowledge of the objective element of the criminal offence has to be prior to or contemporaneous with the carrying out of the criminal offence. In case the perpetrator gained knowledge about the relevant legal elements after having committed the criminal offence, (*dolus subsequens*) he is not criminally liable.

<sup>88</sup> The first two forms of *Vorsatz* are roughly equivalent to the Model Penal Code concepts of purpose and knowledge. See *Michaels*, 'Acceptance: The Missing Mental State', supra note 48, at 1025. For further details on the mens rea concept under the Model Penal Code see *Wayne R. La Fave and Austin W. Scott*, *1 Substantive Criminal Law*, (U.S.A.: West Law Publishing, 1986) 296–340.

<sup>89</sup> *Steffen Wirth*, 'Germany's New International Crimes Code: Bringing a Case to Court', *1 Journal of International Criminal Justice* (2003) 151, 155.

### A. *Absicht* or *dolus directus* of first degree

*Absicht* is the gravest aspect of culpability in which the volitive part dominates.<sup>90</sup> In German law, it is generally assumed that an offender acts with *Absicht* if he desires to bring about the result. In this type of intent, the perpetrator's "will" is directed finally towards the accomplishment of that result.<sup>91</sup> *Absicht* is also defined as a "purpose-bound will".<sup>92</sup> It is irrelevant in this type of *Vorsatz* whether the intended (or desired) result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.<sup>93</sup> Accordingly, *dolus directus* of first degree is not synonymous with the defendant's motive.<sup>94</sup> The following example shall illustrate this: X poisoned her husband's meal, because she wants to profit from his insurance. In this example, the victim's death is a necessary interim goal in order to realize the final goal (obtaining the insurance money). Therefore, X killed her husband with first degree intent. This is now the prevailing opinion.<sup>95</sup> The same has to be applied to § 6 of the German Code of Crimes against International Law (the crime of genocide).<sup>96</sup> A *génocidaire's* final goal (ultimate aim) is to destroy in whole or in part a group as such, his interim goal, however, is to kill members of this group. Accordingly, both the *génocidaire's* interim and final goals are to be considered as first degree intent, and neither of them is synonymous with the *génocidaire's* motive.

Most notably, *Absicht* requires a low intellectual threshold, but an extremely high volitional element.<sup>97</sup> With regard to the intellectual component of this type of *Vorsatz*, it is sufficient that the perpetrator considers the desired result as

<sup>90</sup> Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', 14 *Leiden Journal of International Law* 399, 404 (2001). German lawyers distinguish between *Vorsatz* (intention) and *Absicht* (purpose or aim) and use the latter term to refer to the intent requirement in larceny, fraud and various forms of inchoate offences. See *Fletcher*, *Rethinking Criminal Law*, supra note 29, p. 444.

<sup>91</sup> *Cramer*, in *Schönke & Schröder*, *Strafgesetzbuch: Kommentar*, (Beck: Muenchen 1997) 263. *Absicht . . . liegt nur dann vor, wenn der Handlungswille des Täters final gerade auf den vom Gesetz bezeichneten Handlungserfolg gerichtet war*. See also *Lackner*, *Strafgesetzbuch*, (Beck: München 1991) 95; *Roxin*, *Strafrecht Allgemeiner Teil*, supra note 78, at 366.

<sup>92</sup> *Krey*, *Strafrecht Allgemeiner Teil*, vol. 2, supra note 57, at 109.

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

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

<sup>95</sup> *BGHSt* 9, 146; 11, 173 (official collection of the *Bundesgerichtshof* "Federal Supreme Court" vol. 9, at 146; vol. 11 at 173); *Roxin*, *Strafrecht Allgemeiner Teil*, supra note 78, p. 367; *Jescheck & Weigend*, *Lehrbuch des Strafrechts Allgemeiner Teil*, supra note 67, at 297; *Wessels & Beulke*, *Strafrecht Allgemeiner Teil*, supra note 62, at 74.

<sup>96</sup> Code of Crimes against International Law adopted by both Chambers of the German Parliament, entered into force on 30 June 2002 "*Völkerstrafgesetzbuch*". The text of the Code, as adopted is to be found in the Official Gazette of Germany (*Bundesgesetzblatt* 2002, No. 42 at 2254).

<sup>97</sup> *Triffterer*, 'Genocide. Its Particular Intent', supra note 90, at 405.

“possible”. Even if the perpetrator is not fully aware that the consequences might occur, he still can be held criminally responsible for intentional conduct in the form of *Absicht*. Hence, the degree of probability is unimportant in this matter. The following example shall illustrate this issue: If A fires a rifle in the direction of B who stands a mile away, A may know perfectly well that the chance of hitting B is only one in a thousand; A may fully expect to miss him; nevertheless A intended to hit B (in the form of *dolus directus* first degree) if A desires to do so; if it was A’s purpose.

Strictly speaking, *Absicht* as a form of *Vorsatz* (*dolus directus* of first degree) is not identical with *Absicht* as a “further” or “specific” mental element in some offences provided for in the *StGB* which requires (*besonderes subjektives Tatbestandsmerkmal*, or *besondere Absicht*).<sup>98</sup> That is to say, *Absicht* not only occurs as one of the three types of *Vorsatz*, but it also occurs as a special subjective element in the provision of some criminal offences.<sup>99</sup> A requirement for *besondere Absicht* expressly appears in the case of theft “intention of appropriation” § 242 StGB; or “the intention to benefit unjustly” in case of fraud (§ 263 StGB). In these types of criminal offences the requirement of *Absicht* encompasses further consequence beyond the core conduct or result that constitutes the *actus reus* of the offence. In other words, these offences have an extended mental element (*überschiessende Innentendenz*).<sup>100</sup> That is to say, in such offences, a result has to be only intended and not yet to be achieved. This modality of crimes is quite often chosen by the legislators in order to criminalize acts which because of this additional and therefore particular intent are especially dangerous.<sup>101</sup> Hence, these types of crimes which require a specific *absicht* could be categorized as “ulterior intent crimes”. The same modality of crimes is provided for in § 6 of the German Code of Crimes against International Law, where the actual destruction of a group as such, is not a material element of the crime of genocide. The cardinal question in this type of offences is that whether the perpetrator in carrying out the enumerated acts which may constitute the material element of genocide possessed the genocidal intent.<sup>102</sup>

<sup>98</sup> *Wessels & Beulke*, *Strafrecht Allgemeiner Teil*, supra note 62, at 74.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Wessels & Beulke*, *Strafrecht Allgemeiner Teil*, supra note 62, at 44; *Lenckner* in *Schönke & Schröder*, *Strafrecht Kommentar*, supra note 57, at 151.

<sup>101</sup> *Triffterer*, ‘Genocide: Its Particular Intent’, supra note 90, at 402.

<sup>102</sup> In determining that genocide occurred at *Srebrenica* the Krstić Appeals Chamber had this to say:

“[. . .] the cardinal question is whether the intent to commit genocide existed. While this intent must be supported by the factual matrix, the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted group. Even where the method selected will not implement the

The *BGH* opines that *Absicht* has to be interpreted “according to the legal nature of the criminal offence and according to the purpose of deterrence the legislator pursued”.<sup>103</sup> Yet, *Absicht* sometimes is interpreted by the courts as *dolus directus* of second degree. But, this is only where *Absicht* is not constitutive of the offence in question.<sup>104</sup> Yet, in case of murder, where *Absicht* is considered as a legal ingredient of the offence, (where *Absicht* gives the offence its specific character), *Absicht* has to be applied in the strict sense.<sup>105</sup>

### B. *Dolus directus* of second degree or *dolus indirectus*

The perpetrator acts with *dolus directus* of second degree, if he *knows* that his conduct will fulfil the legal elements of an offence.<sup>106</sup> In this form of *Vorsatz* the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator’s primary purpose. It may be an undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result.<sup>107</sup> Yet, in cases of *dolus directus* of second degree the intellectual element (*knowledge*) dominates, whereas the element of *wilfulness* is weak.<sup>108</sup> It is not required that the perpetrator desires to bring about the side-effect in question; knowledge is sufficient.<sup>109</sup> In such cases the perpetrator may be indifferent or may even regret the result. This may be clarified by the following example: “X” places a time-bomb on an aircraft. His purpose was to cause loss of property and make an insurance claim. He is sure that a fatal crash will result from his conduct, and the crew will die, although this is not his motivation. If he still acts, X will be deemed to have wanted these killings also but, under the category of *dolus directus* of second degree.<sup>110</sup>

perpetrator’s intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.”

See *Prosecutor v. Radislav Krstic*, (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 32.

<sup>103</sup> *BGHSt* 4, 108; see also *BGHSt* 9, 144, and vol. 13 at 221.

<sup>104</sup> *Roxin*, *Strafrecht Allgemeiner Teil*, supra note 78, at 370, with references to other scholarly opinions.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Cramer*, in *Schönke & Schröder*, *Strafgesetzbuch: Kommentar*, supra note 91, at 264. “*Direkter Vorsatz liegt vor, wenn der Taeter sicheres Wissen davon hat, dass sein Verhalten die Voraussetzungen eines Strafgesetzes erfüllt*”; *Lackner*, *Strafgesetzbuch*, supra note 91, p. 96; *Wessels & Beulke*, *Strafrecht: Allgemeiner Teil*, supra note 62, at 213.

<sup>107</sup> *Jescheck & Weigend*, *Lehrbuch des Strafrechts Allgemeiner Teil*, supra note 67, at 298 et seq.

<sup>108</sup> *Krey*, *Deutsches Strafrecht Allgemeiner Teil*, supra note 57, vol. 2, at 113; *Jescheck & Weigend*, supra note 67, at 299.

<sup>109</sup> *BGHSt* 18, 264.

<sup>110</sup> In this case *dolus directus* first degree does not apply because A did not aim for the crew’s death. This fatal result was neither his final goal nor a necessary interim goal.

On closer inspection, however, it is difficult to ascertain the degree of *Vorsatz* in cases where the perpetrator views the incidental consequences (the death of the crew) as desirable. One opinion is that if the result is not the perpetrator's goal, although he is sure about its occurrence, it cannot constitute first degree intent, even though the incidental consequence is desirable.<sup>111</sup> Conversely, if the perpetrator while carrying out a criminal conduct desires certain incidental consequence in addition to the primary desired consequence, he is seen to possess two *Absicht* (intent of the first degree). That is to say that "he strives for another result as well as for the alleged incidental consequences (both being his goals)."<sup>112</sup>

Most notably, the *BGH* argued that a perpetrator, who foresees a consequence of his conduct as certain, is considered to act *wilfully* with regard to this consequence, even if he regrets its occurrence.<sup>113</sup> The Court also asserted that *wilfulness* always exists on the part of the offender where the consequences are foreseen as natural or certain. That is to say, the element of *wilfulness* is deemed to be present by definition.<sup>114</sup>

### C. *Bedingter Vorsatz* or *dolus eventualis*<sup>115</sup>

Generally speaking, *bedingter Vorsatz* is considered to be the usual minimum level of culpability for criminal liability, and the highest disputed form of *Vorsatz* in German criminal law.<sup>116</sup> The most controversial question is what

<sup>111</sup> *Krey*, *Deutsches Strafrecht Allgemeiner Teil*, vol. 2, supra note 57, at 115.

<sup>112</sup> *Ibid.*; *Roxin, Strafrecht*, supra note 78, § 12, at 367 (*Absicht* [muss] nicht das Motiv, den Endzweck [. . .] bezeichnen, sondern liegt auch vor, wenn der erstrebte Erfolg weiteren oder anders gearteten Zielen des Täters dient).

<sup>113</sup> *BGHSt* 21, 283 (vol. 21, at 283).

<sup>114</sup> *Ebke & Finkin*, Introduction to German Law, supra note 53, at 388.

<sup>115</sup> *Dolus eventualis* is a well known concept in most of the Continental law systems. This type of *Vorsatz* is recognized under the Italian criminal law as *dolo eventuale*. Pursuant to Article 43 of 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). According to the Italian law, 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, see *Finbarr McAuley & J. Paul McCutcheon, Criminal Liability* (London: Sweet & Maxwell, 2000), pp. 301–3.

<sup>116</sup> The term "*bedingter Vorsatz*" (conditional intent) is, however, misleading, because it is not the intent which is conditional; on the contrary, a conditional has not yet reached the threshold of "intent", see *Roxin, Strafrecht Allgemeiner Teil*, supra note 78, at 374. "*Dolus eventualis*, and especially its element of "will", are still a matter of dispute. On the one hand, case law concerning this element is inconsistent. . . . On the other hand, a considerable number of penal law scholars contend that *dolus eventualis* requires only an intellectual element, which most of them

distinguishes *dolus eventualis* from conscious negligence (*bewusste Fahrlässigkeit*).<sup>117</sup> In other words how can we draw the precise boundary between *bedingter Vorsatz* and *bewusste Fahrlässigkeit*? In addition to that, there is a need to distinguish between *dolus eventualis* from the two forms of *dolus directus*, particularly, with regard to some definition of offences which requires that the offender act “knowingly” or that he aim at a certain result.<sup>118</sup>

In principle, and in order to avoid any uncertainties or ambiguities which may shadow the present discussion, we have to concede that *dolus eventualis* the same as *Absicht* and *dolus indirectus* should comprise the two components of *Vorsatz* “will” and “knowledge”. Thus, in case one of these components is missing, *dolus eventualis* no longer exists on the part of the perpetrator.<sup>119</sup>

George Fletcher observes that the German law includes *dolus eventualis* within the contours of intending a particular result. *Dolus eventualis*, as perceived by Fletcher, is defined as “a particular subjective posture toward the result. The tests . . . vary; the possibilities include every thing from being ‘indifferent’ to the result, to ‘being reconciled’ with the result as a possible cost of attaining one’s goal.”<sup>120</sup> Fletcher notes that *dolus eventualis* is considered an aspect of intention, not of recklessness. He concludes, recklessness (or ‘conscious negligence’ as it is called in German and Soviet law) requires an affirmative aversion to the harmful side-effect.<sup>121</sup>

The *BGH* Leather Belt case decided in 1957 is illustrative in this manner.<sup>122</sup> 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 his resistance. For fear of killing O, they first tried to stun

define as foresight of “concrete possibility” see *Heribert Schumann*, ‘Criminal Law’ in *Ebke & Finkin* (eds.), Introduction to German Law, supra note 53, at 389–90.

<sup>117</sup> Sometimes referred to as “*luxuria*”, *Wessels & Beulke*, Strafrecht Allgemeiner Teil, supra note 62, at 216.

<sup>118</sup> *Schumann*, ‘Criminal Law’, supra note 116, at 389.

<sup>119</sup> Still the perpetrator could be hold criminally responsible and liable for being conscious negligence.

<sup>120</sup> *Fletcher*, Rethinking Criminal Law, supra note 90, pp. 445–46; See also *Mihajlo Acimovic*, ‘Conceptions of Culpability in Contemporary American Law’, 26 Louisiana Law Review (1965) 28, 48 (describing a Romanist law test according to which the perpetrator acted intentionally if he could have said to himself: It may be either so or different, it may happen either so or differently; anyhow I shall act.) For a different opinion see *Paul T. Smith*, ‘Recklessness in Dolus Eventualis’ 96 South African Law Journal (1979) 81 (criticizing South African law to the extent that it interprets *dolus eventualis* as indifference rather than foresight).

<sup>121</sup> George Fletcher, Rethinking Criminal Law, supra note 90, at 446. This concept of recklessness seems similar to the Model Penal Code’s, which requires conscious awareness of a substantial risk.

<sup>122</sup> *BGHSt* 7, 363, quoted in *Krey*, Strafrecht Allgemeiner Teil, vol. 2, supra note 57, at 117.

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.<sup>123</sup> 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’ (*fuere moeglich halten*) and ‘approves them’ (*‘billigen’, ‘billigend in Kauf nehmen’*).<sup>124</sup> The *BGH* opines that both A and B accepted the fact that O could die while strangling him and therefore approved this result.

Even though, “approval of the result” could be seen as a decisive criterion in distinguishing between *dolus eventualis* and conscious negligence, the employment of this term by the *BGH* is misleading. The reason is that approving the unlawful consequence implicitly requires that this consequence is desired by the perpetrator. The Court went further asserting that even *undesired* result could be approved of.<sup>125</sup>

In Germany, a court will not make a finding of *dolus eventualis* if the accused, in addition to being uncertain whether his conduct would lead to the specific injury suffered by the victim, sincerely believed or hoped that this injury would not occur. At this case he acts negligently (negligent conduct despite the apparent possibility of harm). The sole fact that the accused has taken a particularly great risk (and even intended to cause a lesser form of harm, e.g., intended to injure, but not to kill the victim) will not suffice for a conviction for intentional homicide based on a finding of *dolus eventualis*, even if the accused’s act was in fact highly dangerous and a neutral observer would not have had any doubt that the victim’s life was placed at great risk, and if the accused had the *general* notion that his act was probably unlawful.<sup>126</sup>

<sup>123</sup> *Ibid.*

<sup>124</sup> BGHSt 7, 368–370.

<sup>125</sup> *Krey*, Strafrecht Allgemeiner Teil, vol. 2, supra note 57, at 119.

<sup>126</sup> *Bundesgerichtshof* (German Supreme Court; hereinafter refer to as “*BGH*”), Case No. 5 StR 623/95 in “*Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*” (hereinafter “*NStZ-RR*”) p. 323 (East German soldier shooting (without direct intent to kill) refugee at the Berlin Wall pursuant to standing orders “to annihilate violators of the border” not guilty of homicide; officer reading said standing order to his troops on a daily basis not guilty of instigation to commit homicide); *BGH* 5 StR 139/95 in “*Entscheidungen des Bundesgerichtshofs in Strafsachen*” (Official Reporter of the German Supreme Court, decisions in criminal matters; hereinafter “*BGHSt*”) vol. 41 pp. 149–152 (same; also no co-perpetration by soldiers acting independently); *BGH* 5 StR 88/93 in *Neue Zeitschrift für Strafrecht*” (hereinafter “*NStZ*”) 1993 pp. 488–489; no instigation or aiding and abetting in acts of others); *BGH* 2 StR 513/94 (same; also no liability for assault/battery if direct order to shoot given on the spot was not unlawful on its face); *BGH* 2 StR 329/00 at: <<http://www.hrr-strafrecht.de/hrr/2/00/2-329-.php3>> (no intentional homicide in pre-wall case of shootings at the intra-German border); generally, see further *BGH* 4 StR 271/99 in “*Neue Zeitschrift für Verkehrsrecht*” (hereinafter “*NZV*”) pp. 88–89; *BGH* 4 StR

Recently, *dolus eventualis* was discussed by the Federal Supreme Court in the Doner Shop Case.<sup>127</sup> In this case the accused disliked foreigners, and in order to drive some Turkish people out of Germany, he set their doner kebab shop on fire. The consequences of the accused's act was the complete destruction of the building concerned, and the injury of Y who was at the shop by that time. The Court held that intention to kill would exist if the accused 'considered the occurrence of the proscribed result [i.e. the death of K] to be a not entirely distant possibility and, further, [if] he approved of it or reconciled himself to it for the sake of attaining his desired goal' that is the removal of the Turks from Germany. If, on the other hand, the Court continued, the accused had 'earnestly, and not merely in a vague way, relied on the non-occurrence of a fatal result', he was to be acquitted of attempted homicide as he lacked the necessary intention to commit it. Yet, one might deduce that *dolus eventualis* as defined by the Federal Supreme Court has to encompass two elements, namely, knowledge of a mere possibility of the proscribed result, and a volitional element which does not reach the threshold of wilfulness. *Dolus eventualis*, however, was treated differently according to the following theories:

### 1. Consent and approval theory

This theory is applied by the courts,<sup>128</sup> and is usually referred to as the "theory on consent and approval" (*Einwilligungs- und Billigungstheorie*).<sup>129</sup>

The majority of German legal scholars who ascribe 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 fulfil the legal elements of the offence.<sup>130</sup> Another way of putting the point is to say the offender must "reconcile himself" (*sich abfinden*) to the prohibited result.<sup>131</sup>

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.<sup>132</sup>

642/95 in "Strafverteidiger" (hereinafter "StV") 1997 p. 7; BGH 4 StR 275/96 in NStZ-RR 1996 pp. 355–356; BGH 4 StR 258/86 in NStZ 1987 pp. 284–285.

<sup>127</sup> BGH NStZ 2000, 165 quoted in Greg Taylor, 'Concepts of Intention in German Criminal Law', 24 Oxford Journal of Legal Studies (2004) 99.

<sup>128</sup> BGHSt 36, 1; 44, 99; BGH NStZ (Neue Zeitschrift fuer Strafrecht) 1999 (year), p. 507; BGH NStZ 2000, 583.

<sup>129</sup> Wessels & Beulke, Strafrecht Allgemeiner Teil, supra note 62, at 76.

<sup>130</sup> Roxin, Strafrecht Allgemeiner Teil, supra note 78, at 376.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

The prevailing opinions as well as the courts' view show that in case of *dolus eventualis* both knowledge and wilfulness must be present. As for the requisite component of knowledge, it is, however, sufficient that the offender foresees the consequences as "possible"; as for the component of wilfulness, the offender has to "approve" the result or "reconcile himself" with the result. But "approving the result" as a requirement for the volitional element in case of *dolus eventualis* does not mean that the result is desirable to the perpetrator. The *BGH* clarified this issue asserting that this form of *Vorsatz* (*dolus indirectus*) may also be assumed. The Court considered that the defendant approved the result, where in order to realise the pursued goal, he accepted the fact that his conduct could bring about the actually undesired result.<sup>133</sup> The *BGH* went on drawing the borders between *bedingter Vorsatz* (*dolus eventualis*) and *bewussten Fahrlässigkeit* (conscious negligence) asserting that the perpetrator who trusts in the non-occurrence of the undesired result is merely acting with *conscious negligence*, but not with *dolus eventualis*.<sup>134</sup>

## 2. Indifference theory "Gleichgültigkeitstheorie"

According to the "indifference theory", the volitive element of *dolus eventualis* is present, if the offender is indifferent to the occurrence of the result which he foresees as possible.<sup>135</sup> It could be seen that this theory is similar to the "consent and approval theory". In the Leather Belt Case, 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.

## 3. The Intellectual theory

According to the prevailing theories, it is by means of the component of wilfulness that *dolus eventualis* is distinguished from conscious negligence. There are, however, other theories on *dolus eventualis* discussed among scholars, which refrain from the component of wilfulness. Rather, they restrict *dolus eventualis* to the intellectual component. Moreover, they negate the existence

<sup>133</sup> *BGH* St 7, 363, pp. 369, 370.

<sup>134</sup> *Ibid.*

<sup>135</sup> The indifference theory is supported by *Cramer & Sternberg-Lieben* in: *Schönke-Schröder, Strafgesetzbuch Kommentar*, supra note 79, at 268 et seq. "*dolus eventualis* (ist) gegeben, wenn der Täter die Tatbestandsverwirklichung für möglich haelt und aus Gleichgültigkeit gegenueber dem geschuetzten Rechtsgut in Kauf nimmt." *Ibid.*, at 269.

of a conscious form of negligence. From this point of view, a distinction between *dolus eventualis* and negligence is unnecessary.

#### 4. *The Possibility theory*

The “possibility theory” requires that the offender must recognize a substantial or a considerable possibility that the result could materialize.<sup>136</sup> In other words, if the defendant foresees or recognises the result as ‘concretely possible’ he acts with *dolus eventualis*.<sup>137</sup> 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* can not be understood as acting with both knowledge and wilfulness. Rather, it eliminates the intent’s component of ‘will’. However, it is doubtful whether the element of wilfulness is dispensable. Firstly, *Vorsatz* should comprise two components, an intellectual and a volitional component. Secondly, according to this theory there are no borderlines to be drawn between *dolus eventualis* and conscious negligence. The following case shall 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?<sup>138</sup>

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.<sup>139</sup> According to the possibility theory, even though, X had seriously trusted the non-occurrence 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*).

#### 5. *The Probability theory*

Contrary to the “possibility theory”, the “probability theory”, requires awareness of a higher degree of risk, particularly, the defendant must have consid-

<sup>136</sup> *Schmidhäuser*, Strafrecht Allgemeiner Teil, (1975) 89; *Jakobs*, Strafrecht Allgemeiner Teil, (Berlin, New York: de Gruyter, 1991) 269, 270.

<sup>137</sup> See *Lenckner*, in: *Schönke-Schröder*, Strafgesetzbuch, supra note 57, at 240; *Jescheck & Weigend*, Lehrbuch des Strafrechts, Allgemeiner Teil, supra note 67, at 302.

<sup>138</sup> *Krey*, Strafrecht Allgemeiner Teil, vol. 2, supra note 57, at 125.

<sup>139</sup> *Ibid.*

ered the prohibited result to be likely.<sup>140</sup> According to this theory, an offender acts with *dolus eventualis*, if he foresees that the occurrence of the prohibited result is “probable.”<sup>141</sup> Like the “possibility theory”, the “probability theory” does not refer to any element of wilfulness and is therefore subject to the same criticism. The “probability theory” has also been criticized for using a very vague criterion.<sup>142</sup> “Probable” is defined to be “more than possible, but less than predominantly probable”.<sup>143</sup> The definition reveals its vagueness, nevertheless, the probability theory would lead to the same conclusion adopted by the *BGH* in the Leather Belt Case.

## 6. Frank Formula

Most notably, the *Frank Formula*<sup>144</sup> is not considered to be a proper definition of *dolus eventualis* but rather a means to inquire into the mental states of an offender.<sup>145</sup> According to Frank, if the perpetrator is aware of the possibility of the circumstance or consequence, then the proper inquiry is the following:

How would the perpetrator have behaved with sure knowledge of the circumstances of the offence? . . . If one comes to the result that the perpetrator would also have acted with certain knowledge, then . . . *Vorsatz* is to be affirmed; if one comes to the result that with certain knowledge he would have refrained from action, then *Vorsatz* is to be rejected.<sup>146</sup>

Frank’s hypothetical test was followed by the Federal High Court in a case involving the crime of false accusation. The critical point in this case was whether in circulating a report which falsely charged a government official of accepting a bribe, the defendant was reckless with regard to its falsity. Addressing this point the Federal High Court ruled that:

*Vorsatzlich* action . . . is present when someone not only doubts the correctness of his suspicion, but beyond that, is positive that he would also have cast suspicion with knowledge of its incorrectness. By contrast, if he would have refrained from casting suspicion if its falseness were known to him, then he is burdened by no *vorsatzlich* action in spite of his doubts.<sup>147</sup>

<sup>140</sup> *Wessels & Beulke*, Strafrecht Allgemeiner Teil, supra note 62, at 74.

<sup>141</sup> *Hellmuth Mayer*, Strafrecht Allgemeiner Teil, (Stuttgart: Kohlhammer, 1967) 121; see also *Jakobs*, Strafrecht Allgemeiner Teil, supra note 136, at 270.

<sup>142</sup> See the possibility theory at the present study.

<sup>143</sup> *H. Mayer*, Strafrecht Allgemeiner Teil, (Stuttgart: Kohlhammer, 1967) 121.

<sup>144</sup> *Reinhard von Frank*, Strafgesetzbuch, (Tübingen : Mohr 1931), § 59.

<sup>145</sup> *Roxin*, Strafrecht Allgemeiner Teil, supra note 78, at 385: “*Erkenntnismittel zur Feststellung des Vorsatzes*”.

<sup>146</sup> *Michaels*, ‘Acceptance: The Missing Mental State’, supra note 88, at 1027.

<sup>147</sup> *Ibid.*

Being aware of the restrictive nature of Frank's formula which does not exhaust the possibilities of *bedingter Vorsatz*, the Federal High Court concluded that in the false accusation context, this formula would draw a clear line that would accurately distinguish the indisputably punishable cases.<sup>148</sup>

To conclude, and according to the established jurisprudence of the Federal Supreme Court (*BGH*), acting with *dolus eventualis* requires that the perpetrator perceive the occurrence of the criminal result as possible and not completely remote, and that he endorse it or at least come to terms with 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 accepts such a result. The volitional element denotes the borderline between *dolus eventualis* and advertent or conscious negligence.<sup>149</sup>

## VI. *Fahrlässigkeit* or (negligence)

According to the German Criminal Code (*deutsches Strafgesetzbuch – dStGB*), negligence (*Fahrlässigkeit*), however gross (*fahrlässige Tötung*), does not carry criminal responsibility unless a particular provision provides for its punishment.<sup>150</sup> This is clear from the words of section §15 of the Criminal Code *StGB* which provides “*Strafbar ist nur vorsätzliches Handeln, wenn nicht das Gesetz fahrlässiges Handeln ausdrücklich mit Strafe bedroht*”, “only inten-

<sup>148</sup> *Ibid.* It is to be noted that there are few more theories on *dolus eventualis* and its distinction from negligence. However, due to the lack of space, they could not be discussed in detail in this study. For instance, the “theory of the non-shielded danger” “*Theorie des nicht abgeschirmten Risikos*” by Herzberg, see Herzberg, 26 *Juristische Schulung* 249 (1986), This theory tries to solve the problem via the element of causation. *Dolus eventualis* requires that the offender recognizes the danger and foresees the result as possible. Moreover, it must be a matter of luck and chance whether the result will occur or not. If, however, the danger was shielded in any way, the offender is only criminally liable for negligence. For example, if a teacher allows his students to swim in a dangerous river, ignoring or failing to notice a warning sign, and some students are injured, he is criminal liable for causing bodily harm by negligence.

The “theory of the non-manifested will of avoidance” by Armin Kaufmann, according to this theory, an offender acts with *dolus eventualis*, if he took no efforts to avoid the occurrence of the result. See Armin Kaufmann, *Zeitschrift fuer die gesamte Strafrechtswissenschaft* 1958, 64, 73.

<sup>149</sup> BGHSt 36, 1–20 [9–10].

<sup>150</sup> The advantage of this rule of construction in the *dStGB* and most of the Continental jurisdiction is that the legislator could simplify the code by omitting references to intentional conduct. Accordingly, where a provision is silent on the form of culpability, it would be read as requiring an intentional conduct.

tional acts are punishable, unless the law expressly threatens negligent acts with punishment.”<sup>151</sup>

Although not defined by the *StGB*, criminal negligence, is defined as conscious or unconscious deviation from the required standard of care which causes a result prohibited by criminal law: this may occur either (a) because the actor wrongfully does not consider the consequences of his conduct (unconscious negligence); or (b) if the actor envisaged their occurrence, because he wrongfully relied on the idea that the result would not occur (conscious negligence/culpable negligence/*culpa gravis*).<sup>152</sup>

In 1921 the Leipzig Supreme Court found that Crusius, a captain of the German Army, was guilty of causing ‘death through culpable negligence’ (*fahrlässige Tötung*). In this case the accused acting under erroneous assumption that his superior Major-General Stenger, had verbally ordered the killing of all French wounded, he (the accused) passed on this alleged order to his company. The Court ruled that:

“The act of ‘will’ which in the further course of events caused the objectively illegal outcome . . . included an act of *carelessness* which ran contrary to his duty, and neglect of the consideration required in the situation at hand which was perfectly reasonable to expect from the accused. Had he applied the care required of him, he would not have failed to notice what many of his men realized immediately, namely that the indiscriminate killing of all wounded represented an outrage, and by no means justifiable war manoeuvre.”<sup>153</sup>

The Court went on saying that:

“Captain Crusius was certainly familiar with the provisions of the field operating procedures which require a written order as the basis for troop command by the higher troop leaders, as well as the drill manual which makes the written order a rule, especially concerning orders for brigades and higher. This circumstance is also not entirely without significance, particularly in view of the personality of the accused who was described as a diligent, zealous, and benevolent officer. In view of the accused’s background and personality, he should have anticipated the illegal outcome which was easily demonstrated even if his mental and emotional states at the time were to be fully taken into consideration.”

<sup>151</sup> See § 15 StGB.

<sup>152</sup> *Jescheck & Weigend*, Lehrbuch des Strafrechts, Allgemeiner Teil, supra note 67, at 568.

<sup>153</sup> Case is reproduced in: Deutscher Reichstag, Stenographische Berichte, at 2568 ff.; see also *Claud Mullins*, The Leipzig Trials: An Account of the War Criminals’ Trials and a Study of German Mentality (London 1921) at 151 ff.

“According to the established jurisprudence of the Federal Supreme Court on the delimitation of *dolus eventualis* and conscious/advertent negligence, the perpetrator is acting intentionally if he recognizes as possible and not entirely unlikely the fulfilment of the elements of an offence and agrees to it in such a way that he approves the fulfilment of the elements of the offence or at least reconciles himself with it in order to reach the intended result, even if he does not wish for the fulfilment of the elements of the crime; conscious negligence means that the perpetrator does not agree with the fulfilment of the elements of the crime – which he recognizes as possible – and seriously – not only vaguely – trusts that the fulfilment will not come about.”<sup>154</sup>

Having examined the different forms of *Vorsatz* in German criminal law the following section will examine and discuss the grounds of excluding intention or guilt namely, mistake of fact, and mistake of law.

## V. Grounds of excluding the *Vorsatz* or *Schuld*

Generally speaking, the German Criminal Code (*dStGB*) distinguishes between two kinds of mistakes, namely: mistakes of fact relating to the elements of the offence (*Tatbestandsirrtum*, § 16), and mistakes of law relating to the unlawfulness of the act (*Verbotsirrtum*, § 17).<sup>155</sup> The former, in so far as they correspond the legal element of the crime in question, exclude the criminal intent (*Vorsatz*) regardless of whether they are reasonable, whereas the latter do not.<sup>156</sup> Mistake of law, however, may constitute a ground of excluding culpa-

<sup>154</sup> Confirmed in BGH v. 7. 6. 1994–4 StR 105/94, reproduced in *Strafverteidiger* (StV) 1994, 654 (and BGH v. 22. 2. 2000 – 5 StR 573/99, reproduced in *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport* (NSStZ-RR) 2000, 165), quoted in *Prosecutor v. Tihomir Blaškić*, Appeals Judgment, supra note 1, footnote 73.

<sup>155</sup> Thus, German Criminal Code explicitly departs from what is referred to in the German literature as the theory of intent (*Vorsatztheorie*). This theory proposes to treat knowledge of unlawfulness and knowledge of other elements of a crime equally (e.g., factual elements) ‘equal treatment doctrine’. Most notably this theory was overruled by § 17 of the StGB. For further details on the *Vorsatztheorie* and the ‘equal treatment doctrine’ see *Gunther Arzt*, ‘The Problem of Mistake of Law’, *Brigham Young University Law Review* (1986) 711, 714–716. In Common law systems, mistake of fact is recognised as a defence. Where the law requires intention or recklessness with respect to some element in the *actus reus*, a mistake, whether reasonable or not, will negate the *mens rea* and therefore will be considered as an excuse. Where the law requires only negligence, then only a reasonable mistake can afford a defence since an unreasonable mistake is itself a negligent act.

<sup>156</sup> *Gunther Arzt*, ‘Ignorance or Mistake of Law’, 24 *The American Journal of Comparative Law* (1976) 646, 649. “In German, unlike Anglo-American law a mistake of fact, whether rea-

bility (*Schuldausschließungsgrund*). That is to say, German criminal law does not follow the principle “ignorance of the law is no defence” (*error iuris nocet*) which is widely recognized in common law countries. Hence, one must carefully distinguish between a factual mistake,<sup>157</sup> and a mistake of law.<sup>158</sup>

#### A. The basic distinction between mistake of fact & mistake of law

As mentioned above, German criminal law’s first principle in treating mistake is the explicit distinction between mistake of fact which negates the defendant’s intent, and mistake of law which does not exclude intent but the culpability.<sup>159</sup>

Generally speaking, mistakes of fact occur where the defendant mistakes one person or object for another, whereas in case of a mistake of law, the defendant is fully aware of all circumstances and the conduct he is carrying out. In the latter case, the defendant believes that his conduct does not constitute an offence; that the offence does not count in the given circumstances; or that the

sonable or not, precludes intent”; *Nigel G. Foster*, *German Law and Legal System*, (London: Blackstone Press Limited, 1993) 171.

“Mistakes of fact includes the concept of intent, and thus the grounds of justification of consent or excuse (*Irrtum über Entschuldigungsgründe*). Thus, if intent is a necessary element of the crime, mistake of fact, whether reasonable or not, precludes convictions for intentional crimes, which are the most common traditional type of crime. The only other ground for criminal conviction under these circumstances is negligence, in those exceptional cases where the Criminal Code expressly prescribes punishment for negligent behaviour and does not include intent as a necessary element of the crime.”

<sup>157</sup> Formerly, mistake of facts and mistake of law were treated equally. The so-called “*Vorsatztheorie*” (theory of intent) proposed that the knowledge of the factual components of the offence and knowledge of the legal prohibition as such are equal elements within the concept of intent. An offender who lacks the knowledge of the legal prohibition has no consciousness of wrongdoing “*Unrechtsbewusstsein*” see, *Arzt*, ‘Ignorance or Mistake of Law’ supra note 154, at 653–4. This theory is, however, overruled by § 17 dStGB which provides that not the intent, but the culpability/guilt is excluded.

<sup>158</sup> The *Reichsgericht* (court of the Reich) did not distinguish between mistake of fact and mistake of law; failure to know the law meant absence of intent. The mistake of law (error as to prohibition) was acknowledged by the Great Senate of the BGH in 1952 and was subsequently introduced in the Criminal Code as § 17 dStGB. BGH 2, 194 (201); *Jescheck & Weigend*, supra note 67, at 452.

<sup>159</sup> This issue could be easily understood by thinking of the insanity defence. As framed in most United States jurisdictions, that defence operates not by negating the intent element in the definition of an offence, but as an independent ground for denying culpability. The parallel in the context of the German mistake analysis is that mistake of law operates as an independent denial of culpability (*Schuld*). Most notably some States have narrowed the scope of the insanity defence by declaring it to be a defence only if it negates the intent element in the definition of the crime in question. For example, § 75–2–305 (Supp. 1985) of the Utah Code. This Code conceptualises the insanity defence as one that excludes intent rather than as a separate defence, see *Arzt* ‘The Problem of Mistake of Law’, supra note 155, at 714, footnote 8.

offence does not fall into the scope of a criminal provision.<sup>160</sup> That is to say, the defendant is not mistaken about the existence of a (purely) objective element with respect to the crime in question. In other words, mistake of law occurs in situations where the defendant, though aware about all relevant details of the offence, still acts under the (erroneous) assumption that his conduct is within the law.<sup>161</sup> This error cannot exclude the intent since the defendant acts knowingly and intentionally with respect to all objective elements of the offence, it may, however, affect the culpability/guilt of the defendant concerned, but in a distinct way. If the error was “avoidable”, a mitigation of sentence may be considered, whereas if the error was unavoidable, culpability (*Schuld*) of the defendant concerned shall be completely excluded with the effect that the defendant will not be convicted.<sup>162</sup>

#### B. *Tatbestandsirrtum* or mistake of fact

A factual mistake excluding the intent is given where the perpetrator lacks knowledge of a physical legal element of the respective criminal offence. This is set out in §16 (1) of the *StGB*:

“*Wer bei Begehung der Tat einen Umstand nicht kennt, der zum gesetzlichen Tatbestand gehört, handelt nicht vorsätzlich. Die Strafbarkeit wegen fahrlässiger Begehung bleibt unberührt.*” “Whoever, while committing the criminal offence, has no knowledge about a circumstance being part of the legal elements, does not act intentionally. The criminal liability for negligent action remains unaffected.”<sup>163</sup>

The knowledge of a “circumstance” as it is employed in § 16 of the *StGB* means that the offender was not aware of at least one of the objective elements of the offence.<sup>164</sup> It is required that the offender did not even take into account the possibility that an objective element was given.<sup>165</sup>

The following example shall illustrate this issue: A shot dead a human being under the assumption that it is a scarecrow. In this case A is not crimi-

<sup>160</sup> *Foster*, German Law & Legal System, supra note 156, at 17.

<sup>161</sup> Matthias Neuner, ‘General Principles of International Criminal Law in Germany’, in *Matthias Neuner* (ed.), National Legislation Incorporating International Crimes, (Berlin: Berliner Wissenschafts-Verlag 2003) 105, 120.

<sup>162</sup> *Ibid.*

<sup>163</sup> § 16 subsection I, phrase 1 StGB.

<sup>164</sup> *Wessels & Beulke*, Strafrecht Allgemeiner Teil, supra note 62, at 82.

<sup>165</sup> *Ibid.*

nally liable for intentional killing. If A, however, considered the risk that the scarecrow could be a human being, he would be liable for intentional killing in the form of *dolus eventualis*.<sup>166</sup> That is to say, only full ignorance of one or more material elements of the respective offence can be considered as a mistake of fact.

Most notably, German criminal law recognizes two distinct natures of material elements, namely: *descriptive* and *normative* elements.<sup>167</sup> Descriptive legal elements of the offence describe things or events which are perceivable by means of the human senses. In this case the perpetrator must obviously know that a body which is being shot at is not a scarecrow but a human being. On the contrary, normative elements refer to terms which cannot be perceived, but which need legal evaluation, for example third party's property in case of theft. In this case mere factual knowledge does not suffice.<sup>168</sup> Rather, the defendant has to correctly recognize the socio-legal significance of the material element in question; at least like a reasonable man (*Parallelwertung in der Laiensphäre*) (so-called 'parallel/comparative valuation in the sphere of a layman').<sup>169</sup> Accordingly, it is not required that the offender goes into complicated legal analysis, but he must understand the legal element from a layman's point of view.<sup>170</sup>

A commonly used example is the beer mat case, the number of drinks consumed in a pub is counted by drawing signs on the beer mat. Thus,

<sup>166</sup> *Roxin*, *Strafrecht Allgemeiner Teil*, supra note 78, at 406.

<sup>167</sup> It is rare to find a material element of a purely descriptive character. Most of them have a double nature being both descriptive and normative. For instance, within criminal law the term "human being" requires a value judgment in order to determine at white time human life begins and at white time it ends. Hence, the beginning and the end of human life mark two borders (at what time human life begins and at what time it ends) this is considered as a normative legal element which requires a value judgment. *Krey* has observed that the legal term "taking away" as employed in § 242 StGB (theft) is of a completely normative nature, and accordingly, it does need of a value judgment, see *Krey*, *Deutsches Strafrecht: Allgemeiner Teil*, supra note 57, at 145.

<sup>168</sup> "This is due to the psychological experience that the perception of a fact by the human senses must be transformed into a conceptual picture in order to be perceived as a definitional element of the crime." See *Albin Eser*, 'Mental Elements-Mistake of Fact and Mistake of Law' in *Antonio Cassese, Paola Gaeta, & John R.W.D. Jones* (eds.), *I The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 889, 921.

<sup>169</sup> This is the prevailing scholarly opinion which is followed by the *BGH* (Federal Supreme Court of Justice) *BGHSt* 3, 248, 255. See *Krey*, *Deutsches Strafrecht: Allgemeiner Teil*, supra note 57, at 141 footnote 125.

<sup>170</sup> *BGHSt* 3, 248 (255); 4, 347 (352), *Jescheck & Weigend*, *Lehrbuch des Strafrechts Allgemeiner Teil*, supra note 67, at 295; *Cramer & Sternberg-Lieben*, in *Schoenke & Schroeder*, *Strafgesetzbuch Kommentar*, supra note 79, at 231.

manipulating the beer mat can constitute the offence of “forgery of documents”, so long as the beer mat serves as a document. Although the precise legal definition of the legal element “document” may be unknown to ordinary beer consumers, the law is proceeding on the assumption that a layman is able to understand the socio-legal meaning of the beer mat as a record for the consumed drinks when footing the bill. Due to the “parallel valuation on the sphere of a reasonable man”, the “forger” may be considered as acting with intent regarding all elements of “forgery of documents”. To make it more clear, mistakes about normative elements of the offence which require a legal evaluation (at least as a layman) are treated as mistakes of fact.<sup>171</sup>

Most notably, one important consequence in the case of a factual mistake must be stressed: since a factual mistake excludes the intent, the defendant cannot be convicted for any intentional offences. However, as the law explicitly states, liability for negligent action stands unaffectedly. Hence, a perpetrator shooting at a human being while believing that it is a scarecrow (above-mentioned case), cannot be held liable for intentional killing of that person, but he will still be held criminally liable for negligent killing/manslaughter.

### C. *Error in persona & error in objecto*

*Error in persona vel obiecto* is an error as to the identity of the victim or as to the identity of an object (i.e. A kills C believing that he is B). Most notably, the *error in persona vel obiecto* does not affect the intent, where the persons or the objects that have been mistaken for another by the defendant are of equal value. This is the absolutely prevailing opinion in German criminal law.<sup>172</sup> The underlying argument is that the defendant’s “will” was directed towards the realization of a prohibited consequence, and that his conduct caused this consequence. Hence, in this case, all the subjective and objective elements of the criminal offence are fulfilled, and the mistake as to the specific identity of a person or an object is considered as an error concerning the motive (*Motivirrtum*), which is irrelevant to the legal elements of the offence (*Tatbestand*). In this case both A and B are subjects of legal protection (*Rechtsgüter*) of equal value, and the conduct is directed towards the achievement of the same prohibited consequence (death of a human being).

<sup>171</sup> Arzt, ‘The Problem of Mistake of Law’, supra note 155, at 716.

<sup>172</sup> Jescheck & Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, supra note 67, at 311; Cramer, in Schönke & Schröder, § 15 side number 59; Lackner, *Strafgesetzbuch*, supra note 91 § 15 side number 13; See also a famous case often referred to Rose-Rosahl, Prussian Supreme Tribunal GA 7 [1859], 332.

*Error in persona*, however, could negate the mental element in cases of lacking legal equivalence between the injured object of the act as imagined by the perpetrator and the one actually injured. The following hypothetical case shall illustrate this: A intended to destroy a religious group X by poisoning the main water pipe which provides group X with its daily water. Unfortunately, A has mistakenly poisoned another water pipe, causing severe casualties in group Y. Did A commit genocide?

A has fulfilled the physical legal elements of murder by poisoning. His error to the victims' identity does not exclude his intent with respect to the respective offence, since the lives of group X and Y are legally of equal value.

On the contrary, according to § 6 of the new German Code of Crimes against International Law,<sup>173</sup> the error in persona exclude the intent: with regard to this provision (whoever with the intent of destroying as such . . . a national, racial, religious, or ethnic group) group B and C are not legally equal. A's error in persona, therefore, leads to an error as to the legal elements of the respective offence (factual mistake, § 16 subs. 1 phrase 1 StGB). From a legal point of view, A could be held criminally responsible for attempted genocide with regard to group X, in addition to murder by poisoning (with regard to group Y). This opinion is justified on the basis that A had physically carried out an act with the requisite intent to commit genocide and forming part of a series of acts which would constitute its actual commission, if it were not interrupted (A mistakenly poisoned a water pipe belongs to group Y).

#### D. *Aberratio ictus*

*Aberratio ictus* means that the "act goes amiss". The Latin expression is used to describe the following situation: A shoots at B, but instead of hitting B, the bullet unexpectedly hits and kills C. The difference between *error in persona/obъекto* and *aberratio ictus* lies in the fact that in the former, the offender killed the person he had individualized as a target, in case of *aberratio ictus*, the offender does not kill the person he had individualized.<sup>174</sup> In case of an *error in persona*, the offender aims to kill the person he had in his sight and he succeeds in hitting this person at target, but he was mistaken about the identity of this person. In case of an *aberratio ictus*, the offender wants to kill the person he had in his sight, but he does not succeed in killing this person (i.e. because his bullet was deflected) with the result that another person is killed.

<sup>173</sup> See the Act to introduce the Code of Crimes against International Law adopted by both Chambers of the German Parliament, entered into force on 30 June 2002 (*Völkerstrafgesetzbuch*). The text of the code, as adopted is to be found in the Official Gazette of Germany (Bundesgesetzblatt 2002 I, No. 42 p. 2254 et seq.

<sup>174</sup> *Wessels & Beulke*, Strafrecht Allgemeiner Teil, supra note 62, at 84.

According to the Courts and the prevailing opinion in German criminal law, *aberratio ictus* has the effect, that the offender can be held criminally liable for negligence with respect to the murdered person, and with attempted murder with respect to the targeted person. That is to say, A is not criminally liable for intentional killing of C, but for negligent killing of C and for attempt of killing B.<sup>175</sup> A minority opinion, however, considered A criminally liable for intentional killing of C.<sup>176</sup> This opinion argued that A killed a subject of legal protection of the same value (both B and C are human beings). Thus, the minority opinion wants to apply the same reasoning as in case of *error in persona vel obiecto*. The minority opinion overlooked the decisive difference between *error in persona* and *aberratio ictus*. In the former, the offender had the same person in his sight he killed in the end. Therefore, there is no relevant deviation from the causal course of events the offender expected. In case of *aberratio ictus*, to the contrary, the deviation from the planned or envisaged course of events is obvious. Hence, *error in persona* and *aberratio ictus* cannot be treated equally.<sup>177</sup>

To sum up, in German criminal law the mental state of the defendant must be present in relation to all the elements of the actus reus. Accordingly, mistake of fact is thus considered to be a circumstance which may negate the intent to commit the crime under consideration.<sup>178</sup>

## E. Mistake of law

As noted above, German criminal law does not follow the principle *error iuris nocet*.<sup>179</sup> Notably, German criminal law recognizes that a mistake of law can

<sup>175</sup> BGHSt 34, 55; *Roxin*, Strafrecht Allgemeiner Teil, supra note 78, at 437; *Jakobs*, Strafrecht Allgemeiner Teil, supra note 136, at 303; *Wessels & Beulke*, Strafrecht. Allgemeiner Teil, supra note 62, at 84.

<sup>176</sup> *Puppe*, GA (Goldthammer's Archiv) 1981, p. 1.

<sup>177</sup> *Jescheck & Weigend*, Lehrbuch des Strafrechts Allgemeiner Teil, supra note 67, at 313.

<sup>178</sup> *H. Jescheck*, Lehrbuch des Strafrechts, Allgemeiner Teil, 3rd ed., (Berlin, 1978) at 245 *et seq.*

<sup>179</sup> In the common law systems, ignorance of law is generally held to be no defence to criminal liability. In *Grant v. Borg* (2 All. E.R., p. 263), Lord *Bridge* said that "the principle that ignorance of law is no defence in crime is so fundamental that to construe the word 'knowingly' in a criminal statute as requiring not merely knowledge of facts material to the offender's mind, but also knowledge of the relevant law, would be revolutionary, and, to my mind, wholly unacceptable".

Most notably, a mistake of law may constitute a defence in war crimes trials just as it may before national courts. This has been illustrated in cases where executioners of allied victims have, on occasion, been found not guilty on the ground of their having reasonably believed that

exclude the criminal responsibility. This is explicitly laid down in § 17 *dStGB*, a provision dealing with error as to the prohibition (*Verbotsirrtum*). If the offender is mistaken about the unlawfulness of his act, he may escape criminal liability. However, the legal requisites have to be fulfilled, particularly, the mistake must have been “unavoidable”.

It should be mentioned that due to the high threshold of unavoidability, mistakes of law rarely occur *in praxi*. This is because everybody should know the law and the criminal offences provided for in the criminal code.

### 1. *Error as to the prohibition Verbotirrtum*

An error as to the prohibition does not affect the *Vorsatz*, but it may exclude the culpability *Schuld*.<sup>180</sup> This is expressly provided for in § 17 *dStGB*:

*“Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum vermeiden konnte, Konnte der Täter den Irrtum nicht vermeiden, so kann die Strafe nach § 49 Abs. 1 gemildert werden.”* “If the perpetrator, while committing the offence, is not aware to act unlawfully, his guilt is excluded, provided that he could not have avoided this mistake. Provided that he could have avoided this mistake, the punishment may be mitigated according to § 49 subpara. 1.”

Thus, an error as to the prohibition is given, if the offender believes that he is acting in accordance with the law, and not committing any wrongdoing. In this

the executions which they were carrying out were legal. This issue arose in the *Amelo Trial* (*Trial of Otto Sandrock and three others* ‘Amelo Trial’, 1945, *Law Reports of Trials of War Criminals*, Vol. I at 62–65, British Military Court). The relevant consideration being whether the three accused were carrying out the unlawful sentence of Pilot Gerald Hood, who was taken to the woods and killed by a shot in the back of the neck. In his statement to the court, the Judge Advocate stated set out the test for a mistaken belief as comprised of both ‘honest’ and ‘reasonable’. These criteria were articulated in the following two questions put to the court:

- (1) If you are not satisfied that there exists any evidence upon which you can find that these *men honestly* believed that the British officer had been tried according to law and that they were carrying out a lawful execution, then you must reject the defence.
- (2) If you are satisfied that the existing circumstances were such that a *reasonable man* might have believed that this officer had been tried according to law and that they were carrying out a proper judicial legal execution then it would be open to the court to acquit the accused.

In considering the issue of reasonableness, the Judge Advocate raised the issue of whether it was the duty of the accused, who were given the order from a forceful and determined officer, to ask questions or request further information from the SS lieutenant regarding the legality of the execution.

<sup>180</sup> See section II(C) of the present study.

case, the offender knows what he is doing; he is not mistaken about his factual conduct; however, he is convinced about the lawfulness of his conduct.<sup>181</sup>

It is worth mentioning that German criminal law differentiates between two different types of error as to the prohibition, namely: (a) a direct error as to the prohibition (*direkter Verbotsirrtum*); and (b) an indirect error as to the prohibition (*indirekter Verbotsirrtum*).<sup>182</sup> The former describes the situation that either the offender does not know the criminal law provision prohibiting the act or that he misinterprets the criminal law provision and believes that it does not apply.<sup>183</sup>

An indirect error as to the prohibition is given, if the offender erroneously believes that his conduct is justified under certain legal provisions (i.e. self-defence). In this case, the offender either assumes a legal provision excluding liability which does not exist (is not recognized in criminal law) or he misinterprets a ground of excluding criminal liability which does exist but does not apply in the given situation.

## 2. *An error as to the prohibition may exclude the culpability (Schuld)*

According to § 17, it is necessary that the mistake as to the prohibition could not have been avoided. Therefore, errors as to the prohibition have to be further examined as to their avoidability. The law proceeds on the assumption that, if the error as to the prohibition could not have been avoided by the offender, the offender cannot be blamed for his conduct which he believed was lawful. Since the issue of blameworthiness is a matter of the “third stage” according to the three-stage-structure of the offence in German criminal law, an unavoidable error as to the prohibition excludes the culpability. To the contrary, if the offender could have avoided the error as to the prohibition, he is to be blamed for his unlawful conduct. Therefore, according to § 17 s. 2 *dStGB* culpability is not excluded. However, mitigation of punishment is possible. The punishment may be mitigated because the offender, though acting against the law despite the avoidability of his erroneous belief, at least he did not consciously infringe the law. Therefore it could be justified in some cases, to give weight to the fact that the offender believed that he was acting in accordance with the law.

Hence, errors as to the prohibition might be categorized into two different categories, namely: avoidable errors; and unavoidable errors. The exact definition of the avoidability is still subject to some dispute in German crimi-

<sup>181</sup> BGHSt GrS (Great Senate), 2, 194 (197).

<sup>182</sup> *Jescheck & Weigend*, Lehrbuch des Strafrechts Allgemeiner Teil, supra note 67, at 456.; *Wessels & Beulke*, Strafrecht Allgemeiner Teil, supra note 62, § 11, side number 456 ff. at 160.

<sup>183</sup> *Ebke & Finkin*, Introduction to German Law, supra note 53, at 395–96.

nal law. The Courts apply a very strict standard as to the avoidability of the error as to the prohibition.<sup>184</sup>

The *BGH* ruled in a decision that every person must examine whether his conduct conforms to the requirements of law. The court went on asserting that one must “exert one’s conscience”.<sup>185</sup> In case there are uncertainties as to the lawfulness, a duty rests upon every person to make inquiries about the lawfulness or unlawfulness. This implies that a person not familiar with the law must seek for legal advice. It is not sufficient to rely on one’s own doubtful interpretation of the law.<sup>186</sup> Even though wrong legal advice does not exonerate the offender as such; wrong legal advice is only relevant if the advisor was reliable and could guarantee impartial responsible legal advice.<sup>187</sup>

Due to the strict standard applied by the courts, an error as to the prohibition of law is in most cases avoidable. This is because the offender in most cases could have consulted a legal expert in order to enhance his knowledge about the law.<sup>188</sup> Hence, § 17 dStGB *de facto* hardly ever occurs as a ground for excluding the culpability.

Most notably, the Federal German Criminal Court ruled twice on the concept of *Verbotsirrtum* in cases involving international criminal law. In the first case the Court convicted the East German border patrols of the killing of civilians fleeing to West Germany at the former border between East and West Germany. In this case the Court denied that it was unavoidable that East German border guards believed in the legality of the order to shoot. The Court was of the opinion that such orders to kill which affect the “the life as the highest legal interest” and “which would be contrary to humanity need not be complied with”. The Court held that the fact the border patrols acted with regard to the order to shoot was an avoidable *Verbotsirrtum*.<sup>189</sup> In the second case, however, the Court acquitted East German officials who had granted West German terrorists a permanent refuge in the former East Germany. The Court held that it could not be ruled out that the East German officials had acted in an unavoidable *Verbotsirrtum*, because of the “difficult legal situation,

<sup>184</sup> Only in case of special criminal law provisions which are not embodied in the German Criminal Code (StGB) but in specific statute law, the Courts seem to apply a less stricter standard; *Wessels & Beulke*, *Strafrecht Allgemeiner Teil*, supra note 62, p. 156; but see *Jescheck & Weigend*, *Lehrbuch des Strafrechts Allgemeiner Teil*, supra note 67, at 459. Some criminal law provisions not embodied in the Criminal Code might be interpreted as restricting criminal liability to positive knowledge of the prohibition.

<sup>185</sup> BGH 2, 194 (201).

<sup>186</sup> BGH 5, 111 (284); 21, 18.

<sup>187</sup> BGH 20, 342 (372); 40, 257 (264).

<sup>188</sup> *Ebke & Finkin*, Introduction to German Law, supra note 53, at 396.

<sup>189</sup> Federal German Criminal Court, BGHSt 39, 35 quoted in Neuner, ‘General Principles of International Criminal Law in Germany, supra note 161, at 122–23.

which would be dominated by scarcely outlined principles of international law".<sup>190</sup> The reason that the error was considered to be unavoidable was that the judges could not require that state officials in East Germany should have been aware about the laws on obstruction of justice in West Germany.<sup>191</sup> The above quoted cases demonstrate that the German legal system continues to follow a differentiated approach with regard to mistakes of law in upholding the principle of guilt.<sup>192</sup>

## General remarks

The present study evidence the inconsistency which shadows the jurisprudence of both ad hoc Tribunals with regard to the mens rea required for triggering the criminal responsibility of serious violations of international humanitarian law. Evidently, judges, prosecutors, and defence lawyers coming from different schools of law and joining the ICTY and ICTR have made numerous efforts in order to reach a definitive concept for mens rea in international criminal law, however, more frequently, a breakdown in communication occurs between different legal cultures. Moreover, the case law of the Yugoslav and Rwandan Tribunals lacks the consistency in establishing the constituent mens rea required for different modes of participation in a criminal offence. Hence, and for the sake of international criminal justice, a tendency towards a better understanding of the mens rea concept in different legal systems is a must. This could not be achieved without an in depth and a systematic study of mens rea standards in comparative law. The starting point of this comparative study focused on the concept of intention in German criminal law, as a unique system enriched by enormous theories on the matter. German criminal law has an elaborate and highly refined system of describing and analysing the general structure of criminal offences. In German criminal system, the state of mind of the defendant has to be evaluated at two stages, *Tatbestand* and *Schuld*. One of the main features of the German criminal law is that it distinguishes sharply between intention in the broad sense and negligence. The latter does not carry criminal responsibility unless a particular crime provides for its punishment. Criminal negligence is defined as conscious or unconsciousness deviation from the required standard of care which causes a result prohibited by crimi-

<sup>190</sup> Federal German Criminal Court, BGHSt 44, 52 (60) quoted in Neuner, 'General Principles of International Criminal Law in Germany, supra note 161, at 122.

<sup>191</sup> This is the first judgment in which the BGHSt acknowledged an *unavoidable Verbotirrtum* in the field of international criminal law with the result that the perpetrators were acquitted.

<sup>192</sup> Mathias Neuner, General Principles of International Criminal Law in Germany, supra note 161, at 122.

nal law. Yet, in German criminal law the mens rea qualifying for criminal responsibility is thus only that of intention in the broad sense. This intention covers all situations in which the actor acts both with “will” and “knowledge” of the underlying facts. This intention covers different sub-concepts, namely: *dolus directus* of first degree; *dolus indirectus*; and *dolus eventualis*. In German criminal law the volitional element denotes the borderline between *dolus eventualis* and advertent or conscious negligence. That is to say, mere knowledge is not sufficient to hold a person criminally liable for intentional crimes provided for in the *dStGB*. This was the view adopted by the Appeals Chamber of the Yugoslav Tribunal, where it emphasised that both “an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.”<sup>193</sup> To put differently, intent must encompass both an intellectual element and volitional element, however low this volitional element might be.

Furthermore, the Appeals Chamber of the Yugoslav Tribunal relied on the German “theory of consent and approval”<sup>194</sup> stating that “a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as *accepting* that crime.”<sup>195</sup>

Section V of the present study was an attempt to shed light on the distinction between mistake of law and mistake of fact and whether or not these mistake may negate the mental element of the offence in question. As already mentioned, German criminal law recognises two types of mistakes which are considered to be grounds of excluding criminal responsibility, namely: mistake of fact; and mistake of law. The former as they correspond to the legal elements of the crime in question may exclude the criminal intent, whereas the latter may constitute a ground of excluding culpability (*Schuldausschließungsgrund*). Hence, the German criminal law grants the actor a larger degree of benefit for the subjective contingencies which may have obscured his awareness of acting against the law.<sup>196</sup>

<sup>193</sup> *Prosecutor v. Tihomir Blaškić*, Appeals Judgment, supra note 1, para. 41

<sup>194</sup> See section III(C)(1) of the present study.

<sup>195</sup> Emphasis added.

<sup>196</sup> These types of mistakes were not a subject of discussions under the jurisprudence of the two *ad hoc* Tribunals. However, in *Čelebići* the accused, Landzo, has argued in his pre-trial brief that the Prosecutor “must prove that the accused had knowledge of the laws and customs of war described in Article 3 of the Statute of the Tribunal”, and that he “could not have knowledge of such legal requirements”. In essence, he asserts, therefore, that he could not have possessed the necessary *mens rea* to commit violations of the laws and customs of war. See *Prosecutor v. Delalić et al.* (Case No. IT-96-21-T), Prosecutor’s Response to the Pre-Trial Briefs of the Accused, 14 April 1997, Section 5 ‘Mens rea’, (on file with the author).

To conclude, many provisions provided for in the Statutes of the ICTY, ICTR and the ICC are the result of compromises between different legal systems and cultures, and are therefore questionable, when strictly evaluated from a legal point of view. This holds particularly true with regard to the lack of differentiation between various standards of mens rea in international criminal law. Hence, more comparative surveys should be undertaken with regard to the establishment of a unified concept for mens rea in international criminal law.<sup>197</sup>

<sup>197</sup> Mireille Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', 1 *Journal of International Criminal Justice* (2003) 13; Michael Bohlander & Mark Findlay, 'The Use of Domestic Sources as a Basis for International Criminal Law', 2 *The Global Community Yearbook of International Law and Jurisprudence* (2002) 1; Michael Bohlander, 'The Influence of Academic Research on the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia – A First Overview', 3 *The Global Community Yearbook of International Law and Jurisprudence* (2003) 195. The second survey on the subject will address the *Mens rea* concept in Islamic Law Sharia'a.

Copyright of International Criminal Law Review is the property of Martinus Nijhoff and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.