

# International Criminal Law

## Mental elements and defences



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# Elements of crimes



- Crimes: Material (*actus reus*) and mental (*mens rea*) elements.
- ICC Statute, Article 30 (Mental element):
  1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
  2. For the purposes of this article, a person has intent where:
    - (a) In relation to conduct, that person means to engage in the conduct;
    - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
  3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly’.
- Material elements (ICC Elements of Crimes, introduction, para. 7).
  - i) Conduct: criminalization of a conduct.
  - ii) Consequences: effects caused by a person’s conduct.
  - iii) Circumstances: relevant facts relevant to the crime, including contextual elements.

# ICC Statute, Article 30 (mental element)



- Importance.
- Evidence matters (see also Elements of Crimes, introduction).
- When a mental element involves a legal conclusion or value judgment → it is sufficient the accused was aware of the relevant facts (See also Elements of Crimes, introduction).
- Default rule.
- Deviations.
  - i) Reduction of mental element
    - Article 28(a)(i): ‘should have known’.
    - Article 8.2.b.xxvi: ‘should have known’.
  - ii) No mental requirement (quite exceptional)
    - Article 7.1.h: ‘Persecution [...] in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court’.
  - iii) Additional element of intent and knowledge
    - Article 6: genocide---- special intent
- Apparent ‘modifications’: ‘willful’, ‘deliberately’.

# Categories/degrees within Article 30



## **I. Intent:** volitional element

- Conduct: ‘person means to engage in the conduct’ (30.2.a)
- Consequence:
  - i) ‘person means to cause that consequence’ (30.2.b) or
  - ii) ‘is aware that it will occur in the ordinary course of events’ (30.2.b)

## **II. Knowledge:** cognitive element (30.3)

- ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’
- Part of intent, focus on result, autonomous.

**Intent and knowledge:** *Lubanga, Katanga/Ngudjolo Chui, Bemba*, Decisions on confirmation of charges; *Lubanga, Katanga, Bemba* Judgments → *Dolus*:

- 1<sup>st</sup> degree *Dolus directus*
  - i) knowledge of actions/omissions- → will bring about objective elements of crime, and
  - ii) actions/omissions with concrete intent to bring about objective elements of the crime.
- 2<sup>nd</sup> Degree *Dolus directus*
  - i) No need for concrete intent to bring about objective elements of crime, but
  - ii) Awareness that such elements will be the necessary outcome of actions or omissions. ‘Virtual certainty’ (*Katanga* judgment). ‘Substantial risk’ (*Lubanga* judgment).

# Categories outside Article 30



## I. Outside Article 30 but found in other ICC Statute provisions

### i) Special intent

- Genocide (Article 6).
- Crime against humanity of persecution (Article 7.1.h).
- Forced pregnancy (Article 7.2.f).
- Torture (Article 7.1.f)
- Not part of the ICC jurisdiction: Terrorism. Special Tribunal for Lebanon: *Ayyash et al.*

### ii) *Dolus eventualis* (equivalent recklessness, called ‘indirect intent’ by the ICTY (*Strugar, Delic Rasim*)). ICC case-law:

- Awareness of the risk that the objective elements of the crime may result from his/her actions or omissions, and
- Acceptance of this outcome by reconciling himself/herself with it or consenting to it.
- Difference: foreseeing occurrence of undesired consequences as a mere likelihood or possibility (*dolus eventualis*) vs. Awareness consequence ‘will occur in the ordinary course of events’ (*dolus directus*).
- Mere possibility-----Virtual certainty
- ‘Willful blindness’: Article 28(b)(i) ‘consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crime’.

### iii) Gross, culpable or criminal negligence

- Article 28(a)(i) ‘military commander or person [...] owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes’.

## II. Outside both Article 30 and ICC applicable law

- Simple or inadvertent negligence.

# Defences

## Classifications (\*)



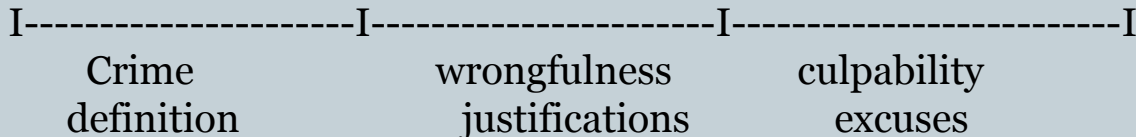
### I. Substantive and procedural defences

- Substantive defences -> conduct in question Article 31: grounds for excluding criminal responsibility; Article 33: superior orders; and (arguably) Article 32: mistake.  
- Evidence matters.
- Procedural defences: challenge the jurisdiction, including official capacity (Article 27(1)).

### II. Full and partial defences

- Article 31: only full defences.

### III. Justifications and excuses



- Justifications: self-defence, necessity, reprisals.
- Excuses: duress, intoxication, mental disease/defect, superior orders, and (arguably) mistake of law/mistake of fact.
- Effects: i) Secondary participants; ii) reparations; iii) self-defence.

### IV. Defences based on failure of proof and alibi

### V. Sequential order to trigger defences?

(\*) Classifications proposed by Kai Ambos, *Treatise on International Criminal Law*. Vol. I (2013) pp. 301-311.

# Self-defence



- Article 31(1)(c): ‘The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph’.
- Comparative law and public international law
  - Requirements
- i) Existence of a defence situation
  - Imminent and unlawful force.
  - Danger to a person or a property.
  - Self-defence vs. putative self-defence.
- ii) Defence must be reasonable
  - Necessity and proportionality
- iii) Subjective element: Knowledge

# Necessity



- Justification → Lesser of two evils.
- Case-law: ICTY, *Oric. Oral Decision Rendered Pursuant to Rule 98Bis*:
  - i) Imminent threat of severe and irreparable harm to life.
  - ii) Crime committed as the only way to avoid this harm.
  - iii) Proportional.
  - iv) Not caused voluntarily.
- Necessity in the ICC Statute? Not explicitly mentioned but:

Article 31(1)(d): ‘The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of **imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:** (i) Made by other persons; or (ii) **Constituted by other circumstances beyond that person’s control**’ (emphasis added).
- Differences with duress.



# Duress



## I. Differences with necessity

- Natural force/event (necessity) vs. threat (duress).
- Justification (necessity) vs. excuse (duress).
- Therefore, necessity and duress are independent defences.

II. ICTY *Erdemovic*: ‘Your honour- I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: “if you are sorry for them, stand up, line up with them and we will kill you too”. I am not sorry for myself but for my family, my wife and son who then was nine months, and I could not refuse because then they would have killed me’.

- Customary international law concerning duress in cases of killing of victims?
- Erdemovic: Majority → no complete defence
- Dissident opinions: Steiner and Cassese. Cassese → complete defence subject to strict conditions:

i) Immediate threat of severe and irreparable harm to life or limb.

ii) No adequate means of averting such evil.

iii) Proportionality (lesser of two evils).

iv) Duress situation was not voluntarily brought up by the offender.

# Duress



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- See also ICC, *Onyiah*, Decision on Confirmation of Charges, 23 March 2016.
- Requirements
  - i) Threat of death or serious bodily harm
    - Existence of a threat.
    - Overwhelming pressure.
    - Temporal requirement: ‘continuing’, imminent’.
  - ii) Necessary and reasonable reaction
    - Proportionality.
  - iii) Subjective requirement
    - \* Knowledge.

# Mental disease or defect



- Article 31(1)(a): ‘The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law’.
- National criminal law.
- Three situations:
  - i) Person cannot understand the the nature of his/her conduct (cognitive).
  - ii) Understanding of nature of conduct but not its unlawfulness (cognitive).
  - iii) Understanding of unlawful conduct but no able to control (volitional).
- Requirements:
  - i) Mental disease or defect  
Momentary psychological abnormalities -> insufficient.  
ICTY, *Delalic*: diminished mental capacity or harsh conflict environment -> insufficient.
  - ii) Destruction of actor’s capacity to ... see three above-mentioned situations.  
At the time of the crime.
- Evidence problems.

# Intoxication



- Article 31(1)(b): ‘The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court’.
- National criminal law.
- ICTY: *Todorovic, Kvočka* (aggravating).
- Requirements
  - i) State of intoxication.
  - ii) Destruction of the defendant’s ability to assess or control his/her own conduct.
  - iii) Involuntary intoxication: not voluntary intoxication unless unawareness of the risk of ending up committing crimes.

# Mistake of law



- Article 32(2): ‘A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility **if it negates the mental element** required by such a crime, or as provided for in article 33.’
- Ignorance of law inadmissible but evolving, highly technical ambiguous law areas: ‘other inhumane acts’ (Article 7(1)(k)) → reasonableness.
- Status and position of the individual.
- Two exceptions: mistake of law ‘negates the mental element’ and Article 33 (superior orders).
- Evaluation of facts permeated with a legal assessment:
  - \* Normative aspect no need for a complete ‘value’ judgment. Elements of Crimes, introduction, para. 4: ‘With respect to mental elements associated with elements involving value judgement, such as those using the terms “inhumane” or “severe”, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated’.
  - \* Possible mistake about the factual basis for a subsequent normative evaluation → mistake of fact. For example: attacks against civilians or killing of peacekeepers.
- *Lubanga*: accused invoked lack of knowledge of criminalization of relevant conducts.
- Mistake of law concerning defences: normative defence mistakes → inadmissible.

# Mistake of fact



- Article 32(1): ‘A mistake of fact shall be a ground for excluding criminal responsibility only **if it negates the mental element** required by the crime’.
- Negates *mens rea* and culpability → Prosecutor’s burden of proof.
- ‘Negates the mental element’:
  - i) Factual basis upon which the element is based; and
  - ii) Deprives the required mental element.
- Exception to relevance of mistake of fact: superior responsibility ‘should have known’.
- Irrelevant mistakes of fact.
- Factual defence mistakes: (putative-self defence) -> admissible.

# Superior orders



- Pre-WWI: full defence.
- WWI German trials: *Llandovery Castle*: ‘personal knowledge’ principle.
- Nuremberg, ICTY, ICTR, SCSL, STL: Absolute liability.
- ICC Statute: absolute liability only for genocide and crimes against humanity

Article 33: ‘1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful’.

- Requirements or elements:
  - i) Existence of a legal obligation to obey the government or superior.  
Broad sense: Civilians, military, and non-state actors (chain of command).
  - ii) Lack of knowledge that the order is unlawful
    - Relationship with mistake of fact: reliance on information given by others, e.g., execution of a death penalty after a sentence of a regular court.
  - iii) Order not manifestly unlawful.
    - Relationship with mistake of law: critique; ‘manifestly unlawful’ standard in domestic manuals; cases rejecting superior orders.

# Defences not mentioned explicitly in the ICC Statute (examples) (\*)



ICC Article 31(3): ‘At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence’.

## I. Victim’s consent

- Collective interest vs. self-disposal.
- Failure of proof defence → *actus reus*.

## II. Military necessity

- Military necessity vis-a-vis humanitarian circumstances.

## III. Reprisals

- ICTY, Trial Chamber, *Kupreskic*: principle: not acceptable; admissibility subject to demanding requirements:
  - i) Last resort.
  - ii) Special precautions.
  - iii) Proportionality.
  - iv) Considerations of humanity.

## IV. *Tu-quoque* principle.

- ‘An eye for an eye, and a tooth for a tooth’?.
- Inadmissible.

(\*) Examples identified by Kai Ambos, *ob. cit.*, pp. 386-393.



# Irrelevance of official capacity



- Functional immunities (immunities *ratione materiae*): immunity for acts performed in an official capacity.
- Pre-Nuremberg: Admissible but Treaty of Versailles.
- Nuremberg, ICTY, ICTR, SCSL, STL: not complete defence → potentially mitigating... but *Kambanda*.
  
- ICCS, Article 27(1): ‘This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of Sentence’ → irrelevance of official capacity as a procedural defence.
  
- Article 27(2): ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.
  
- Differences with Article 27(2) (See William Schabas, *The International Criminal Court-A Commentary on the Rome Statute* (2nd edn, OUP 2016) 596-599).
  - Article 27(1): follows previous ICTs (and Genocide Convention) and, thus, denies a defence of official capacity.
  - Article 27(2): States Parties to the ICC Statute renounced the immunity of their own Head of State to which they are entitled under customary international law. No precedent.
  
- Exception to the customary rule of functional immunities or a self-standing international law obligation?
  
- Malabo Protocol, Article 46A bis. Immunities. ‘No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office’.

# Bibliography



- Antonio Cassese, *International Criminal Law* (3<sup>rd</sup> edn, OUP, 2013).
- Kai Ambos, *Treatise on International Criminal Law*. Volume I, OUP, 2013.
- William Schabas, *The International Criminal Court- A Commentary on the Rome Statute* (2nd edn, OUP 2016).