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Book Review

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CREATING AND EXPLAINING THE INTERNATIONAL CRIMINAL COURT

Reviewing:

Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, London and New York, Routledge, 2006. xv + 131 + References + Index.

July 2008 marked the tenth anniversary of the conclusion of the negotiations that led to the creation of the International Criminal Court, the adoption of the Rome Statute for an International Criminal Court. It is thus an opportune moment for a belated review of this very interesting work that tries, *inter alia*, to re-create the flavour of those negotiations.

Some personal transparency is needed at the outset. From late 1995, I represented the Government of Samoa, *pro bono*, in the negotiations that led to Rome. At Rome, I accompanied then Ambassador to the United Nations Tuiloma Neroni Slade who later became one of the first judges of the Court. We were the delegation of Samoa, which held one of the Vice Presidencies of the Conference and coordinated the negotiations on the Preamble and the Final Clauses of the treaty. I continued to represent Samoa at the Preparatory Commission for the Court. More recently, on Samoa's behalf, I have attended the Court's Special Working Group on the Crime of Aggression. That Group seeks to conclude the unfinished substantive business of Rome, providing a definition of the crime of aggression for the purposes of the exercise of the Court's jurisdiction over that crime. Samoa was one of the very early members of the Like-Minded Group of states about which Glasius has some significant comments to make. We attended what I

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understood to be the first "formal" meeting of the Group early in 2006. That Group – with much prompting from civil society – provided the driving force that led to the successful conclusion of the Statute. Early on, about all that the Group shared was a common understanding that a permanent, independent Court was "good thing" and a useful addition to the architecture of international law and organization. By Rome, it had achieved an understanding that was close to the final achievement, although some would clearly have liked a bit more. In particular, as Glasius points out, the Group insisted at Rome on the *propriu motu* power of the Prosecutor (pp. 51–52). This means that the Prosecutor can seize the Court of a situation even in the absence of a referral by the Security Council or a State.

Glasius's book asserts two objectives. One is to provide an introduction to the ICC for non-lawyers, particularly students of political science and international relations. It therefore, "describes the main features of the Court; the crimes it covers, the role of the prosecutor, the jurisdiction regime, the gender aspects and its position on weapons of mass destruction" (p. xiii). The second is "to understand the negotiations and struggles surrounding the establishment of the ICC as an example of how international law-making and the building of global institutions are influenced by global civil society" (p. xiv). Glasius argues (*id.*), correctly in my view, that "The input of organizations and individuals from civil society in the process of establishing the ICC was unprecedented." I venture to suggest that, without the involvement of the very large NGO Coalition for an International Criminal Court, and its symbiotic relationship with several key Governments in the Like-Minded Group, the Statute would have been unlikely to emerge.

An introductory text of this ilk must, of necessity, be selective and obviously it is not possible to cover every issue or detail in the Statute, let alone all the intricacies of the negotiations, but the author has made some good selections. She includes some useful references to many of those individuals such as Arthur Robinson, Cherif Bassiouni, Ben Ferencz and Robert Woetzel, who provided intellectual leadership and the sheer energy required to keep the project alive for the 50 years or so that it took to achieve the Court as the fulfillment of the promise of Nuremberg. So far as introducing the material to non-lawyers is concerned, there is a pretty good discussion of the basic structure of the Court, how cases are generated and its jurisdictional limitations. As the author points out, absent a Security Council referral, a case can normally come before the Court only if the state on whose territory the events occurred or the state of which

the alleged perpetrator is a national is a party to the Statute or otherwise consents to jurisdiction. This was a compromise between those states wanting more expansive possibilities and those insisting that both the territorial state *and* the state of nationality should afford their consent (Chapter 4, entitled "The defeat: No universal jurisdiction" gets the flavour of that debate).

I would have been inclined to say rather more about the concept of "complementarity" that became quite fundamental in the negotiations. Glasius dismisses it as "a minor, relatively uncomplicated strand" in the "whole Gordian knot on how the Court would come by its cases" (p. 48). In fact, it marked a distinct departure from the model of the *ad hoc* Tribunals which have power to trump national jurisdictions when they want particular cases. In the Rome Statute, national jurisdictions receive priority and it is only when a nation-state is "unable or unwilling" that the international jurisdiction takes over. The detailed provisions giving effect to the principle, especially Article 17 on "Issues of admissibility" and Article 18, on "Preliminary rulings regarding admissibility," were the subjects of long and hard bargaining. An unintended consequence for many states was the realization that if they wanted to be in a position to exercise their primary jurisdiction, they would need to legislate carefully in their domestic law to make the Statute's offences part of their own law – otherwise they would not be "able" to prosecute their own. Indeed, the debate on complementarity drove a whole new emphasis on taking seriously the domestic prosecution of international crime (Complementarity was, for me, a new term that emerged in the discussion around 1995. I was often stunned at how many diplomats knew exactly what it meant, that is to say, what they meant it to mean).

I would also have been inclined to say more and with a little more structure about the four crimes within the subject-matter jurisdiction of the Court – genocide, crimes against humanity, war crimes and the crime of aggression. The definition of genocide is taken almost verbatim with that in the Genocide Convention of 1948 (aside from the perhaps inexplicable omission from the Statute of the inchoate conspiracy to commit genocide which is a significant feature of the Convention). Crimes against humanity have never been defined in such detail before, and the Rome definitions build on what was contained in the Nuremberg and Tokyo Charters and the Statutes of the ad hoc Tribunals for Former Yugoslavia and Rwanda. Glasius quite properly notes the progression from earlier instruments in referring explicitly to gender crimes within the category of crimes

against humanity, but I could find no entry in the index for the additions of the crimes of *apartheid* and disappearances, both of which had to find a home in a litany of crimes against humanity developed in the late twentieth century. Times, indeed, change: the new South Africa plugged for the inclusion of *apartheid*, cheered on by members of the West European and Other Group who had been appalled when the *Apartheid* Convention was negotiated in the General Assembly in 1973. War crimes too have never appeared in an international instrument in such detail; Nuremberg, Tokyo, Former Yugoslavia and Rwanda all entailed what were ultimately open-ended invitations to the prosecutors and judges to make it up as they went along. The collection of war crimes in Article 8 of the Statute, read in conjunction with the Elements of Crimes anticipated in Article 9 of the Statute, and developed by the Preparatory Commission, aims to provide an expansive but precise list. The aim is to keep these judges on a short leash. Here too, as Glasius points out, the gender crimes gain more prominence. The same is true – and this could have had some more exposition – of atrocities in non-international armed conflict. The Rome Statute continues the process begun with Common Article 3 of the 1949 Geneva Conventions and continued with 1977 Protocol II to the Conventions of assimilating many of the rules for treatment of civilians and prisoners developed in international conflict into the rules dealing with conduct of civil wars. Finally, on the crimes, more could be said about the challenge of providing some clarity to a topic that was fudged in Nuremberg and Tokyo: just what is entailed in the crime of aggression; who commits it on behalf of a State; does the Security Council have a role in particular cases; what is the relationship between the crime and the acts of aggression (done by states) in the General Assembly's 1974 Definition of Aggression? These are all questions that the Court's Special Working Group on the Crime of Aggression is trying to sort out as it prepares to present proposals for consideration at the first Review Conference on the Court, to take place in early 2010.

It is perhaps worth recalling, as the author does, that the limitation of jurisdiction to these four crimes (with jurisdiction over aggression not to be exercised until further drafting is completed) was not totally pre-ordained. A permanent tribunal with jurisdiction similar to that of Nuremberg (crimes against peace, war crimes and crimes against humanity) had been on the international agenda since the 1940s. Glasius notes that the 1989 proposal to the General Assembly by then Prime Minister Arthur Robinson of Trinidad and

Tobago, which revived UN discussion of the issue, emphasized the possibilities of a court with jurisdiction over "illicit trafficking of narcotic drugs across national borders" (p. 11). Later proposals, such as the draft produced by the International Law Commission in response to the 1989 resolution (and the draft that went to Rome), included the series of "terrorism" offences defined by treaties such as the 1970 Hague Convention on Aircraft Hijacking. From the point of view of a country short on prosecutorial resources, like a Trinidad, international backup made enormous sense. The larger players, however, believed that the current system of national prosecution with as many countries as possible having potential jurisdiction, works adequately. A new player on the scene, like the ICC, needs to build up its credibility and resources first. It remains to be seen whether an expansion of jurisdiction will occur in the future.

Glasius's discussion of the role of civil society is very compelling. There is a very telling and realistic comment early on in the book: "It would be quixotic to believe that international law can come into existence without the backing of states, or overcome the opposition of a majority of states. This has never happened in the past, and whatever one may believe about the erosion of state power through globalisation, it is not possible today. However, it is equally the case that those parts of international law that intend to protect the interests of humanity, rather than the interests of states, do not come about without the involvement of global civil society. While the final authorization has to come from states, the moral and intellectual impulse to draft such rules inevitably comes out of global civil society" (p. 3). Glasius notes that only five or six NGOs were present at the General Assembly at the end of 1994 when the draft statute produced by the ILC was discussed. When the Assembly agreed to create an *ad hoc* Committee to study the draft, Bill Pace, Executive Director of the World Federalist Movement, and Chris Hall, legal adviser to Amnesty International, decided to invite a number of groups to form an NGO Coalition to further the cause (p. 26). By the time of the Rome Conference "the CICC had grown into a network of over 800 organisations, 236 of which sent one or more representatives to Rome. Taken collectively, the Coalition delegation was therefore far bigger than any state delegations" (p. 27) (The U.S. delegation, of about 50, was by far the largest state delegation). Glasius describes in a very interesting way how the coalition and its various caucuses worked.

I can attest to the great value of the Coalition's information to a small delegation that could not possibly attend all of the working meetings that took place simultaneously. They also produced significant written materials that were invaluable in sharpening the issues. I found especially useful the material from the European Law Students' Association, Amnesty International and Human Rights Watch.

Not that all of civil society was always on the same page. Glasius has some thoughtful comments on groups like REAL Women of Canada whom she describes as "a vocal minority of anti-abortion groups, supported by the Vatican and Arab groups, whose preoccupation was to prevent any language that might be interpreted as facilitating abortion from entering the Statute" (p. 32). They devoted special attention to the concept of "gender" and to "forced pregnancy" in the definitions of crimes against humanity and war crimes, endeavouring unsuccessfully to have the latter replaced by "forced impregnation". Ultimately, forced pregnancy includes a connotation of preventing raped women from obtaining medical attention that may well result in aborting the fetus. Glasius adds, "While abortion was the primary concern, their agenda was wider, including concerns about 'forced social change by feminist homosexual and other radical groups'" (*id*). Such groups went head to head on these issues with the very active (and geographically diverse) Women's Caucus for Gender Justice that got much of its intellectual leadership from Professor Rhonda Copelon of the Law School at the City University of New York (pp. 80–81).

From time to time, there was a certain tension in the material from the human rights organizations, noted by Glasius thus: "The focus of human rights advocates with respect to criminal trials had always instinctively been on safeguarding the rights of the defendant. Now, the rights of suspects – in effect the enemies of human rights – the rights of victims and the interest in creating an effective system capable of convicting perpetrators had to be balanced against each other" (p. 30). This is true; there is, however a somewhat misleading comment in the same paragraph to the effect that "Amazingly, there was no tradition in international human rights law of assigning criminal responsibility to individual perpetrators of violations" (*id*). Nuremberg was, of course, the great breakthrough moment for individual criminal responsibility in an international tribunal, encapsulated in the Tribunal's aphorism that "crimes against international law are committed by men, not by abstract entities."

"Crimes against humanity" in the Nuremberg Charter were ultimately about how Germans treated other Germans – they were all about human rights violations within the domestic order. The war crimes category, which had stronger antecedents, covered all the acts in occupied territories. While crimes against humanity were somewhat novel in 1945, human rights treaties requiring criminalisation of violations go well back into the early nineteenth century. I refer to "suppression treaties" requiring criminal punishment at the national level of those participating in the slave trade. The early ones were bilateral agreements between Great Britain on the one hand and Portugal and Spain on the other, and there were several multilateral ones later in the century. That model was repeated in the Genocide Convention. It required the evil defined therein to be made criminal, as did the 1973 *Apartheid* Convention and the 1984 Convention against Torture. On the other hand, it is the case that such major human rights treaties as the Covenants on Human Rights and the Convention on the Elimination of all forms of Racial Discrimination do not explicitly require use of the criminal law.

In any negotiation of this complexity, some issues that may not appear to be central to some may turn out as deal-breakers to others. Glasius discusses one of these in Chapter 6, "The missed chance: Banning weapons." Another was capital punishment, which she does not discuss. Indulge me while I say a little about the latter and then return to weapons.

There is no question that there is an international trend towards the abolition of the death penalty, most recently symbolized by the passage of General Assembly Resolution 62/149 of 18 December 2007 which calls for a moratorium on carrying out the penalty. Samoa, which had not executed anyone since it became independent in 1962, used the opportunity of ratifying the Rome Statute to become abolitionist *de jure*. It will be recalled that at Nuremberg it was assumed – even by the United States Chief Prosecutor Robert Jackson, an abolitionist – that there would be some executions. At Tokyo the position was more controversial, in that both the Australian President of the Tribunal and the Soviet member voted against all the death sentences. Soon after, a sea change took place in attitude as all of Europe, Canada, Australia and New Zealand joined the ranks of abolitionists. It was plain when the United Nations Security Council was adopting the Statutes for Former Yugoslavia and Rwanda that the European members of the organization would never accept Statutes including the death penalty. Some, indeed, had

human rights or constitutional qualms about the imposition of life imprisonment, unless it included the possibility of parole. The Europeans, especially Sweden and Italy, made some strong statements about capital punishment up to and in Rome. This was one area in which I do not recall any special NGO initiatives – the Governments themselves were out front on this issue from the start. Yet the Islamic states in general and a number of African and Caribbean states (including Trinidad and Tobago, a strong supporter of creating the Court) – to say nothing of China and the United States – take a different view on the propriety of capital punishment, at least to crimes of the kind in the Rome Statute. The upshot was a lengthy and heated debate in Rome that led to the exclusion of the penalty from the Statute and an agreed statement that the Italian President of the Conference read (uncomfortably, I thought) at the last session of the Conference. Designed to undercut the impact of the omission of the penalty as a piece of practice contributing to an international customary rule against it, the relevant part of the statement reads: "It should be noted that not including the death penalty in the Statute should not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor should it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes." Whatever one makes of this statement, the tide appears to have turned inexorably against capital punishment. One cannot help but be reminded of poor King Canute ordering the waves to go back!

I turn to the weapons debate, a subset of the negotiation on war crimes to be included within the Statute. This issue was driven mostly by the question of nuclear weapons, although some of us thought that the use of anti-personnel land mines should have been forbidden also. The nuclear debate took place in the shadow of another initiative that had involved significant non-governmental pressure, the Advisory Proceedings in the International Court of Justice on the use or threat of use of nuclear weapons. A number of the countries and NGOs that had participated in that exercise were active on the issue in Rome.

Efforts to restrict certain kinds of weapons have proceeded in international humanitarian law at both the level of general principle and that of specific rule. The general principles include that of discrimination – weapons should be used in a way that discriminates between military and civilian targets – and that of unnecessary

suffering – no more is necessary than to incapacitate the enemy. At the level of rules, this translates traditionally into a prohibition of the use of such weapons as barbed lances, poison, asphyxiating gases, bacteriological weapons and the like. The use of such weapons is absolutely prohibited; they may not be used in any circumstances, no matter how dire the threat to the state. The object of the World Court Project that led to the proceedings before the ICJ in response to questions asked by the World Health Organization and the General Assembly was to obtain a finding that nuclear weapons belonged in this absolutely forbidden category. Once States were convinced that they could never use such weapons, it was hoped that they would negotiate in earnest to achieve their total abolition, as envisaged in the 1968 Nuclear Non-Proliferation Treaty. Of the 14 judges who participated in the proceedings, three accepted in the 1996 decision that it would be impossible ever to use nuclear weapons consistently with the laws of armed conflict. Seven more were of the view that "generally" it would be contrary to those rules to use them. Participating in Rome were a large number of States, particularly from the Non-Aligned Movement and the Pacific Island States that agreed with the position of the three judges and who believed that this might be an opportune time either to solidify that position or to engage in some progressive development in the area (Pacific islanders, having experienced Hiroshima and Nagasaki and nuclear testing by the US, Britain and France in their vicinity, are leery of weapons of mass destruction in their neighbourhood). By and large, though, while the jurisdiction of the Court was to be prospective, dating from the time the Statute came into force, the negotiators were conservative about including only offenses on which there was consensus that they represented existing international customary law. There were exceptions where a leap was taken, perhaps in some of the crimes against humanity, certainly in respect of some of the rules relating to non-international armed conflict. But there was some adamant reluctance to taking the step here. Glasius quite rightly points out that the NGO community was divided on pursuing this matter. Frankly, some of the major human rights organizations were downright unhelpful on it – as they were and continue to be on the matter of aggression – seeing this as an unnecessary diversion from their central issues. Moreover, the Like-Minded Group as a whole was equally unhelpful, comprising as it did one of the avowed members of the nuclear club, the United Kingdom, and most of the members of NATO who found themselves protected by the nuclear umbrella (some of them a little

reluctantly). My guess is that if a vote had been forced on the issue, a very large majority could have been garnered for the inclusion of nuclear weapons as forbidden. But it might well have been a deal-breaker and would have precluded early ratification by France and the UK who have become strong supporters of the Court. At all events, the references to nuclear weapons were ultimately dropped, along with specific references to "poor man's weapons of mass destruction", chemical and biological weapons.

Anti-personnel land mines were another problem. My recollection is that Canada, which had taken the labouring oar in the conclusion of the 1997 treaty on the subject, was not prepared to fight the battle in the Rome forum. It accepted that international customary law had not quite got to the position where they too were clearly illegal. Again, many States would have agreed to their inclusion. Glasius makes a fairly persuasive argument about what happened (or did not happen): "An appearance by the International Coalition to Ban landmines (ICBL) might have shamed the chairing country [of the Working Group of the Whole in Rome], Canada, into championing a prohibition on at least the use of anti-personnel mines: the Rome conference took place just 6 months after the conclusion of the Ottawa Convention to Ban Landmines, and the award of the Nobel Prize to ICBL. The Peace Caucus included members of ICBL, and had officially made criminalisation of the use of landmines one of its objectives, but it did not run a high profile campaign on the issue, as its core members were focused on nuclear weapons. Nor did activists more centrally involved in the landmines ban campaign join the negotiations, despite have been invited to do so by the Peace Caucus" (p. 108).

To some degree, the weapons battle is a symbolic one. Glasius (p. 105) notes correctly that "On the other hand, the ICC Statute describes 'murder', 'extermination' and 'other inhumane acts...intentionally causing great suffering, or serious injury to body or mental or physical health', carried out as 'part of a widespread or systematic attack directed against any civilian population' as crimes against humanity. 'Wilful killing', willfully causing great suffering, or serious injury to body or mental health' and 'intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians...clearly excessive in relation to the concrete and overall military advantage anticipated' are all war crimes. It is difficult to see how biological, chemical or nuclear weapons could be used without breaching these provisions, though it

may be possible to use landmines." True, but it would have been nice to take the matter a bit further in the Statute!

Glasius suggests in her Preface (p. xiii) that "[w]hile the history of the ICC has been described before, these accounts tend to concentrate on the official history." A fair point, and your friendly reviewer pleads guilty to contributing to such works. This book is a good read and, while certainly not the gospel on either the content or the legislative history of the Statute, is a very useful vehicle for introducing the Court to a wider audience than the (ever expanding) international criminal law establishment. Members of that no longer rarified establishment could well read it with profit as well.

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ROGER S. CLARK*

DRAFTING A GENERAL PART TO A PENAL CODE: SOME THOUGHTS INSPIRED BY THE NEGOTIATIONS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND BY THE COURT'S FIRST SUBSTANTIVE LAW DISCUSSION IN THE *LUBANGA DYILO* CONFIRMATION PROCEEDINGS

I. INTRODUCTION

What follows are some reflections based on my involvement with the negotiations to create the International Criminal Court and the later project to craft "Elements of Crimes" for the Court. The comments relate to several aspects of the general part of the Statute of the Court: mental and material (physical) elements; grounds for excluding responsibility; mistake; personal jurisdiction; secondary parties; and inchoate offenses. These are all issues that are basic in any domestic attempt at codification or re-codification and I believe that the experience on the international level – remarkably successful – helps to give perspective to national efforts.[1] The discussion includes

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[1] I have addressed some of these issues in another context in Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L. F. 291 (2001) ("*Mental Element*"), and *Criminal Code Reform in New Zealand? A Martian's View of the Erehwon Crimes Act 1961 with Some Footnotes to the 1989 Bill*, 21 VICT. U. WELLINGTON L. REV. 1 (1991). (The latter records my impressions of a failed New Zealand re-codification with which I was marginally involved.) *See also* ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 182–185, 237–241 (2d ed. 2008).

some comments on the first significant discussion of general part issues at the Court, the decision of the Pre-Trial Chamber in confirming the charges against Thomas Lubanga Dyilo.[2]

Teachers of Criminal Law are obsessed with general part issues; it is just about all that many of us teach. Let me demonstrate that with the results of a totally unscientific enquiry. A decade ago, in May of 1998, I stopped off in Athens on my way to Rome to represent Samoa at the Diplomatic Conference that created the International Criminal Court. I was in Athens to teach a course on International Criminal Law. The 18 students comprised 14 Americans (from about as many Law Schools), two Greeks and two Canadians.

The first day, I enquired idly about what they had learned in their first course in Criminal Law. In a triumph of the Socratic method, I quickly discovered that 17 of them had taken a course which was essentially about the general part of criminal law. Some of the courses claimed to be Code-based; some emphasized common law. The Greeks have a Code based on the German one; the Canadians have their version of the Stephen Code, quite familiar to a New Zealander (or to a Samoan, since the New Zealand version of it was substantially applied during the colonial period and remained in force after independence). There are big general part gaps in the Stephen Codes to be filled by the judges.[3] Thirteen of the Americans had studied from the same casebook[4] and it emphasized the Model Penal Code structure. There were, however, common themes in the courses in the U.S., Canada and Greece: mental and physical elements; mistake,

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[2] *Prosecutor v. Thomas Lubanga Dyilo*, ICC No. 01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007 ("*Lubanga Confirmation decision*").

[3] Martin Friedland, *Codification in the Commonwealth: Earlier Efforts*, 2 CRIM. L. F. 145, 150 (1990) (Code drafted by Sir James Fitzjames Stephen for England in 1878 never enacted there, but adopted in many variants throughout the Commonwealth). In the United States, the Model Penal Code sought to fill all (or nearly all) the gaps. Its principal drafter claimed that "[t]he effort here was to exhaust the possibilities of useful generalizations about the use of penal sanctions, going far beyond the fragmentary formulations found in penal codes drafted in the Anglo-American tradition and even beyond the more extensive statements in the newer European Codes." Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1429 (1968).

[4] SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (6th ed. 1995). For a fine tribute to the impact of this work from the author of one of its leading competitors, *see* Joshua Dressler, *Refining Complicity Law: Trivial Assistance as a Lesser Offence?* 5 OHIO ST. J. CRIM. L. 427 (2008).

concepts of culpability such as intent, knowledge, recklessness and negligence and their civil law counterparts (including assorted varieties of *dolus*), causation, burden of proof, accomplice or secondary liability, attempts, and "defenses" such as insanity, self defense and necessity. Most of the students understood that Criminal Law has a general part and a special part; they had, indeed, studied the general part, but they were a bit thin on the special part.

The eighteenth student was an outlier. He had gone to a California school that people like us who went to Prestigious Places have never heard of. He had studied the special part. To be exact, his course had consisted of learning a book of California Model Jury Instructions. He was the only one who took a stab at my cosmic question: what is an "element?" We all use that concept do we not, and we know what it means, the same way we know a dirty book when we see it. But the literature actually exploring the concept of elements is pretty thin.[5] Anyway, his answer was functional for him: a crime is composed of elements, physical elements and their corresponding mental elements. (He hedged a bit on whether "negligence" could be described as "mental".) The prosecution carries the burden of proof as to all elements, he said; fail to prove any one of them and it loses. Want to know what the elements of a particular crime are, read the Model Jury Instructions for that crime – somebody has figured it out by Committee (subject to occasional veto by the State Supreme Court, I noted). His notion of elements is useful for what follows.

This got my head in a good place for Rome – and beyond.

We had already been negotiating the general part for the Rome Statute in a Working Group in New York since early 1996. Then, a tacit agreement seems to have been reached to have, for the first time in a global instrument, an expansive general part, subject to the ultimate solution of frustrated drafters, national or international, consignment of intractables to the "too hard basket." These efforts had included an attempt at defining the "*actus reus*" – including references to crimes by omission and to causation. The draft provision, titled "Actus reus (act and/or omission)", that went forward to Rome read as follows:

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

[5] The best attempt I know is PAUL H. ROBINSON, CRIMINAL LAW 149–152 (1997).

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person has [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

   (a) the omission is specified in the definition of the crime under this Statute; or
   (b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such an act], and the person is [either] under a pre-existing [legal] obligation under this Statute to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime.

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.][6]

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[6] Report of the Preparatory Committee on the Establishment of an International Criminal Court, draft Article 28, in THE STATUTE of THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 144 (M. Cherif Bassiouni comp. 1998). Footnotes omitted (indicating that some delegations thought a provision on causation was not necessary and some wondered about whether omissions should be in the Statute). It will be noted that the draft dealt only with the "conduct" and causation parts of the "physical elements" that were referred to in the accompanying draft Article 29 which dealt with "Mens rea (mental elements)." There was no reference to what became "consequence" and "circumstance" elements. "Actus reus" to many participants seemed to be mean "conduct" and did not include other items such as consequences, causation and circumstances. In para. 3, the alternatives "accountable" and "attributable" made the point that this was not just a scientific enquiry – some evaluation of "responsibility" was involved. The reference to a "principal" perhaps reflected the point that the special parts of codes generally follow the drafting convention of applying to what the principal perpetrator does. "Secondary parties" are typically covered in the general part. Aiders and abettors may be responsible even if their causal contribution comes nowhere near to "but for" causation. Some of the international case-law asserts that their contribution must be "substantial" but it is by no means clear what this means, nor how it applies to the Rome Statute. *See* GERHARD WERLE, PRINCIPLES of INTERNATIONAL CRIMINAL LAW 126–128 (2005); Kai Ambos, *Article 25, Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 757 (Special print of Article 25) (Otto Triffterer ed., 2d ed. 2008). The brackets around disputed items and alternatives typified the shape of the draft Statute as it went to the Rome Conference.

The whole *actus reus* provision was ultimately dropped in Rome as too difficult.[7] Part of the problem was conceptualizing omissions and how they "cause" things. Some Governmental representatives had been in denial about crimes of omission; some conflated them with negligence crimes and found imposing liability on that basis unthinkable in the present context; others did not want to think about the "duty" issues that go with crimes of omission.

Causation itself is a strange one. Specific but random aspects of the matter found their way into the special part (homicide) provisions in some of the Stephen Codes.[8] The Model Penal Code has sophisticated causation provisions.[9] But even New York State, whose Penal Law from the 1960s has unmistakable historical connections to the MPC, gave up on causation and left the issue with the Courts.[10] The Statute negotiators shared the instincts of New Yorkers to let it go.

One thing that was pretty new on the agenda, introduced late in the day at the Preparatory Committee in New York, was a United States proposal for "Elements of Crimes," to be negotiated in Rome,

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[7] Per Saland, *International Criminal Law Principles* in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 189, 205 (Roy Lee ed. 1999). Ambassador Saland of Sweden chaired the negotiations on the general part. Saland does not explain further how the issue became too hard and I have not found anything useful on the public record.

[8] *See*, e.g., Crimes Act 1961 (N.Z.) § 163 (not criminally responsible for killing by influence of the mind – with some exceptions); § 164 (acceleration of death while victim "labouring under some disorder or disease arising from some other cause"); § 165 (causing death that "might have been prevented by resorting to proper means"); § 166 (causing injury the treatment of which causes death) and similar provisions in the Canadian Criminal Code, § 224 (death that might have been prevented), §225 (death from treatment), § 226 (acceleration of death), § 228 (killing by influence on the mind). The origin of these provisions seems to have been HALE'S PLEAS OF THE CROWN. *Cf.* the rather different (but equally random) provisions in Samoa Crimes Ordinance 1961, § 70 ("hastens the death of any person from any disease or disorder from which that person is already suffering"); § 71 (liability for indirect cause of death "although the immediate cause of death is the act or omission of some other person or some other independent intervening event"). All of these could be generalized so as to apply to crimes, especially offenses against the person, other than homicide.

[9] Model Penal Code, § 2.03. The New Jersey version of the MPC, N.J. S.A. 2C:2–3, refines further the framework for deciding the cases where (unexpected) human intervention contributes to part of the "chain of causation" (result not too "dependent on another's volitional act to have a just bearing on the actor's liability or the gravity of the offense)."

[10] *See People v. Kibbe*, 35 N.Y. 2d 407 (1974) (drunken victim dumped on highway and struck by passing truck; responsibility on common law principles).

or, as it was ultimately decided, later.[11] I thought, wrongly, that the American military who were pushing this had in mind the structure of the Model Penal Code, or even my Californian student's Model Jury Instructions. The latter would have been a little strange since the ICC was not to have jury trials. As it turned out subsequently, the model they had in mind was military manuals, which are actually not all that different from jury instructions.[12] My Californian's insights would later be of considerable use to me!

II. MENTAL AND MATERIAL (PHYSICAL) ELEMENTS: A CONCEPTUAL FRAMEWORK

Breaking "a crime" or "guilt"[13] into physical components and mental (or "culpability") components provides a structure for pedagogy and for analyzing things for judges and juries. It also offers a framework for some policy decisions on what kinds of culpability are appropriate in the relevant context, in this instance the "most serious crimes of concern to the international community as a whole."[14] Since the negotiations on both the general part and The Elements proceeded on

[11] Rome Statute of the International Criminal Court, Article 9. Paragraph 1 says simply that "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties." Paragraph 2 deals with the procedure for amendments. Paragraph 3 gives the judges ultimate control over the validity of The Elements. It provides that "The Elements of Crimes and amendments thereto shall be consistent with this Statute." The drafting task was carried out by the Preparatory Commission for the Court in sessions held in New York and Siracusa in 1999–2000. Adopted by consensus at the Preparatory Commission in 2000, the Elements of Crimes were also adopted (unchanged) without a vote at the first meeting of the Assembly of States Parties in 2002. *See generally*, THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy Lee et al ed. 2001); Clark, *Mental Element*, *supra* note 1. No doubt the Court will afford some deference to the consensus work of the Preparatory Commission, but it must have the last word on what the Statute means. The Elements of Crimes are found at http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf.

[12] In one of life's many ironies, parts of the Manual for use in the U.S. trials in Guantanamo bear an unmistakable kinship to the ICC Elements of Crimes. *See* U.S. Secretary for Defense, MANUAL FOR MILITARY COMMISSIONS (2007). It must be either a case of cannibalism or common authorship.

[13] Article 66 (3) of the Rome Statute of the International Criminal Court states: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." "Guilt" seems to encompass all the "elements" of the crime.

[14] Rome Statute of the International Criminal Court, preambular paragraph 4.

a basis of "consensus" and nothing was ever forced to a vote, one cannot be sure of the ultimate positions of particular States, other than that they agreed to "live with" the results. My understanding of the terms of this debate, however, was that most of the players did not want any of the crimes to involve strict liability; they were generally uncomfortable with negligence-based liability;[15] they were generally uncomfortable with liability based on recklessness or its civil law (near) counterpart *dolus eventualis*.[16] What they could agree upon was a default rule in Article 30 of the Statute[17] that "unless otherwise provided"[18] the

[15] But they did ultimately include a negligence test in respect of the responsibility of military commanders, Rome Statute, Art. 28 (a). *See also* examples of a negligence standard as to some circumstance elements to be found in The Elements, *infra* note 57. "Manifestly unlawful" in Article 33 (superior orders) must also be a negligence test (standard of "reasonable soldier in all the circumstances" ?).

[16] But they did ultimately include a type of recklessness test in respect of the responsibility of other superiors, Rome Statute, Art. 28 (b). A draft definition of (subjective) "recklessness" carried forward to Rome was deleted when it was concluded that it was redundant, the term not appearing anywhere in the special part to which the definition could be applied. Saland, *supra* note 7 at 205.

[17] For a useful account of Article 30, by one of its principal drafters, *see* Donald K. Piragoff Darryl Robinson, *Article 30, Mental Element*, in Triffterer ed., *supra* note 6 at 849.

[18] "Unless otherwise provided" is an enigma. Obviously something could be otherwise provided, expressly and perhaps even impliedly, in another part of the Statute. But does the phrase permit reference out via the applicable law provisions in Art. 21 of the Statute to, say, the case-law of other tribunals? Could the Elements of Crimes make free use of such material, or strike out in new directions even in the absence of strong clues within the Statute? The way the committee structure worked in drafting the Statute, the drafters of the special part (mostly Foreign Office and Military lawyers) seemed determined to remain in (invincible?) ignorance of what their counterparts (mostly from Justice Ministries) were doing in the drafting of the general part. To the extent they used other language than that in the general part, it seems hardly to have been in a coherent effort to apply different mental elements in particular cases. For the most part, they tracked language aimed primarily at State responsibility contained in such instruments as the Hague and Geneva Conventions. The drafters of The Elements were reluctant to depart from the default rule without a good reason in the Statute or common sense. For a disputed departure, *see* note 57*infra*. I believe that Gerhard Werle and Florian Jessberger, *"Unless Otherwise Provided": Article 30 in the ICC Statute and the Mental Element of Crimes Under International Law*, 3 J. INT'L CRIM. JUST. 35 (2005), grossly mis-state the position of the drafters of both the Statute and the Elements when they conclude that "In most cases, the mental element is 'otherwise provided'". They place great reliance on the special part language and on what they believe to be customary international law (found in case-law) and underplay what the drafters thought they were doing, including in removing the reference to recklessness at Rome.

"material elements"[19] had to be committed "with intent and knowledge."[20] For purposes of the Article, a person was said to have "intent" where (a) in relation to conduct, that person means to engage in the conduct; and (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the normal course of events.[21] "Knowledge", for the purpose of the article "means awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[22]

Given that the provision on physical element or *actus reus* that came forward from New York[23] travelled to outer darkness in Rome,[24] we are left to infer, from the definitions of the mental element in Article 30, a conceptual structure for what now became "material elements". Thus, as the alert reader will have noticed in the immediately previous paragraph, Article 30 speaks of "conduct," "consequences" and "circumstances." While they are not defined further, they are a serviceable set of categories for purposes of analysis. The drafters of The Elements of Crimes ultimately adopted

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[19] The negotiation of Article 30 had been concluded in the Working Group of the Whole in Rome using the term "physical element" when someone in the Drafting Committee (allegedly France) changed the terminology so that the non-mental elements became described as "material" ones. Nothing substantive seems to turn on it, but the terminology is especially confusing to common lawyers who are not familiar with the usage. Care has to be used in distinguishing how "material" is used here compared with the way it appears in other contexts. In the Model Penal Code, for example "material elements" can include mental elements, physical elements and matters of justification and excuse. A "material element" is "an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct." Model Penal Code, § 1.13 (9) and (10). In the MPC, the prosecution bears the burden of proof as to all elements (including jurisdictional ones) and as to material elements there is a presumption that culpability of at least recklessness is required. Model Penal Code §§ 1.12 and 2.02 (3). Thus, there can be strict liability as to jurisdictional elements.

[20] The "and" in "intent and knowledge" was especially important for some civil lawyers. The common lawyers tended to see the concepts as alternative rather than cumulative and "knowledge" as especially useful for thinking about the relationship of an actor and "circumstance" elements. *See infra* at notes 34–38.

[21] Rome Statute of the International Criminal Court, Art. 30 (2).

[22] *Id.* Art. 30 (3). Note the overlap between intention and knowledge as to consequences in these definitions.

[23] *Supra* note 6.

[24] Saland, *supra* note 7.

this framework, as they concluded the Statute required. Paragraph 7 of the General Introduction to the Elements reads:

The elements of crimes are generally structured in accordance with the following principles:

- As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
- When required, a particular mental element is listed after the affected conduct, consequence or circumstance;
- Contextual circumstances are listed last.[25]

This left causation somewhere in limbo. Probably most of the participants saw it as included/implicit in either conduct or consequences; some perhaps saw it as an extra category that could safely be left for another day.

There is some thoughtful, but far from definitive, discussion of aspects of Article 30 in the first reasoned opinion from the Court on substantive matters, the *Lubanga Confirmation decision*.[26] Lubanga Dyilo was charged with the war crimes of conscripting and enlisting children under the age of fifteen into an armed group and using them to participate actively in hostilities.[27] He was alleged to be connected

[25] General Introduction to Elements of Crimes. "Contextual circumstances" is a probably unnecessary separate category of "jurisdictional" or "threshold" circumstance items that give the crimes their "international" character. There appear to be only three examples of the category in The Elements: a manifest pattern of similar conduct, in the case of genocide; a widespread or systematic attack against a civilian population, in the case of crimes against humanity; and an armed conflict (international or non-international) in the case of war crimes. They could just as easily have been lumped with the other circumstance elements. The first case to address the structure of the Statute and refer to The Elements is the *Lubanga Confirmation decision*, *supra* note 2. At p. 57, the Chamber has a heading on "Material elements of the crime" and begins its discussion with the "existence and nature of the armed conflict," apparently treating this as a material element no different from the others that it discusses based on The Elements, namely "enlisting or conscripting children under the age of fifteen years" (at 83); "active participation in hostilities" (at 90); discrete nature of "into the armed forces" and "into armed forces or groups" in the relevant provisions of the Statute (at 94); and "existence of a nexus between the armed conflict and the alleged crimes" (at 98). Notwithstanding the heading, the discussion uses the term "objective" rather than "material" to modify "element".

[26] *Supra* note 2.

[27] The crime is defined, identically for present purposes, in Rome Statute Article 8(2)(b)(xxvi) (in international armed conflict) and Article 8(2)(e)(vii) (in non-international armed conflict.)

to the crimes as a "co-perpetrator."[28] The Pre-Trial Chamber found it necessary to traverse the elements of the crimes charged. In what seems to be a lapse into the Judges' national modes of thinking, the Chamber assumes that a crime can be described in terms of "objective" and "subjective" elements.[29] I think that "objective" elements are what the Statute describes as "material" and "subjective" ones are those the Statute terms "mental," but the Chamber does not explain its assumptions.[30]

The discussion of the subjective elements of the "crime in question" (which the Chamber believes must be shared with other co-perpetrators)[31] is interesting but contains some doubtful assumptions. Apparently meaning to offer an interpretation of Article 30's references to intent and knowledge, the Chamber says that this entails a "volitional element."[32] This "encompasses, first and foremost, those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as *dolus directus* of the first degree)."[33] This must be the classic situation of intent (or intent and knowledge) of which Article 30 speaks. The Chamber adds that the "volitional" element also encompasses other forms of the concept of *dolus*" which it says "have already been resorted to by the jurisprudence of the *ad hoc* tribunals."[34] These are:

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[28] For discussion of this issue, *see infra* at notes 91–98.

[29] *Lubanga Dyilo Confirmation decision*, *supra* note 2 at 116–124. The (original) French text of the judgment is to the same effect. It uses the terms "subjectif" and "objectif" rather than the Statute's "psychologique" and "matérial."

[30] The terms "subjective" and "objective" were often used during the debates pre- and at Rome, as were "physical" and "mental." Many of the later commentators use the same language. The Statute settled for "material" and "mental." The common lawyers have had a hard time getting their collective head around the term "material" and it looks as though some civilians do too.

[31] *Lubanga Confirmation decision*, *supra* note 2 at 118.

[32] *Id.* at 119. " Volition" is used here in the sense of an attitude towards the result, not as it is sometimes used in the common law to describe the voluntariness of an act (as opposed to acting, say, in a state of automatism).

[33] *Id.*

[34] *Id.*, referencing *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, 15 July 1999, paras. 219 and 200; *Prosecutor v. Stakic*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 587.

i. situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime is aware that such elements will be the necessary outcome of his or her actions or omissions (also known as *dolus directus* of the second degree), and
ii. situations in which the suspect (a) is aware of the risk that the objective elements in the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).[35]

These categories are hardly what emerges from the literal language of the Statute, nor, if my analysis of the history is correct, from the *travaux préparatoires*. The first of these (*dolus directus* of the second degree) comes close to knowledge as defined in Article 30 and may thus pass muster. But *dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus. If it is to be read into the Statute, it is in the teeth of the language and history.

In one other respect, the Chamber was faithful to the intentions of the drafters, in this case the drafters of The Elements. The Court notes that,[36] in respect of the war crimes of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities, the third element is that, concerning the age of the victims,[37] "[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years."[38] This was a compromise on the part of the drafters, and controversial among them in view of the general exclusion of negligence.[39] The Chamber,

[35] *Id.* at 119–120 (footnotes omitted). *Cf.* Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM L. F. 1, 21–22 (1999) who finds no room in the Statute for recklessness or what he describes as the "higher threshold of *dolus eventualis*."

[36] *Id.* at 121.

[37] Age must be a "material" "circumstance" element in terms of the structure of Article 30 and The Elements.

[38] *See also infra* note 57 for other examples of "should have known."

[39] Charles Garraway, British representative in the drafting, describes the provision on children as a compromise between those who thought strict liability appropriate and those who wanted the default rule to apply. He adds that "[t]hose with reservations as to the *vires* of this provision were reassured by article 9 (3) of the Statute providing that elements 'shall be consistent' with the Statute. Any inconsistent element would be struck down by the judges." Charles Garraway, *Article 8(2)(b)(xxvi) – Using, Conscripting or Enlisting Children*, in Roy Lee et al ed., *supra* note 7, 205, 207. Kevin Jon Heller, *Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute*,

in this instance, refers to the "unless otherwise provided" language in Article 30 and describes the element as "an exception."[40] The relevant passage of the Chamber's opinion shows that it clearly understood the approach of the drafters of The Elements in addressing separately the mental element for each of the material elements of a particular crime (although the Chamber uses the term "objective" instead of "material").[41] The passage is worth quoting in full:

> As a result, the "should have known" requirement as provided for in the Elements of Crimes in relation to articles 8(2)(b)(xxvi) and 8(2)(e)(vii) is an exception to the "intent and knowledge" requirement embodied in article 30 of the Statute. Accordingly, as provided for in article 30(1) of the Statute, it will apply in determining the age of the victims, whereas the general "intent and knowledge" requirement will apply to the other objective elements of the war crimes set forth in articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, including the existence of an armed conflict and the nexus between the acts charged and the armed conflict.[42]

Footnote 39 continued
6 J. INT'L CRIM. JUST. 419 (2008), regards the negligence provisions as "almost certainly inconsistent with the Rome Statute." Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the* Lubanga *Decision on Confirmation of* Charges, 6 J. INT'L CRIM. JUST. 471, 474 (2008) comments that the Chamber, in apparently accepting The Elements on their face, took "a far-reaching step that should have been accompanied by at least a modicum of explanation." *See also* note 57 *infra*.

[40] *Lubanga Confirmation decision, supra* note 2 at 122.

[41] Explaining the drafting convention on which The Elements are structured, using article 30 as a default position, paragraph 2 of the General Introduction to The Elements asserts:

> As stated in article 30, 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. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to article 30, based on the Statute, including applicable law under its relevant provisions, are indicated below.

[42] *Lubanga Confirmation decision, supra* note 2 at 122. An armed conflict and a nexus to it are two of the material elements contained in all of the war crimes provisions of The Elements. With respect to the existence of an armed conflict, the Chamber noted, *id.*, that The Elements require only that "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict," without going as far as to require that he or she conclude, on the basis of a legal assessment of the said circumstances, that there was an armed conflict. For more on these two (circumstance) elements, *see supra* note 25.

At this stage of the proceedings, the Chamber seemed prepared to accept the position of The Elements uncritically. Whether the negligence exception is consistent with the Statute, as understood in Article 9 (3), is a question that will no doubt be argued by the defense at a later stage.

III. GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY[43]

For the Model Penal Code, matters of justification and excuse are elements of the crime. For its drafters, the structure is that of a complete code. Everything is defined by the legislature. The prosecution's *prima facie* case and whatever defenses the accused is able to raise are subject to proof or disproof as the case may be. This is seen as consistent with the principle of legality. The position is not quite so stark in the case of the ICC. There is no general definition of what constitutes an element. Not all the defenses are spelt out. Article 31 lists and defines several grounds for excluding responsibility, namely insanity, intoxication, defense of person or property, and duress (either of persons or circumstances).[44] Article 32 adds mistake of fact and mistake of law as grounds for exclusion in certain cases (using the term "excluding criminal responsibility"). Article 33 (controversially) permits a defense of superior orders for war crimes (using the words "relieve ... that person of responsibility") where the orders were not "manifestly unlawful." Beyond that, though, the area is at large. Paragraph 3 of Article 31 says that:

> 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

[43] The distinction between justifications and excuses was too controversial across legal systems and the term "grounds for exclusion of responsibility" was used to encompass whatever might fit into either of these categories. Rome Statute of the International Criminal Court, Article 31.

[44] Infancy was finessed by a jurisdictional solution in Article 26 of the Rome Statute which excludes jurisdiction over anyone who was under the age of 18 at the time of the alleged commission of the crime. Some potential defenses are precluded: Article 27 asserts the irrelevance of official capacity to exempt from responsibility; Article 29 says that crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.[45]

As I read the Statute, the ultimate burden of persuasion concerning the defenses lies on the prosecution. Article 66 contains a general statement as to the presumption of innocence and the need to prove guilt beyond reasonable doubt.[46] Article 67 (1) (i) emphatically entitles the accused to a "minimum guarantee" *inter alia*, "Not to have imposed on him of her any reversal of the burden of proof or any onus of rebuttal."[47] In negotiating The Elements, the Preparatory Commission avoided entering into the area, commenting in the General Introduction to The Elements that "[g]rounds for excluding responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime." For some, that perhaps meant that they did not regard the defenses as "elements"; for others, even if they saw them as such, it was an acknowledgement that the group could probably not come up with anything useful in the time available and that it was better to lie low.[48]

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[45] Rule 80 of the Rules requires the defense to give notice before trial to both the Trial Chamber and the Prosecutor. The Trial Chamber will decide whether the defense will be permitted to raise the ground. The mode of analysis used by the ICTY in *Prosecutor v. Erdemovic*, I.C.T.Y., Case No. IT-96–22-A, Appeals Chamber Judgment, Oct. 7, 1997, suggests an interesting model for the kinds of enquiry into general principles that Article 31 (3) will demand of the ICC. (Article 31 (1) (d) of the Statute in fact adopts the position of the *Erdemovic* dissent concerning duress.)

[46] Article 66 was at one early point contained in the general part of the Statute as well as in the part dealing with trial. *See* Report of the Preparatory Committee (Compilation of proposals) (1996) in Bassiouni comp., *supra* note 6 at 496 (general part) and 543 (trial). It found its final home in the Part dealing with The Trial. National codes often place the burden of proof in the general part.

[47] The whole question of burden of proof is ripe for more development in International Criminal Law. EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 828 (2d ed. 2004).

[48] Professor Eser makes the important point that the structure of the Rome Statute makes it difficult to apply the mistake provisions of the Statute to mistakes relating to grounds for the exclusion of responsibility. "Therefore," he says, "in these cases, the door to a recognizable mistake of fact could be opened only if the 'material elements' of the crime were understood as comprising both the positive and negative components of unlawfulness, that is the definitional elements of the crime as one part and the (absence of) justification as the counterpart." Albin Eser, *Mental Element – Mistake of Fact and Mistake of Law* in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (A. Cassese, P. Gaeta & J.W.R.D. Jones ed. 2002) at 940–941 (referring to German, Italian and Spanish authorities). The way forward is perhaps to regard the grounds for the exclusion of responsibility as "circumstance" and thus "material" elements.

There is, at the least, an interesting question about how the principle of legality really plays out here. Certainly many of those who wanted lots of precision in the special part (and in The Elements) tended to be more tolerant in this context.[49]

IV. MISTAKE – FACT AND LAW

During the drafting of the Model Penal Code, there were those who believed that any special provisions for mistake were unnecessary. A mistake or ignorance simply negatives the element of culpability (purpose, knowledge, recklessness or negligence as the case may be for the particular physical element of the offense). The view that special provision was unnecessary did not prevail and § 2.04 was inserted in the Code and in most modern U.S. codifications.[50] A similar debate took place in respect of the Rome Statute. As early as a 1996 Compilation of Proposals by the Preparatory Committee, the point was made that:

> In view of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility ... it was questioned whether this defence need be explicitly mentioned as it is merely one example of the various factors which could negate the existence of the required mental element.[51]

Others were adamant that the issue had to be addressed. The result was Article 32 of the Statute, which provides:

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

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[49] Paul Robinson, speaking generally about codifications, suggests that the principle may have "differential application" depending on the function of criminal doctrine that is relevant in each instance. For "rule articulation" (as one finds in the provisions of the special part of the Rome Statute) considerable precision is in order; but, for "principles of adjudication" (as in Article 31) less precision is necessary. *See* PAUL H. ROBINSON, CRIMINAL LAW 85 (1997). The New Zealand Crimes Act 1961, § 20, and the Samoa Crimes Ordinance 1961, § 9 (operating alongside a number of codified rules) retain rules and principles of common law on justification and excuse except to the extent they are altered by or inconsistent with anything in the Act or other legislation. These provisions do not appear to have spawned great creativity on the part of the judges.

[50] AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Pt. I, Comment on § 2.04 at 270–272 (1985).

[51] Compilation of Proposals, Bassiouni comp., *supra* note 6 at 491.

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.[52]

In arriving at this formulation, three of the main issues that arise in such debates were canvassed from various points of view, but there was a great deal of difficulty in gaining understanding across various legal systems. One issue is whether a mistake must be both honest and reasonable; another is whether this is some kind of "confession and avoidance" defense for which the burden of persuasion shifts; a third is how far to take the proposition that mistake or ignorance of the law is no defense. Difficult negotiations led to mistakes of fact and mistakes of law being dealt with in separate paragraphs.[53]

As to the first of the classic mistake issues, I believe that the rule that all that is required is a genuine mistake prevailed. Various references to negligent or "invincible", or "unavoidable" mistakes[54] disappeared during the drafting.[55] As in the case of the Model Penal Code, the word "mistake" is not modified by any requirement of

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[52] Rome Statute of the International Criminal Court, Art. 32. Art. 33 deals, controversially, with superior orders. On the debate concerning Article 33, *see* Ambos, *supra* note 35 at 30–31. There is an excellent recent account of Artice 32 in Heller, *supra* note 39.

[53] Cf. Model Penal Code § 2.04 which treats the two together:

> (1) Ignorance or mistake as to a matter of fact or law is a defense if:
>
> (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
>
> (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

[54] Compilation of Proposals, Bassiouni, *supra* note 6 at 490, Proposal 2:

> Invincible [unavoidable] mistake of fact [or of law] shall be a defence provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact [or of law] may be considered in mitigation of punishment.

[55] "Unavoidable" to some civil lawyers seems to be roughly the same as the common law's "non-negligent", although at times in the ICC negotiations it seemed to be used as equivalent to something that could happen in spite of the exercise of extreme care, so that it is close to the old common law tort doctrine of "inevitable accident."

reasonableness.[56] Perhaps I am too sanguine – there are bound to be those who can find the doctrine of unavoidableness or unreasonableness out there as a gloss waiting to be added by the Courts.[57]

On the matter of the burden of persuasion, I know of no definitive statements on the record, but the view that this is conceptually a

[56] Compare M.P.C. § 2.04 (mistake may negative the "purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense") with New Jersey Code 2C:2–4 (only "if the defendant reasonably arrived at the conclusion underlying the mistake"). The New Jersey approach (found in various guises in many other jurisdictions) effectively transforms the culpability element in cases of purpose, knowledge, belief and recklessness into one of negligence.

[57] And see *infra* note 66 on Professor Triffterer's view concerning mistake of law. In The Elements, as to some material elements, the "mental element" was accepted as "knew or should have known," thus introducing a negligence attitude as to those material elements (all of them, I think, circumstances elements). *See* Elements, Article 6 (e), Genocide by forcibly transferring children (perpetrator "knew or should have known, that the person or persons were under the age of 18 years"); Article 8 (2) (b) (vii)-1,-2 and -4, War crimes of improper use of flags, insignias, emblems, etc. (perpetrator "knew, or should have known of the prohibited nature of such use") ("prohibited nature" said to denote illegality, so a mistake of law is relevant here, *cf.* (vii)-3 on improper use of flag, insignia or uniform of the United Nations, where the prosecution must prove that the perpetrator *knew* of the prohibited nature; this is said to be because of the "variable and regulatory nature of the relevant provisions'); Article 8 (2) (b) (xxvi), War crime, in international armed conflict, of using, conscripting or enlisting children (perpetrator "knew or should have known that such person or persons was under the age of 15 years); Article 8 (2) (e) (vii) (same, children in non-international armed conflict). *See* Garraway, *supra* note 39 on the compromises involved here. Professor Eser, *supra* note 48 at 933, suggests that this is a situation where *dolus eventualis* or recklessness might apply. He adds: "By using the words 'should have known', the borderline between *dolus eventualis* and recklessness is clearly transgressed, and so the Preparatory Commission's Elements are in this respect hardly reconcilable with the ICC Statute." His argument is that "it seems feasible to distinguish between consequences and other circumstances of the crime: with regard to consequences, *dolus eventualis* is indeed excluded ... whilst indifference may suffice with regard to other elements of the crime, such as the age of the victim." If age is, as I believe it to be, a circumstance element, then Article 30 (3) surely requires awareness that the circumstance exists, unless the "otherwise provided" clause comes into play. The argument for recklessness is no stronger than the argument for negligence, at least on the face of the Statute. Heller, *supra* note 39 at 444–445, suggests that if negligence (or presumably recklessness) is to be applied in these cases, which he thinks is a good idea but inconsistent with the Statute at present, it must be by amendment of the Statute. This is an unlikely event at the first Review Conference on the Rome Statute in 2010 which is likely to be dominated by the question of the crime of aggression. *See generally* Roger S. Clark, *Possible Amendments for the First ICC Review Conference*, 4 N.Z.Y.B. INT'L L. 103 (2007) but Heller thinks it may be possible once the Parties to the Statute recognize how broad the defense possibilities are under Article 32.

denial of the prosecution's evidence of intent and knowledge is plain on the face of the article. And there is the insistence later in the Statute that the defense may not be required to shoulder "any reversal of the burden of proof or any onus of rebuttal."[58]

Mistake of fact seemed to be non-contentious. Mistake of law was the problem. The proposition that a mistake of law can never be a defense is "usually greatly overstated" in most domestic law systems[59] although where the lines lie is often hard to discern. It must, for example, be no defense to deny knowledge of the illegality of destroying property belonging to one's landlord. What if I believe that the property is mine, not the landlord's? Some such cases may be simple ones of a factual mistake. But what if there is a legal element involved in the ownership question? It must equally be a defense to introduce a belief that the property was one's own, even if wrong in law.[60] It is no defense to a bigamy charge to insist on a belief that having two or more spouses is legal, but there must be a defense for the actor who believes that the previous marriage had terminated in divorce, even if this involved some mistake as to the law relating to divorce. The typical case where the defense "works" is where the element in question ("property of another" and "already married" in my two examples) is what the Rome Statute would call a "circumstance" element. A mistake of law that works is typically about some law that is collateral to the central criminal proscription.

Article 32 appears compatible with the views just summarized. Mistake of fact goes to denial of the requisite mental element (normally intent or, especially, knowledge). Mistake of law does the same where there is an element, especially a circumstance one that includes a legal element. For example, in domestic jurisprudence, the theft cases are fruitful for ownership issues with a legal as well as a factual twist. The Rome Statute, especially as spelled out in The Elements, has some obvious possibilities. Consider, for example, "destroying or

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[58] Art. 67 (1) (i), discussed *supra* at notes 46–48. International Criminal Law has not yet developed any sophisticated notions like those in the common law that distinguish burdens of persuasion from burdens of going forward. It would not seem unreasonable that the defense should carry an evidentiary onus as to a defense of mistake (or other defenses such as those within Art. 31 for that matter). But Art. 67 (1) (i) is pretty emphatic on its face.

[59] Model Penal Code, Tentative Draft No. 4 at 131 (1955).

[60] *See R. v. Smith*, [1974] 2 Q.B. 354 (C.A.) (conviction reversed where Smith believed property was his own but, because of arcane rules of English property, it had become part of the realty and thus the landlord's). Heller, *supra* note 39, describes such mistakes as "mistake of legal element."

seizing 'property of a hostile party,'"[61] or in respect of "pillaging", the "perpetrator intended to deprive the owner of the property and to appropriate it for personal use."[62] Regarding a number of possibilities for the application of a mistake of law argument, however, the drafters of The Elements worked a creative finesse by re-casting the material element in factual rather than legal terms.[63] I have suggested elsewhere that in respect of the crime of aggression, there may be cases where some of the players can fairly rely on legal advice as to the legality of the circumstance element of a State act of aggression that will be a material element of the crime of aggression.[64] Such cases are controversial – some would prefer strict liability as to such an element; some would re-work the hypothetical in "factual" terms, making it harder to defend. My point, though, is that Article 32 provides a framework and accepts that there will be some cases where a mistake as to a legal matter will exclude responsibility.

Professor Otto Triffterer, while agreeing essentially with my analysis of Article 32 (1) has a somewhat different approach to Article 32 (2) which suggests that paragraph 2 does not codify the whole concept. His strongest argument is the difference in language between paragraphs 1 and 2. Paragraph 1 says that mistake of fact "*shall be* a ground for excluding criminal responsibility *only* if it negates the mental element." The first sentence of Paragraph 2, drafted with an equally imperative (but this time negative) "shall", says that 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 responsibility."[65] The second sentence of Paragraph 2 is worded differently. It says that "a mistake of law *may*, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime ...." What is to be made, in context, of the "may"? For Professor Triffterer (and he is surely correct), the

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[61] Rome Statute, Art. 8(2)(b)(xiii), Element 2.

[62] *Id.* Art. 8(2)(b)(xvi), Element 2.

[63] *See*, e.g., the numerous examples in the Elements of war crimes where the knowledge requirement for an armed conflict is re-cast as: "The perpetrator was aware of the factual circumstances that established the existence of an armed conflict."

[64] Roger S. Clark, *The crime of aggression*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn & Göran Sluiter eds. 2008) at 716–717.

[65] On the reference to "jurisdiction of the Court," *see also supra* note 19 and *infra* note 72.

Court has no discretion as to the matters mentioned in the first sentence of paragraph 2. A mistake about whether conduct "is a crime within the jurisdiction of the Court" is of no moment. There is criminal responsibility. He continues:

> However, with regard to other mistakes of law referred to in sentence 2 there is a discretion which is expressed by the word "may". There is no obvious hint in article 32 or elsewhere in the Statute about how to exercise this discretion. Since this differentiation between sentence 1 and sentence 2 must presumably make some sense it may be based on the following reason: the Court has to decide to which category the mistake of the suspect should be assigned to, is it an error on the underlying facts or a mistaken legal evaluation? Assuming the first, the consequence is related obligatorily by paragraph 1; because the error is one of fact and therefore falls under this provision. The discretion expressed in paragraph 2 sentence 2 therefore concerns exclusively a mistake of law by wrongful evaluation. *This means, the Court may judge that even in these cases a mistake of law may negate the mental element required and thus exclude responsibility because the error was unavoidable. The "unavoidableness" is not mentioned in article 32, but this criterion is well accepted by general principles of law.*[66]

I doubt that the "may" carries all this freight and that is represents anything more than the vagaries of a complicated negotiation. In particular, it is hard to see how it re-inserts notions of unavoidability that sank without trace in the drafting process.[67] Nevertheless, I do think that the issue is a nice example of a fundamental issue with any codification, national or international. To what extent does the new regime amount to a clean break from the past, so that everything is within the four corners of the codification? Or perhaps to put it more softly, how strong is the presumption that it is all in the code? And what role is there for the baggage of the old dispensation? In the international context, general principles are much more difficult to discern across different systems.

Once again the *Lubanga* case provided a first judicial rehearsal of some of the issues:

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[66] Otto Triffterer, *Article 32*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer, ed., 2nd ed. 2008) at 907–908 (emphasis added). I am not clear whether he is suggesting that in civil law doctrine, unavoidability (negligence?) may be relevant to mistakes of law, but not mistakes of fact. Does it apply even to a misunderstanding of the core obligations of a statute? Professor Eser, *supra* note 48 at 942, agrees that the Court has a discretion with mistakes of law, but does not seem to base its application on unavoidability.

[67] The existence of those proposals is not even mentioned by the chair of the relevant negotiations in his definitive account of the proceedings, Saland, *supra* note 7 at 210.

[T]he Defence argued that the principle of legality of sentences and crimes required the Chamber to make a threshold determination whether Thomas Lubanga Dyilo was aware of the existence of the crime of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities and whether he could foresee that the conduct in question was criminal in nature and could therefore entail his criminal responsibility.[68]

Noting that the Democratic Republic of the Congo had ratified the treaty in April 2002, before the events that were the subject of the indictment, and that the offenses were previously established in customary law, the Chamber had little difficulty in characterizing the situation as one governed by Article 32(2)'s denial of a mistake defense to one who claims ignorance of basic criminality.[69] It was thus of no avail to Lubanga Dyilo.

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[68] *Lubanga Confirmation decision*, *supra* note 2 at 102.

[69] *Id.* at 105. (The Chamber added, *id.*, that there was evidence before it that Lubanga in fact knew of the illegality.) The Chamber also commented, at 107, citing Eser, *supra* note 48 at "961" (the reference seems in fact to be to p. 941.):

[A]bsent a plea under article 33 of the Statute, the defence of mistake of law can succeed under article 32 of the Statute only if Thomas Lubanga Dyilo was unaware of a normative objective element of the crime as a result of not realizing its social significance (its everyday meaning).

Eser appears to be dealing with the question of circumstance elements that refer out to other norms (international law, law of armed conflict) and thus include a "legal" element. He is suggesting, apparently based on German doctrine, that the test is not whether the perpetrator understands the legal issues, but whether he understands the everyday meaning of the terms. The General Introduction to The Elements takes on a related point when it insists in paragraph 4 that "With respect to mental elements involving value judgments, such as those using the terms 'inhumane' or 'severe,' it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated." It seems a fair comment that the drafters of The Elements often tried to narrow the scope of potential applications of Article 32 (2). Eser would, I think, like to expand a little. Heller, *supra* note 39, regards the German approach as inconsistent with Articles 30 and 32 and what he regards as their common law foundations. As he puts it, at 439:

It is thus difficult to argue that Article 30's definition of knowledge incorporates the layman's test, because the argument requires assuming that he drafters of Article 30 intended to adopt German criminal law's idiosyncratic definition of knowledge, hut never felt compelled to reveal that assumption during the drafting process. Both assumptions may, of course, be correct – but the burden of proof is clearly on those who argue that they are.

See also criticism of the Court's remarks by Weigend, *supra* note 39 at 475–476.

V. TO WHOM DOES THE CODE APPLY? (PERSONAL JURISDICTION)

None of my unscientific sample of students in Athens, aside from the two Greeks, admitted to having been introduced to anything about jurisdiction in their courses. This is curious since the Model Penal Code and even the old common law codifications with stripped-down general parts do address such matters.[70] The Model Penal Code treats jurisdiction as an "element" of the offense which is thus subject to proof beyond reasonable doubt.[71] It is not, however, a "material" element (as the Code uses that term) so there is no presumption as to a mental element in respect of it.[72] Putting aside the special problems of federal systems like the United States, modern law of jurisdiction is surely dominated by issues of extraterritoriality that typically arise in the context of crimes under international customary law and pursuant to multilateral suppression treaties on subjects like drugs and terrorism.[73] A modern code must surely think through what to do about jurisdiction over genocide, war crimes, crimes against humanity and at least some terrorism offenses done outside the national territory.

There is nothing about jurisdiction in such senses in the general part of the Rome Statute. Yet the negotiations stimulated all sorts of thoughts about jurisdiction which are worth noting. One conceptual point on which the collective diplomatic mind managed ultimately to avoid taking a firm stand is whether what the ICC has acquired in respect of jurisdiction is something that already "belongs" to the

[70] The New Zealand Crimes Act 1961, for example, is mostly about territorial jurisdiction, but it includes nationality jurisdiction over citizens who commit bigamy, treason, inciting to mutiny and espionage (but not homicide) abroad, universal jurisdiction over pirates and slave traders, and "landing state" jurisdiction over crimes committed aboard anybody's vessels or aircraft that subsequently come into a New Zealand port (subject in the latter case to the consent of the Attorney-General and a defense that the conduct is not criminal in the state or nationality or citizenship of the accused). Crimes Act 1961, §§ 6, 8 and 400.

[71] Model Penal Code § 1. 13 (including "attendant circumstance" that "establishes jurisdiction" in definition of elements of crime); *State v. Denofa*, 187 N.J. 24 (2006) (same, interpreting New Jersey version of MPC).

[72] *See supra* note 19. Functionally, for mistakes of law and jurisdiction, the same result appears to be reached in the Rome Statute, through Article 32 (2)'s denial of a mistake of law defense on "whether a particular type of conduct is a crime within the jurisdiction of the Court", *supra* note 65. Jurisdiction must be proven, but not knowledge of it.

[73] For an excellent attempt to catch such obligations, *see* MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE (Vivienne O'Connor & Colette Rausch eds. 2007).

international community in a collective sense, or whether it is something possessed by nation-states that they have agreed to delegate or "transfer" to an international organization. The paradigm cases for ICC jurisdiction (described as "preconditions" in the Statute)[74] occur where either (or both) the "State on the territory of which the conduct in question occurred[75] or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft" or the "State of which the person accused of a crime is a national" is a party to the Statute. One can characterize the Court's personal jurisdiction thus as transferred territorial or nationality jurisdiction. Many of the negotiators wanted to go further and include a transfer of universal jurisdiction, it being assumed that the crimes within the Court's subject-matter jurisdiction were crimes of universal jurisdiction. If any State could exercise jurisdiction on a universal basis, why not pass that jurisdiction over to a tribunal with even more legitimacy? This was resisted, notably by the United States, which also objects to the Court's exercise of jurisdiction over its nationals who are captured after allegedly committing crimes on the territory of a State Party.[76]

The universal jurisdiction issue came back in a number of States when the time came to give domestic effect to the Statute. New Zealand and Samoa, for example, both took the position that the Statute's crimes could be prosecuted in their courts, wherever and by whomever committed. Samoa made the more modest claim of the two. It asserts jurisdiction where the accused is present on the national territory after the commission of the offense.[77] New Zealand's

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[74] In discussing a document circulated in behalf of Samoa at the Preparatory Commission for the ICC concerning Elements of the Crime of Aggression, U.N. Doc. PCNICC/2002/WGCA/DP.4, we used the term "element" to describe the preconditions and met with considerable opposition – unfairly, I thought, but consistent with a widespread feeling that jurisdiction is a distinct category of its own and not "really" an element.

[75] There must be some interesting questions about where the "conduct" "occurred" in some marginal cases. Take a purchaser of blood diamonds in the Czech Republic (not yet a party to the Statute) who is full of intent and knowledge about the crimes against humanity committed in the Congo (a party) to acquire the diamonds. Is there jurisdiction? Some of the "conduct" (a broad concept surely) must have occurred in the Czech Republic. Does the purchaser's conduct in Prague "immunize" the effects of his actions in Kinshasa?

[76] *See* Roger S. Clark, *The ICC Statute: Protecting the Sovereign Rights of Non-Party States*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 207 (Dinah Shelton ed. 2000).

[77] International Criminal Court Act 2007 (Samoa), § 24 (d).

legislation seems broad enough on its face to support an extradition request for someone with no existing connection to New Zealand (if the relevant extradition treaty will bear the traffic).[78] Such legislative efforts are supported by the preambular paragraph of the Rome Statute that recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,"[79] and by the reasonable expectation that international criminals will turn up who are beyond the resources of the ICC to deal with and who are not reasonably extraditable (or deportable) somewhere else.

I would suggest that a modern code would include an international crimes part incorporating such instances and other examples of extraterritorial jurisdiction,[80] rather than leaving them sitting out in some specialized legislation.

VI. "SECONDARY" PARTIES, COMPLICITY AND OTHER MODES OF PARTICIPATION

By and large, the drafting of codes proceeds on the basis that the actor whose deeds are described in the special part is what we think of

[78] § 8(1)(c) of New Zealand's International Crimes and Criminal Court Act 2000, provides that there is jurisdiction over the treaty crimes regardless of "(1) the nationality or citizenship of the person accused; or (ii) whether or not any act forming part of the offence occurred in New Zealand; or (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence." *See Demjanjuk v. Petrovsky*, 778 F.2d 571 (6th Cir. 1985), where the U.S./Israel treaty was held to support an extradition request based essentially on universality. A basic premise of the ultimate decisions of the House of Lords in the *Pinochet* case was that the extradition arrangements between the U.K. and Spain would support an extradition request founded on a universal jurisdiction theory, at least where both countries adopted that theory at the relevant time. *Regina v. Bow Street Magistrate, Ex Parte Pinochet Ugarte (No. 3)* [2001] 1 App. Cas. 147 (H.L.). In *Demjanjuk*, on the other hand, only Israel had a universal jurisdiction basis, not the U.S.

[79] Rome Statute of the International Criminal Court, preambular paragraph 6.

[80] For efforts in this direction, *see* O'Connor & Rasch, *supra* note 73. The unsuccessful effort at codification of federal criminal law in the United States included a general provision aimed at rationalizing extraterritorial jurisdiction theories. *See* FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW § 208 (1971). If revived, the draft would need updating in light of numerous multinational suppression treaties since 1971.

as a "principal" – the one who does it himself.[81] Other participants are linked through a provision in the special part. The Rome Statute is no exception, although it devotes a little more attention to the principal than do some codes. Article 25 (3) of the Statute provides in relevant part, that a person[82] shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

    (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

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[81] The Elements of Crimes follow this drafting convention and use the term "perpetrator" to describe such a person. Paragraph 8 of the General Introduction to The Elements notes:

As used in the Elements of Crimes, the term "perpetrator" is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.

[82] The Rome Statute applies only to natural persons. Some legal systems still have hang-ups about the liability of legal persons and an effort to include them failed. Saland, *supra* note 7 at 199. There are some obvious practical problems with dealing with corporations in an international court, such as who will "surrender" them and how to punish them, but these are not insuperable. Among the NGO community those who pushed hardest for responsibility of legal persons were those most concerned with finding ways to compensate victims of international crimes. The same was true of France and Solomon Islands which made the final unsuccessful efforts in Rome to include at least corporate responsibility. *See generally*, Joanna Kyriakakis, *Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare*, 19 CRIM. L. F. 115 (2007).

(ii) Be made in the knowledge of the intention of the group to commit the crime.

Subparagraph (a) covers principals and co-principals and the people who act through those who are not criminally responsible, such as children or the insane (perhaps even the un-knowing and the mistaken). Subparagraph (b) is aimed at the big fry, those typically "most responsible" for what occurs. As Professor Schabas has noted, to describe such persons as "secondary" parties in respect of genocide is to miss the point.[83] The same must be true of those involved in crimes against humanity and war crimes. Subparagraph (c) deals with more obviously "secondary" parties like aiders and abettors. Annoying people like me, who wondered whether it should be "aid *and* abet" or whether some definition might help, were assured that "the jurisprudence" took care of it. Subparagraph (d) was characterized by the Chair of the Working Group on General Principles in Rome as related to the "very divisive issue" of "conspiracy, a concept strongly advocated by common law countries, but unknown in some civil law systems."[84] It was also closely related to the doctrine of joint criminal enterprise that had found a toehold in decisions of the *Ad Hoc* Tribunals.[85] Ambassador Saland comments:

> We were helped by the successful negotiation in 1997 of the Convention for the Suppression of Terrorist Bombings,[86] which had been adopted by consensus. In Rome, it was easy to reach agreement to incorporate, with slight modifications, the text from that Convention which we now find in paragraph 3(d) of Article 25 of the Rome Statute.[87]

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[83] *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 286 (2000):

> Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing "secondary" about it. The "accomplice" is often the real villain, and the "principal offender" a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically. He was "only" an accomplice to the crime of genocide.

[84] Saland, *supra* note 7 at 199.

[85] *See generally* SHANE DARCY, COLLECTIVE RESPONSIBILITY AND INTERNATIONAL LAW, Chapter IV (Conspiracy, Common Plan and Joint Criminal Enterprise Liability) (2007); MARJA LEHTO, INTERNATIONAL RESPONSIBILITY FOR TERRORIST ACTS: A SHIFT TOWARDS MORE INDIRECT FORMS OF RESPONSIBILITY 216–232 (Joint Criminal Enterprise) (2008). *See also* the Tokyo Judgment which comes close to conflating this version of conspiracy and joint enterprise, NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL (2008) 221–227.

[86] G.A Res. 52/164 of 15 December 1997.

[87] Saland, *supra* note 7 at 199–200.

Subparagraph (d) is thus a classic example of a very useful principle of international negotiation, the "previously agreed text" principle – there is a presumption that whoever negotiated it knew what they were doing, so it is safe to use it.

There is, however, more here than meets the eye. United States conspiracy doctrine is twofold. Conspiracy is both an inchoate offense and (in a development that has not gained much traction in the rest of the common law) a mode of complicity.[88] As such, it catches people on the fringe of criminal activity who would not meet the aid or abet category, especially those associated recklessly or negligently, rather than intentionally, with the relevant activities. Conspiracy as complicity is what was in play here. The preparatory work on the Terrorist Bombing Convention makes it clear that this kind of conspiracy doctrine was what people had in mind in the present context.[89] But there was the other kind of conspiracy, the inchoate one that should have been put more forcefully on the Rome agenda by the Genocide Convention. It got lost in the shuffle, I think because people thought they had solved the whole problem in Subparagraph (d). More on this in the next section of this paper.[90]

Some valuable first thoughts on how to interpret Article 25 (3) (a) appear in the *Lubanga Confirmation decision.*[91] The prosecution contended that the theory that "best represents the criminal responsibility" of the accused was under Article 25 (3) (a) as a "co-perpetrator."[92]

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[88] Recognized as federal common law in *Pinkerton v. U.S.*, 328 U.S. 640 (1946) and law in some states. It is rejected by the Model Penal Code and most state statutes based on it. *See* WAYNE R. LAFAVE, CRIMINAL LAW 684–686 (4th ed. 2003).

[89] *See* Report of the Ad Hoc Committee established by general Assembly Resolution 51/210 of 17 December 1996, U.N. GAOR, 52nd Sess., Supp. No. 37, at 20, U.N. Doc. A/52/37 (1997) (preliminary working document from Group of Seven major industrialized countries and Russian Federation) (word "conspiracy" appears), 38 (proposal by United States) (concept but not word "conspiracy"), 39 (proposal by Italy) (closer to final version). The Terrorist Bombing provision was in turn based on the Convention relating to extradition between Member States of the European Union, 27 September 1996, 1996 O.J. (C 313) 12 which represented some recognition of conspiracy by European States.

[90] *Infra* at notes 117–718.

[91] *Supra* note 2. There is a very rich discussion of this aspect of the *Lubanga Confirmation decision* in Weigend, *supra* note 39 at 476–487.

[92] *Id.* at 110. At one point the Prosecutor had a "common purpose" theory under Article 25 (3) (d), but apparently abandoned it in favor of what it thought to be a stronger case. *Id.* at 109 n. 406. The Pre-Trial Chamber notes that Art. 25 (3) (a) "covers the notions of direct perpetration (commission of a crime in person), co-perpetration (commission of a crime jointly with another person) and indirect

After examining various theories of what constitutes a co-perpetrator, the Chamber settled for a concept of "control over the crime".[93] "The notion underpinning this ... approach," said the Court, "is that principals to a crime are not limited to those who physically carry out the objective elements of the offense, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed."[94] According to the Chamber, there are two "objective elements" of co-perpetration "based on joint control over the crime." These are (i) "Existence of an agreement or common plan between two or more persons," and (ii) "Co-ordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime."[95] There is some obvious (and perhaps unavoidable) overlap here with the common purpose category in Article 25 (3) (d). The choice of the term "objective elements"[96] is curious. I think the items the Chamber discusses are examples of "conduct" elements that would fit the category of "material" elements in Article 30 of the Statute.[97] Describing them as "objective" is probably a lapse into the

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Footnote 92 continued
perpetration (commission of a crime through another person, regardless of whether that person is criminally responsible." *Id.* at 109. The Statute does not actually use the terms "perpetrator," "co-perpetrator" or even "principal;" it speaks of one who "commits" individually or jointly.

[93] *Id.* at 113.

[94] *Id.* There is some obvious overlap here with those who order, solicit or induce (subparagraph (b)). It is typical of parties provisions at the domestic level that they give prosecutors alternative theories to pursue.

[95] *Id.* at 116–117.

[96] I think the word "elements" is used here the way it is used in Articles 9 and 30 of the Statute, but it is possible that the judges have some other conceptual framework; certainly they are treating these items as matters that must be proved ultimately by the prosecution.

[97] In examining the material elements of the offense as it would be carried out by a single perpetrator, the Chamber looks to The Elements and treats them as definitive. When it comes to the corresponding material elements that must be proved in respect of other parties, its instincts are surely right: there must be some mental and material (or objective and subjective) elements "out there" that can be found in the language or the jurisprudence. The Chamber does not mention it, but the Preparatory Commission had before it a useful attempt by the United States to codify such issues, U.N. Doc. PCNICC/1999/DP.4/Add.3. The Preparatory Commission suffered from fatigue and the United States did not insist on completing that part of the project. Perhaps a return could be made to that exercise. The whole area of complicity may be ripe for codification (and progressive development).

national thinking of the judges and the word "objective" appears through the remainder of the relevant discussion. Perhaps the habits of a professional lifetime spent thinking in a particular way explains also why the judges go on to discuss the "subjective elements" that must accompany these "objective" ones, rather than the "mental" elements of which Article 30 speaks. The "subjective elements" of co-perpetration are said to be threefold: the suspect must fulfill the subjective elements of the crime in question; the suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime; and, the suspect must be aware of the factual circumstances enabling him or her to jointly control the crime.[98]

One crucial issue on Article 25 (3) on which I do not recall any significant discussion during the Rome Statute negotiations is the exact mental element required for secondary parties (using that term loosely to include those whose responsibility falls to be determined under Article 25 (3), paragraphs (b) to (d)). Must the secondary party share the principal's intention, in the way in which the *Lubanga Dyilo* Pre-Trial Chamber believed that a co-perpetrator must share his cohort's intentions?[99] Or is it enough that, with knowledge of those intentions, he deliberately gives aid. The question is especially relevant to the crime of genocide. The chief génocidaire must surely act with intent, and indeed with the specific "intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such."[100] This must be the case in Article 25 (3) at least with principals under subparagraph (a) and those who order and solicit under subparagraph (b). Subparagraph (c) is slightly harder but I think gets the same result. The key phrase is "the purpose of facilitating the commission of such a crime." A *purpose* to facilitate must imply an intent to achieve the objective of the other criminals. As to subparagraph (d), part (i) seems to be quite explicit that there has to be the "aim of furthering the criminal activity or criminal purpose of the group."

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[98] *Id.* at 118–124. These concepts seem to be derived from case-law at the ICTY rather than from the language of the Rome Statute, but they are a useful framework for further argument. There seems, however, to be a reluctance to read, and make sense of, the actual language of the Statute.

[99] *Id.* at 118.

[100] This is the over-arching ("special") intent required by Article II of the Genocide Convention and the chapeau of Article 6 of the Rome Statute – a clear example of something "otherwise provided" in the Statute.

Knowledge will not suffice. But part (ii) simply requires that an "intentional" contribution be made "in the knowledge of the intention of the group to commit the crime."[101] "Intentional" here could mean merely the intention to engage in an act ("volition" in a narrow sense), or it could travel all the way down the sentence and modify the later material which is either a circumstance or a conduct element. That is to say, the intent as to the circumstance or must be shared with the principal actor. Perhaps the latter argument can be bolstered via Article 30's default rule of "intent and knowledge."[102] If (i) and (ii) do carry such distinctions (intent as to (i); knowledge only as to (ii)), are they nonetheless "offenses" (or modes of committing offenses) of equal gravity, or is there a hierarchy of evil here when it comes to punishment. Is he or she who actually shares the intentions "more" guilty?[103]

The general issue of the *mens* rea of secondary parties has arisen starkly in the ICTY and, less conclusively, in the ICJ. In *Prosecutor v. Krstic*[104] the Appeals Chamber of the ICTY upheld the conviction of General Krstic for aiding and abetting genocide in the United Nations "safe area" of Srebenica in July of 1995. The Tribunal held that it was sufficient that he furnished aid knowing of the genocidal intent of other participants. The Tribunal believed that this result was supported by French, German, Swiss, English, Canadian and Australian law and by "some jurisdictions in the United States."[105] As

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[101] Professor Eser is dismissive of the drafting of subparagraph (d): "Clearly, the employment of obviously different mental concepts in this provision can hardly hide the lack of expertise in criminal theory when this provision was developed." Albin Eser, *Individual Criminal Responsibility* in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. I, 767, 803 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds. 2002). It is hard to believe that the drafters really intended to arrive at a different result under the two situations in subparagraph (d), but the literal language is a problem.

[102] The phraseology, like "purpose to facilitate" and "aim of furthering" seems to have been developed without any clear thoughts out to Article 30's default rule. Is the whole (most?) of Article 25 an example of "unless otherwise provided" or does Article 30 have some interstitial role in interpreting it?

[103] The Statute does not categorize offenses in degrees of evil, so the judges are on their own to create sentencing categories rather than categories of degrees of substantive offenses. *Cf.* the categories of secondary parties based on differing degrees of culpability in some American legislation, *infra* note 107.

[104] I.C.T.Y., Case No. IT-98–33-A, Appeals Chamber Judgment of April 19, 2004.

[105] *Id.* para. 141.

the Tribunal concedes in a footnote,[106] it is not the majority United States rule. Nor is it the rule espoused in the American Law Institute's Model Penal Code.[107] I do not believe, for the reasons already canvassed, that it is the Rome Statute position on aiders and abettors – intention is required there – but I am not so sure about a person linked by common purpose where knowledge may be enough.

The question was discussed further by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[108] The issue there was one of state responsibility but there is a very useful discussion of the complicity provisions of the Genocide Convention. The Court held that not even knowledge on the part of Serbia and Montenegro had been shown in respect of the same massacre as in *Krstic*, so that there was no responsibility on any basis. Thus, there was no need to decide if knowledge was sufficient – at the least, something less than knowledge would not be enough. Judge Keith, who believed that knowledge but not purpose had been shown, took the view that knowledge was enough.[109] The correct interpretation of Article 25 is bound to be an early issue for the ICC.

Article 28 of the Statute, concerning the responsibility of commanders and other superiors, needs mention here. The essence is a failure to prevent. These are alternative theories for connecting

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[106] *Id.* n. 244, citing Candace Courteau, Note, *The Mental Element Required for Accomplice Liability*, 59 LA. L. REV. 325, 334 (1998).

[107] Model Penal Code, Official Draft (1962), § 2.06 (3) ("purpose of promoting or facilitating the commission of the offense" required.) The Chief Reporter had supported a knowledge position, accompanied by a requirement that the behavior *substantially* facilitate. The Institute rejected this position. Some jurisdictions, following New York's lead, have created a new offence of knowing facilitation, which is of a lower grade than the crime which is facilitated. *See* MODEL PENAL CODE AND COMMENTARIES, *supra* note 50 at 314–319. As Professor Dressler points out, *supra* note 4 at 428–429:

> American [and, one might add, other] criminal law is a disgrace. It treats the accomplice in terms of guilt and potential punishment as if she were the perpetrator, even when her culpability may be less than the perpetrator (end even less than is required in the definition of the offense for which she is convicted) and/or her involvement in the crime is tangential. (Footnotes omitted.)

[108] Bosnia and Herzegovina v. Serbia and Montenegro, I.C.J., Judgment of Feb. 26, 2007.

[109] *Id.* Declaration of Judge Keith at paras. 1–7 (relying heavily on *Krstic*). See also the briefer discussion to the same effect by Judge Bennouna, in Declaration de M. le juge Bennouna (paragraphs not numbered).

leaders with crime carried out by others, or perhaps alternative crimes with which to charge them. In the case of military commanders the relevant standard is essentially a negligence standard; for other superiors the standard is one akin to recklessness. Both of these are clear exceptions to the general default rule in Article 30 of the Statute, contained in the plain language of the Statute itself.[110]

VII. INCHOATE OFFENSES

General parts of codes tend to have provisions addressing inchoate offenses, notably attempts and conspiracies. The Charters of the Nuremberg and Tokyo Tribunals, however, made no mention of attempts and none were charged. On the other hand, the Charters had confusing provisions on conspiracy. The inchoate version of it was held to apply only to the crime against peace;[111] the complicity version of it was never closely analyzed at Nuremberg, although it did receive some examination in Tokyo.[112] The Genocide Convention of 1948 made provision for the inchoate crimes of "conspiracy to commit genocide," "direct and public incitement to commit genocide" and "attempt to commit genocide."[113] The preparatory work of the Convention makes it clear that conspiracy and direct and public incitement are both punishable even in the event that genocide is not in fact committed. The belief was in 1948 that the inchoate offenses in question are a danger in themselves such as to merit criminal suppression. In Rome, there was some desultory discussion about whether to extend the inchoate incitement provisions to other crimes, but the effort failed.[114] Article 25 (3) (e) simply includes as an example of criminal responsibility: "In respect of the crime of genocide, directly and publicly incites others to commit genocide." I thought the debate on incitement hopelessly confused; some participants could not grasp the distinction between an inchoate offense, like public incitement in

[110] Compare the negligence standard applied to both military and civilian superiors at the Tokyo trial. BOISTER & CRYER, *supra* note 85 at 231–236.

[111] On Nuremberg, *see* Roger S. Clark, *Crimes against Peace at Nuremberg*, 6 WASH. U. GLOB. STUD. L. REV. 527 (2007). On Tokyo, *see* BOISTER & CRYER, *id.* at 206–221.

[112] *See* BOISTER & CRYER, *id.* at 221–227 (discussing "conspiracy and joint enterprise").

[113] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), Article II.

[114] Saland, *supra* note 7 at 200.

the Genocide Convention, and becoming a party to a completed or attempted offense by ordering, soliciting or inducing under Article 25 (3) (b).[115] They thought the problem had been solved in 3 (b) and need not trouble us further. Others thought that the incitement provision was unique to genocide and explicable perhaps on historical grounds, but not necessarily to be extended to other offenses – certainly a defensible position.

The International Law Commission, in its drafts of a Code of Crimes against the Peace and Security of Mankind, had routinely from 1954 onwards included a general attempt provision,[116] presumably based on the Genocide Convention. Including an attempt provision applicable to genocide, crimes against humanity and war crimes does not seem to have generated any controversy and it duly found its way into the Rome Statute.

If carrying forward the inchoate conspiracy provision of the Genocide Convention was addressed in Rome, I was not there.[117] My impression is that it got lost in the shuffle – some of the participants thought that the Genocide Convention's conspiracy had been cleverly carried forward into Article 25 (3) (d) and, indeed, applied to other crimes within the jurisdiction of the Court as well. Others did not think to ask. It is nowhere to be found.[118]

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[115] One who successfully incites must be either a solicitor or an inducer of the completed offense (or attempt) in terms of (3) (b). Solicitors and inducers need not, however, act publicly (or even directly) in order to become a party to a substantive offense. Note that, unlike the situation in some jurisdictions, a mere solicitation is not an offense under the Rome Statute.

[116] Kai Ambos, *Article 25, Individual Criminal Responsibility*, in Triffterer ed., *supra* note 6 at 767.

[117] A bracketed proposal on inchoate conspiracy, potentially of application to all the Statute crimes, was on the table in 1996. *See* Bassiouni comp., *supra* note 6 at 489–490. It died before Rome.

[118] A State which is a party to the Rome Statute and to the Genocide Convention might wish to comply legislatively with its criminalization obligations in respect of conspiracy under the Genocide Convention, even in legislation concerned primarily with the ICC. For an example, *see* the identical provisions in International Crimes and International Criminal Court Act 2000 (New Zealand) § 9 and International Criminal Court Act 2007 (Samoa) § 5 (1) (b) ("conspires or agrees with any person to commit genocide, whether that genocide is to be committed in New Zealand [Samoa] or elsewhere"). The Genocide Convention is nearly unique among international criminal law treaties in containing an inchoate conspiracy provision. In giving effect to its criminalization obligations under terrorism treaties, the United States often adds a provision on conspiracy over and above the offenses criminalized in the relevant treaty, PODGOR & CLARK, *supra* note 1 at 79 n. 114 and references therein.

VIII. CONCLUSION

It is, I believe, necessary to work with the Statute/codification that we have, not the one we might have preferred, or even the one we thought we had. This one has a strong general part – and a set of preparatory work that is not totally opaque.[119] It uses language in a way that is different from the German, New Zealand or Samoan codifications. The trick is to make it work as a *sui generis* piece of codification, just as the procedural provisions of the Statute are neither those of the common law nor those of the civil law as their respective practitioners and devotees understand them. They are something new; the general part of the Rome Statute is something new. To repeat myself: "How judges will fare if they insist on bringing their ingrained intellectual structure to judging, rather than making as much as they can of the Statute's negotiated structure, is hard to say."[120]

[119] The documentation pre- and at Rome is published. Moves are afoot to make the material from the Preparatory Commission more widely accessible.

[120] Clark, *Mental Element*, *supra* note 1 at 302, n. 37.