

## **DIVERGENCE IN A SYSTEM OF COMPLEMENTARITY?**

**The incorporation of *dolus eventualis* in the interpretation of criminal intent for serious crimes of international concern: A comparison of the International Criminal Court and the national legal system of Canada**

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I, Helen Stamp, declare that the material contained in this Honours dissertation, except where properly acknowledged and attributed, is the product of my own work carried out during the Honours year and has not previously been submitted for a degree or an award at any tertiary education institution.

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## ABSTRACT

The creation of the first, permanent International Criminal Court by multilateral treaty was destined to be problematic. The specificity demanded by elements of criminal law does not sit easily with the compromise required in order for agreement to be reached on the Rome Statute. A clear example of this tension is Article 30 of the Rome Statute. Article 30 is the first time that a *general* provision defining the intent required to establish criminal responsibility has been included in the statute of an international criminal tribunal. This provision has been the subject of different opinions in respect to the forms of intent that are incorporated in it. In particular, there is disagreement as to whether *dolus eventualis* or recklessness is included as a form of intent.

The International Criminal Court itself has provided conflicting opinions on whether *dolus eventualis* is incorporated within Article 30. Commentators have observed that the prevailing view of the International Criminal Court – that *dolus eventualis* is not a form of intent included in Article 30 – is contrary to the position of a number of national legal systems in which *dolus eventualis* is recognised as a legitimate form of criminal intent. The question has therefore been posed: is this creating a dual system of criminality between the International Criminal Court and national legal systems?

Examination of this possible divergence to date has focused predominantly on civil law national legal systems. This thesis will examine the common law jurisdiction of Canada in order to ascertain whether this divergence in interpretation applies more broadly to both civil law and common law jurisdictions. The forms of criminal intent recognised in Canada will be considered and, in particular, whether recklessness (the common law equivalent of *dolus eventualis*) is identified as part of Canadian criminal law.

This thesis will then consider whether a dual system of criminality is as problematic as has been suggested and will ask: could this divergence be recognised instead as a natural progression of the system of complementarity in place between the International Criminal Court and national legal systems? Does this divergence reflect more on the division of case types between the International Criminal Court and

national legal systems rather than a true difference in the forms of criminality found in each of these jurisdictions? Should the willingness of Canadian courts to incorporate *dolus eventualis* or recklessness in their interpretation of the intent required for serious crimes of international concern be viewed more positively as evidence that national courts of member States to the Rome Statute are gaining confidence in their roles as primary prosecutors of such crimes?

# CONTENTS

CHAPTER 1: INTRODUCTION.....	1
CHAPTER 2: THE INTERPRETATION OF ARTICLE 30.....	9
I INTERPRETATION OF ARTICLE 30 BY THE ICC.....	9
II RESPONSES TO THE ICC’S JURISPRUDENCE ON ARTICLE 30.....	13
A <i>Context of the Rome Statute</i> .....	14
B <i>Forms of intent under Article 30</i> .....	15
C <i>Comparative Studies of Intent in National Legal Systems</i> .....	17
III CONCLUSION .....	21
CHAPTER 3: CRIMINAL INTENT AND CANADIAN LAW .....	23
I CRIMINAL LAW AND INTENT IN CANADA.....	23
II FORMS OF INTENT .....	24
III IMPLEMENTATION OF THE ROME STATUTE INTO CANADIAN LAW .....	27
IV INTERPRETATION OF THE <i>WAR CRIMES ACT</i> .....	29
V <i>EZOKOLA V CANADA (CITIZENSHIP AND IMMIGRATION)</i> .....	31
CHAPTER 4 CONCLUSION.....	40
BIBLIOGRAPHY .....	43

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## CHAPTER 1: INTRODUCTION

In 1998 the first, permanent International Criminal Court (ICC) with jurisdiction for the prosecution of the most serious crimes of concern to the international community, such as crimes against humanity and genocide, was established by the Rome Statute.<sup>1</sup> The agreement of a majority of the international community to establish the ICC was a defining moment for proponents of international criminal justice who have struggled for some time to find a suitable forum in which to prosecute such crimes.<sup>2</sup> The ICC was a bold step forward by the international community in respect to holding individuals accountable for crimes of international concern. Some innovative steps have been taken by the ICC in how it does this. For example, individuals in senior positions can no longer rely on traditional immunities to shield them from ICC prosecution, such as the absolute immunity afforded to serving heads of government in respect to civil and criminal jurisdictions in other States.<sup>3</sup>

The general progress forward in the last 20 years has been tempered by ongoing criticism of the ICC, such as why certain individuals have been selected for prosecution over others and the apparent focus of the ICC in prosecuting individuals from predominantly African countries.<sup>4</sup> Such criticism about apparent geographical or racial selectivity has cumulated in the announcement by some States parties, such as South Africa, that they intend to withdraw from the Rome Statute.<sup>5</sup> Given the criticism and because of the importance of maintaining its credibility, the ICC is under constant scrutiny to justify the matters that it investigates and prosecutes.<sup>6</sup>

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<sup>1</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 5.

<sup>2</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 27; see also Malcolm N Shaw, *International Law* (Cambridge University Press, 6<sup>th</sup> ed, 2008), 399-430.

<sup>3</sup> Shaw, *ibid* 739; see also *Congo v Belgium* [2002] ICJ Rep 3, 20.

<sup>4</sup> See eg, Alana Tiemessen, 'The International Criminal Court and the politics of prosecutions' (2014) 18 *The International Journal of Human Rights* 444; David Kaye and Kal Raustiala, 'The Council and the Court: Law and Politics in the Rise of the International Criminal Court' (2016) 94 *Texas Law Review* 713.

<sup>5</sup> Patrick Wintour, 'African exodus from ICC must be stopped, says Kofi Annan', *The Guardian* (online), 18 November 2016 <<https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan>>.

<sup>6</sup> See also Margaret deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2009)32(5) *Fordham International Law Journal* 1400; Declan O'Callaghan, 'Is the International Criminal Court the Way Ahead?'(2008)8(3) *International Criminal Law Review* 533; Mirjan Damaska, 'The International Criminal Court between Aspiration and Achievement' (2009) 14(1) *UCLA Journal of International Law and Foreign Affairs* 19.

Moreover, the ICC is under pressure when it does prosecute to present a consistent approach in the interpretation and application of the Rome Statute and its supplementary sources.<sup>7</sup> Such an approach to the Rome Statute is important, as the ICC operates as a complementary jurisdiction to national legal systems.<sup>8</sup> In a nod to the preservation of State sovereignty, the Rome Statute stipulates that domestic State courts have the primary responsibility to prosecute their nationals who commit crimes of international concern and such crimes that occur on their territory. The ICC supplements this process by investigating and prosecuting when a State is unable or unwilling to take these actions.<sup>9</sup> Consistency by the ICC in the application of international criminal law and the exercise of its jurisdiction is thus crucially important to maintain the confidence of States parties in the ICC and the overall system of complementarity.

A key difficulty in taking and maintaining a unified and consistent approach turns on the nature of the Rome Statute itself. As a multilateral treaty, the text of the Rome Statute was drafted with input from multiple interested parties each working from the perspective of a different legal system.<sup>10</sup> This negotiated drafting process resulted in certain key but necessary compromises in respect to the offences and procedures contained within the final text of the Rome Statute, such as the use of defensive force to exclude criminal responsibility in situations of self defence, defence of others and defence of property.<sup>11</sup> It is, therefore, unsurprising that interpretation of the meaning of different articles of the Rome Statute has generated ongoing debate in the literature.

One provision that has particularly divided commentators is Article 30 of the Rome Statute which states:

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<sup>7</sup> International Criminal Court, *Rules of Procedure and Evidence* No ICC-ASP/1/3 (adopted 9 September 2002); International Criminal Court, *Elements of Crimes* No ICC-ASP/1/3 (adopted 11 June 2010).

<sup>8</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 1.

<sup>9</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 17 (1); The United Nations Security Council and States parties may also refer matters to the ICC.

<sup>10</sup> See Lijun Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4(1) *Chinese Journal of International Law* 121.

<sup>11</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 31 (1) (c); Hannah Tonkin, 'Defensive Force under the Rome Statute' (2005) 6(1) *Melbourne Journal of International Law* 86.



1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.<sup>12</sup>

Article 30 thus represents the first time that a *general* provision that specifies the requisite intent required for criminal responsibility has been included in the statute or charter of an international criminal tribunal.<sup>13</sup> The wording of Article 30 also demonstrated a transition in drafting styles from an offence analysis approach to an analytical one. Tribunals such as the United Nations *ad hoc* tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) have traditionally used the offence analysis approach, which is where offences are described in terms such as intentional, reckless or negligent offences.<sup>14</sup> Article 30, however, is based on an element analysis approach, which assigns various levels of intent to each of the material elements of the particular crime.<sup>15</sup> The operation of Article 30 relies on proving that a person has both intent *and* knowledge when committing an offence to establish that they are criminally liable for the offence. In addition, ‘intent’ has different meanings under Article 30 which depend on whether this is related to the material elements of conduct, consequence or related circumstances.

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<sup>12</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 30.

<sup>13</sup> G Werle and F Jessberger, “‘Unless Otherwise Provided’: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law” (2005) 3 *Journal of International Criminal Justice* 35, 36.

<sup>14</sup> Paul Robinson and Jane Grall, ‘Element Analysis in Defining Criminal Liability: The Modal Penal Code and Beyond’ (1982-83) 35 *Stanford Law Review* 681, 683.

<sup>15</sup> Sarah Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis’ (2012) 61 *International and Comparative Law Quarterly* 325, 337.

Since the Rome Statute entered into force there has been significant confusion as to the correct interpretation of Article 30.<sup>16</sup> Much of this debate has centred on whether the article includes the mental element of *dolus eventualis* (or recklessness) as a form of intent under the Rome Statute or whether this specific form of criminal liability is excluded. At the core of the issue is the fact that Article 30 is a compromise between the different forms of intent found within the common law and civil law legal systems. The common law system distinguishes between direct intent, indirect (or oblique) intent and conditional intent or recklessness. In comparison, the civil law legal systems recognise *dolus directus* in the first degree (direct intent), *dolus directus* in the second degree (direct intent) and *dolus eventualis* (conditional intent or recklessness).<sup>17</sup>

The issue of whether Article 30 includes *dolus eventualis* is exacerbated by the fact that the concept of *dolus eventualis* itself is complex and has no standard definition.<sup>18</sup> *Dolus eventualis* has been described as the situation where a person ‘reconciles’ or ‘makes peace with the fact’ that a certain consequence may result from their conduct.<sup>19</sup> The concepts of *dolus eventualis* and recklessness have both been described as knowingly undertaking a certain risk with *dolus eventualis* having the added element of a ‘willingness’ to undertake the risk.<sup>20</sup> It is generally agreed by commentators, such as Hoctor<sup>21</sup> and Van der Vyver,<sup>22</sup> that *dolus eventualis* means that a perpetrator has a level of foresight that their actions could lead to a secondary consequence other than the desired result. However, there is significant disagreement as to the level of awareness that is required and whether the perpetrator needs to

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<sup>16</sup> See also Antonio Cassese, ‘Mens Rea and the International Criminal Tribunal for the Former Yugoslavia’ (2003) 37 *New England Law Review* 1015, 1025; Helmut Satzger, ‘German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes against International Law’ (2002) 2 *International Criminal Law Review* 261; Werle and Jessberger above n 13.

<sup>17</sup> Finnin, above n 15, 329; see also Mohamed Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective’ (2008) 19 *Criminal Law Forum* 473.

<sup>18</sup> Finnin, above n 15, 334.

<sup>19</sup> Werle and Jessberger, above n 13, 51-2; see further George Fletcher, ‘The Theory of Criminal Liability and International Criminal Law’ (2012) 10 *Journal of International Justice* 1029.

<sup>20</sup> Amy Sepinwall, ‘Failures to Punish: Command Responsibility in Domestic and International Law’ (2009) 30 *Michigan Journal of International Law* 251, 292.

<sup>21</sup> Shannon Hoctor, ‘The Degree of Foresight in *dolus eventualis*’ (2013) 26(2) *South African Journal of Criminal Justice* 131.

<sup>22</sup> Johan D. Van der Vyver, ‘The International Criminal Court and the Concept of Mens Rea in International Criminal Law’ (2004) 12(1) *University of Miami International & Comparative Law Review* 57.

approve of the result or whether indifference to the result is sufficient.<sup>23</sup> While the terms *dolus eventualis* and recklessness will both be used throughout this thesis (dependent on whether the discussion relates to a civil law or common law legal system), it is acknowledged that the ICC has used the term *dolus eventualis* in their decisions when considering this form of intent.

The debate about the correct interpretation of Article 30 is not just an abstract, theoretical one: there have been four decisions by the ICC chambers on Article 30 during the period 2007-14, lacking in consistency. The first decision recognised *dolus eventualis* as a form of intent under Article 30.<sup>24</sup> However, the following three decisions have excluded this form of intent from Article 30.<sup>25</sup> Although the ICC appears to have accepted at this stage that *dolus eventualis* is not incorporated into Article 30, the issue of the correct interpretation of this article is by no means settled. Indeed, the consequences of the ICC taking the view that *dolus eventualis* is excluded from Article 30, is that there may be divergence between the ICC and national legal systems in relation to the scope of conduct that establishes criminal responsibility. This divergence, if indeed it is occurring, could weaken the system of complementarity that is viewed as so integral to the ICC.

The possible emergence of a dual system of criminality has been explored by Mohamed Badar. Badar conducted a comparative study of the use of *dolus eventualis* in the national criminal jurisdictions of Egypt, France, Italy, South Africa and Germany and issued ‘a plea’ to the ICC to recognise that *dolus eventualis* is ‘a form of intent that has its distinct identity [sic]’<sup>26</sup> Badar was concerned that, if *dolus eventualis* is excluded from Article 30, a ‘dual system of criminality under

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<sup>23</sup> M Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 63-4, quoted in Finin above n 15, 334.

<sup>24</sup> *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* ICC-01/04-01/06 P-T Ch. I, 29 January 2007.

<sup>25</sup> *Prosecutor v. Jean-Pierre Bemba Gombo (Decision on the Confirmation of Charges)* ICC-01/0501/08, P-T Ch. II, 15 June 2009; *Prosecutor v. Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* ICC01/04-01/06-2842 TCh. I 14 March 2012; *Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction)* No. ICC-01/04-01/06A5, Appeals Chamber, 1 December 2014.

<sup>26</sup> Mohamed Badar, ‘The *Mens Rea* Enigma in the Jurisprudence of the International Criminal Court,’ Chapter 17 in Van den Herik and Stahn (eds) *The Diversification and fragmentation of international criminal law*, 2012, Koninklijke Brill nv, isbn 978 9004 21459 0 available online at <<http://booksandjournals.brillonline.com.dbgw.lis.curtin.edu.au/content/books/b9789004236912s019?showFullText=pdf>>, 533; see also Mohamed Badar, ‘*Dolus eventualis* and the Rome Statute without it?’ (2009) 12 *New Criminal Law Review* 43.

international criminal law,' will emerge<sup>27</sup> where perpetrators would be acquitted by the ICC for the same crime and intent which would convict them in the *ad hoc* tribunals and various national courts. Badar asked the interesting question:

Whether we should accept these differences as inevitable forms of fragmentation or still strive for some uniformity which would render the project of international criminal justice a more credible, legitimate and coherent one is a question yet to be answered by the coming jurisprudence of the International Criminal Court.<sup>28</sup>

The issue of how Article 30 should be interpreted is important, due to the possible consequences of adopting an interpretation that excludes *dolus eventualis*. If the interpretation of Article 30 crystallises – as it seems to be in the process of doing – to exclude *dolus eventualis*, then it could mean that, inadvertently, a dual system of criminality emerges between the ICC and States. In this dual system, the same conduct may be treated very differently by the ICC and States in terms of criminal responsibility.

More significantly, however, a dual system of criminality may be inconsistent with the ICC's operating principle of complementarity between it and the domestic jurisdictions of its member States. The emergence of a dual system of criminality could have profound consequences for the longevity of the ICC and its role as a complementary jurisdiction in terms of fragmentation of this system. Concerns about issues of fragmentation have already arisen in various areas of international law, including international criminal law.<sup>29</sup> The principle concern regarding fragmentation is that it could 'generate negative effects by exposing the frictions and contradictions between the various legal regimes and imposing on States mutually exclusive

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<sup>27</sup> Mohamed Badar, 'The *Mens Rea* Enigma in the Jurisprudence of the International Criminal Court,' Chapter 17 in Van den Herik and Stahn (eds) *The Diversification and fragmentation of international criminal law*, 2012, Koninklijke Brill nv, isbn 978 9004 21459 0 available online at <<http://booksandjournals.brillonline.com.dbgw.lis.curtin.edu.au/content/books/b9789004236912s019?showFullText=pdf>>, 533, 534.

<sup>28</sup> Ibid 534.

<sup>29</sup> See also Anthony Cassimatis, 'International Humanitarian law, International Human Rights Law and Fragmentation of International Law' (July 2007) 56(3) *International and Comparative Law Quarterly* 623; Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25(4) *Michigan Journal of International Law* 849; Alexander Kunzelmann, 'An Australian International Law: The Impact of Australian Courts on the Fragmentation of International Law' (2008) 27(1) *Australian Year Book of International Law* 225, United Nations International Law Commission Report 'Conclusions of the work of the study group on the Fragmentation of International Law: difficulties arising from the diversification and expansion of international law' (2006) 2 *Yearbook of the International Law Commission* Part 2.

obligations.<sup>30</sup> Fragmentation is especially relevant when considering the international criminal law regime imposed by the Rome Statute, which specifically works on a system of complementarity between the national criminal courts of the States parties and the ICC.<sup>31</sup> Inconsistencies between national criminal courts and the ICC in respect to the application of the mental element in crimes could contribute to the fragmentation of this system by applying very different degrees of accountability to the same crimes.

Thus far, literature on the interpretation of Article 30 and *dolus eventualis* has tended to focus on the experience of civil law national jurisdictions<sup>32</sup> and to omit discussion of common law jurisdictions. This thesis seeks to address this gap by examining the interpretation of Article 30 and the issue of *dolus eventualis* in a common law national jurisdiction in order to gain a fuller perspective on whether a dual system of criminality is emerging.

Chapter 2 provides an overview of the ICC's conflicting case law on Article 30 and *dolus eventualis* and the relevant literature. Chapter 3 then examines the forms of criminal intent recognised in the common law system of Canada. Canada has been selected as it is a State party to the Rome Statute and has enacted the *Crimes against Humanity and War Crimes Act 2000 (War Crimes Act)* as its implementing domestic legislation. This chapter discusses the interpretation of *dolus eventualis* or recklessness in Canadian criminal law and how this has influenced the interpretation of provisions of the *War Crimes Act*.

After ascertaining whether Canada is contributing to a divergence in respect of the incorporation of *dolus eventualis*, Chapter 4 analyses the possible impact of a dual system of criminality and whether a dual system could lead to fragmentation within international criminal law. While concerns about the detrimental impact of a dual system of criminality on the ICC system of complementarity have been raised, the follow-up question should be: is this divergence in respect to *dolus eventualis* a natural progression of the system of complementarity, which is occurring across civil and common law of national legal systems, and a reflection of the division of cases

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<sup>30</sup> Hafner, *ibid*, 851.

<sup>31</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) Preamble, art 1.

<sup>32</sup> Finnin, above n 15; Badar, above n 26; Sara Porro, *Risk and Mental Element: An Analysis of National and International Law on Core Crimes* (Nomos Verlagsgesellschaft, 2014) ).

between the ICC and national courts? If so, then perhaps this process should be viewed more positively and recognised as the national courts of member States to the Rome Statute gaining confidence in their roles as primary prosecutors of serious crimes of international concern.

## CHAPTER 2: THE INTERPRETATION OF ARTICLE 30

It was probably inevitable that there would be differing opinions as to the correct interpretation of Article 30, and whether it incorporated *dolus eventualis*, given that the Rome Statute was drafted on the basis of compromise between different legal systems and is a document covering a spectrum of criminal behaviour, without precedence in international criminal law. Moreover, disagreements about interpreting Article 30 gained momentum when the ICC chambers handed down conflicting opinions on whether it included or excluded *dolus eventualis*.

This chapter reviews the ICC's interpretations of Article 30 since its establishment by the Rome Statute. It then thematically considers the discussion in the literature about the correct interpretation, including the studies of various national legal systems, predominantly civil law jurisdictions, that ascertain whether those jurisdictions recognise *dolus eventualis* as a form of criminal intent. The key concern that ICC observers and commentators have articulated is that if *dolus eventualis* is recognised in national legal systems but is excluded by the ICC from the operation of Article 30, then national legal systems could be extending criminal responsibility to certain conduct when the ICC would not do so.

### I INTERPRETATION OF ARTICLE 30 BY THE ICC

The ICC is a young court and its chambers have had little time to develop substantial jurisprudence. It is striking, therefore, that the ICC has already handed down differing opinions on the interpretation of Article 30, most particularly about whether the article incorporates *dolus eventualis* as a form of intent. The key phrase to interpret in Article 30 is the wording that 'a consequence *will occur* in the ordinary course of events.'<sup>1</sup> It is the use of the verb 'will' rather than 'may' or 'might' occur which has generated discussion as to how Article 30 should be interpreted.

The ICC's opinions on Article 30's interpretation have initiated ongoing debate in the literature about what should be the correct interpretation. The first decision of the ICC to interpret Article 30 was the Pre-Trial Chamber in the *Prosecutor v Lubanga* (2007).<sup>2</sup> The Pre-Trial Chamber held that Article 30 encompassed three forms of

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<sup>1</sup> Emphasis added.

<sup>2</sup> *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* ICC-01/04-01/06 P-T Ch. I, 29 January 2007. The Pre-Trial Chamber appears to have addressed the issue of Article 30 and *dolus eventualis* in its decision due to general arguments made by defence counsel regarding the

intent: (1) *dolus directus* in the first degree; (2) *dolus directus* in the second degree; and (3):

situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).<sup>3</sup>

This initial interpretation of Article 30 by the Pre-Trial Chamber in the *Lubanga* decision did not appear to generate much discussion by ICC commentators. Such attention was to come two years later with a significantly different decision on Article 30 by the ICC.

In 2009, in *Prosecutor v Jean-Pierre Bemba Gombo*,<sup>4</sup> different judges in Pre-Trial Chamber II took the opposite view to the earlier *Lubanga* decision. The Pre-Trial Chamber found that Article 30, while encompassing *dolus directus* in the first and second degrees, does not include the concept of *dolus eventualis* or recklessness. The Pre-Trial Chamber concluded that:

by way of a literal (textual) interpretation, the words ‘a consequence will occur’ in Article 30(3) serve as an expression for an event that is ‘inevitably’ expected. Nonetheless, the words ‘will occur’, read together with the phrase ‘in the ordinary course of events,’ clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as ‘virtual certainty’ or ‘practical certainty,’ namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.<sup>5</sup>

The Chamber is of the view that if the drafters of the statute had intended to include *dolus eventualis* in Article 30, then the words ‘may occur’ or ‘might occur’ in the ordinary course of events would have been used.<sup>6</sup>

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knowledge Mr Lubanga had of the events that constituted the charges he was subject to rather than any specific submissions made on the operation of Article 30 itself.

<sup>3</sup> *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* ICC-01/04-01/06 P-T Ch. I, 29 January 2007 [352].

<sup>4</sup> *Prosecutor v. Jean-Pierre Bemba Gombo (Decision on the Confirmation of Charges)* ICC-01/0501/08, P-T Ch. II, 15 June 2009.

<sup>5</sup> *Prosecutor v. Jean-Pierre Bemba Gombo (Decision on the Confirmation of Charges)* ICC-01/0501/08, P-T Ch. II, 15 June 2009 [362].

<sup>6</sup> *Prosecutor v. Jean-Pierre Bemba Gombo (Decision on the Confirmation of Charges)* ICC-01/0501/08, P-T Ch. II, 15 June 2009 [363]; see Jocelyn Courtney and Christodoulos Kaoutzannis, ‘Proactive Gatekeepers: The Jurisprudence of the ICC’s Pre-Trial Chambers’ (2014-2015)15 *Chicago Journal of International Law* 518.



Continuing the line of reasoning given in *Bemba* (2009), in the case of *Prosecutor v Thomas Lubanga Dyilo* (2012),<sup>7</sup> the superior Trial Chamber examined briefly the drafting history of the Rome Statute. It found that the drafting history suggested that *dolus eventualis* and the concept of recklessness were deliberately excluded from the Rome Statute. The Trial Chamber thus approved of the approach taken by the Pre-Trial Chamber in the *Bemba* decision. The Trial Chamber concluded that the inclusion of the words ‘will occur’ instead of ‘may occur’ in Article 30 must exclude the concept of *dolus eventualis*.<sup>8</sup> Further explaining the Trial Chamber’s reasoning that *dolus eventualis* is excluded, it observed that:

the ‘awareness that a consequence will occur in the ordinary course of events’ means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future.<sup>9</sup>

The Trial Chamber stated that this process involved concepts of ‘probability’ and that the degree of risk that a consequence would occur ‘must be no less than an awareness that the consequence will occur in the ordinary course of events and not be a low risk.’<sup>10</sup> As such, the concept of *dolus eventualis* or recklessness was excluded.

In 2014, after his conviction, the defendant Mr Lubanga argued on appeal that the Trial Chamber had erred by applying the ‘concept of “sufficient risk” to establish the “critical element of criminality” of the common plan necessary for co-perpetration.’<sup>11</sup> Mr Lubanga argued that this reasoning did not accord with Article 30 (2) of the

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<sup>7</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* ICC01/04-01/06-2842 TCh. I 14 March 2012.

<sup>8</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* ICC01/04-01/06-2842 TCh. I 14 March 2012 [1011]; see Kai Ambos, ‘The First Judgement of the International Criminal Court (*Prosecutor v Lubanga*): A Comprehensive Analysis of the Legal Issues’ (2012) 12 *International Criminal Law Review* 115, 149; see also Thomas Lieflander, ‘The Lubanga Judgement of the ICC: More than just the First Step?’ (2012) 1 *Cambridge Journal of International and Comparative Law* 191.

<sup>9</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* ICC01/04-01/06-2842 TCh. I 14 March 2012 [1012].

<sup>10</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* ICC01/04-01/06-2842 TCh. I 14 March 2012 [1012].

<sup>11</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction)* No. ICC-01/04-01/06A5, Appeals Chamber, 1 December 2014 [441].

Rome Statute because it imported the concept of *dolus eventualis* which, in his opinion, ‘was not adopted by the drafters of the Statute.’<sup>12</sup>

In considering Lubanga’s appeal, the Appeals Chamber observed that what was at issue in the appeal, amongst other issues, was the interpretation of the ‘second alternative’ of a person having intent in relation to a *consequence*<sup>13</sup> (rather than actual conduct) which is provided for in both Article 30 (2) (b) and (3) of the Rome Statute. The Appeals Chamber considered the degree of foreseeability required of a certain consequence occurring in order to establish that an individual intended this consequence and observed that these two provisions in Article 30 do not refer to the ‘notion of “risk”, but employed the term of occurrence of a consequence “in the ordinary course of events”’. The Appeals Chamber continued:

the words ‘[a consequence] will occur’ refer to future events. The verb ‘occur’ is used with the modal verb ‘will’, and not with ‘may’ or ‘could’. Therefore, this phrase conveys, as does the French version, certainty about the future occurrence. However, absolute certainty about a future occurrence can never exist; therefore, the Appeals Chamber considers that the standard for the foreseeability of events is *virtual* certainty. That absolute certainty is not required is reinforced by the inclusion in article 30(2) (b) and (3) of the Statute of the phrase ‘in the ordinary course of events.’<sup>14</sup>

The Appeals Chamber did not consider that the Trial Chamber’s approach had broadened the scope of Article 30(2) and (3) of the Rome Statute, despite the Trial Chamber’s use of the term ‘risk.’<sup>15</sup> In doing so, the Appeals Chamber confirmed that *dolus eventualis* or recklessness is not incorporated into Article 30.

The Appeal Chamber’s interpretation of Article 30 in 2014 has been followed in subsequent decisions. On 19 October 2016, for instance, the Trial Chamber in the matter of *The Prosecutor v Jean Pierre Bemba Gombo et al*, issued a Judgement relating to offences under Article 70 of the Rome Statute, which relates to offences

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<sup>12</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction)* No. ICC-01/04-01/06A5, Appeals Chamber, 1 December 2014 [441].

<sup>13</sup> Emphasis added.

<sup>14</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction)* No. ICC-01/04-01/06A5, Appeals Chamber, 1 December 2014 [447].

<sup>15</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction)* No. ICC-01/04-01/06A5, Appeals Chamber, 1 December 2014 [450].

against the administration of justice (such as the giving of false testimony).<sup>16</sup> In considering whether such offences had been committed, the Trial Chamber observed that the offender must ‘intentionally’ commit the offences.<sup>17</sup> The Trial Chamber noted that Article 30 defines the required *mens rea* applicable to these offences. The Trial Chamber then agreed with previous rulings that excluded *dolus eventualis*. It observed that Article 30’s key phrase ‘will occur in the ordinary course of events’ requires ‘virtual certainty’. The Trial Chamber continued:

This standard implies that ‘the consequence will follow, barring an unforeseen or unexpected intervention that prevent this occurrence.’ Accordingly, any lower *mens rea* threshold, such as *dolus eventualis*, recklessness and negligence, is insufficient to establish the offence under Article 70(1)(a) of the Statute.<sup>18</sup>

Given the decisions in these cases, and particularly the 2014 appeal of *Lubanga*, the weight of the authority of the ICC currently supports the view that Article 30 does not incorporate *dolus eventualis*. Therefore, for an individual to be held criminally responsible, the foreseeability by them that a specific action will occur must be a ‘virtual certainty,’ which is a considerably higher standard of intent than that found in *dolus eventualis* or recklessness. The exclusion of *dolus eventualis* from Article 30, has engendered discussion in the literature over time as to the correctness of the ICC’s interpretation and the likely consequences of it.

## II RESPONSES TO THE ICC’S JURISPRUDENCE ON ARTICLE 30

The discussion of the interpretation of Article 30 of the Rome Statute, and whether it incorporated *dolus eventualis* as a form of intent began with the entry into force of the Rome Statute; that is, it commenced before any decisions had been handed down as authority on the issue of interpretation. The level of discussion increased when the Pre-Trial Chamber endorsed the inclusion of *dolus eventualis* in Article 30 in 2007

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<sup>16</sup> *Prosecutor v Jean Pierre Bemba Gombo et al (Judgement pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber VII, Case No. ICC- 01/05-01/13, 19 October 2016).

<sup>17</sup> *Prosecutor v Jean Pierre Bemba Gombo et al (Judgement pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber VII, Case No. ICC- 01/05-01/13, 19 October 2016) [26].

<sup>18</sup> *Prosecutor v Jean Pierre Bemba Gombo et al (Judgement pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber VII, Case No. ICC- 01/05-01/13, 19 October 2016) [29].

and reached a peak in 2012, when another decision came down that excluded *dolus eventualis*.<sup>19</sup>

This chapter now turns to the main themes in the literature discussing Article 30 and *dolus eventualis*, which have turned on context, forms of intent and comparative studies between various national legal systems. The works of Badar and Porro are particularly significant, as they both undertook comparative studies to ascertain whether *dolus eventualis* is recognised as a form of criminal intent in certain national jurisdictions and the role that risk-taking may have (or not) in forming the requisite criminal intent required for certain criminal offences. Effectively underscoring the disagreement about interpreting Article 30, Badar and Porro reached opposing views on whether Article 30 should be interpreted as incorporating *dolus eventualis*. This highlights the difficulty involved with using a general provision drafted into a multilateral treaty to define the requisite criminal intent applicable to a number of different criminal offences of serious international concern.

#### A *Context of the Rome Statute*

Overall, commentators have significantly criticised the drafting of Article 30 and its interpretation by the ICC. Some of this criticism directly acknowledges the context of the Rome Statute being a multilateral treaty in which drafting compromises were made in order for agreement to be reached. For instance, Jeet argues that an ‘inherent contradiction’ exists between the Rome Statute with its multilateral treaty base and the fact that it functions as an ‘instrument of criminal law.’<sup>20</sup> Jeet observes:

While [the] principle of legality in criminal law requires specificity i.e. clear and precise formulation of definitions and elements of crimes, treaties contain built in ambiguities to address concerns of States and to reach consensus to accommodate divergent viewpoints during negotiations.<sup>21</sup>

This is a clear problem with the Rome Statute: it is a treaty of negotiated compromise which, at the same time, sets out crimes and how responsibility for these crimes is established. It is also observed in the literature that clarity and consistency are

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<sup>19</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No. ICC 01/04-01/06-2842, 14 March 2012).

<sup>20</sup> Chandra Jeet, ‘Definitions and Elements of Crimes in the Rome Statute: Some Critical Reflections’ (2006) 6 *ISIL Year Book of International Humanitarian & Refugee Law* 169, 170.

<sup>21</sup> *Ibid* 170.

required in respect to how risky conduct is assessed by international criminal law;<sup>22</sup> these are both qualities which appear to be lacking in the form and interpretation of Article 30. The application of Article 30 was always going to be challenging: it is tasked with providing a *default rule* on the mental element (intent) required to establish criminal responsibility for certain conduct. This conduct includes both situations where a person directly intends a particular act to occur *and* situations, with an element of risk included, where a certain consequence is likely to occur as a result of an individual's actions. The difficulties of applying a general rule of intent to conduct where an outcome is uncertain are now being realised with conflicting interpretations of Article 30 by the ICC and in the literature.

### B *Forms of intent under Article 30*

A significant amount of the relevant literature focuses on the different forms of intent that can be discerned pursuant to Article 30 and whether the concept of *dolus eventualis* or recklessness is, in fact, incorporated into it. Understanding the precise intent required for offences in the Rome Statute, and whether intent can include *dolus eventualis*, is complicated by the fact that there is no general standard test for *dolus eventualis*.<sup>23</sup> *Dolus eventualis* is a form of intent predominantly found in the civil law legal system which does not readily compare with similar forms of intent found in common law legal systems.<sup>24</sup>

As discussed in the introductory chapter, *dolus eventualis* has been aptly described as the situation where a person 'reconciles' or 'makes peace with the fact' that a certain consequence may result from their conduct.<sup>25</sup> The level of awareness that is required by a perpetrator to constitute the intent of *dolus eventualis* is also complicated. The question has been asked whether, for *dolus eventualis* to be satisfied, the perpetrator

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<sup>22</sup> Mark Summers, 'The Problem of Risk in International Criminal Law' (2014) 13 *Washington University Global Studies Law Review* 667, 692-3.

<sup>23</sup> Sarah Finnin, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis' (2012) 61 *International and Comparative Law Quarterly* 325, 334.

<sup>24</sup> *Ibid* 329.

<sup>25</sup> G Werle and F Jessberger, "'Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 35, 51-2; see George Fletcher, 'The Theory of Criminal Liability and International Criminal Law' (2012) 10 *Journal of International Criminal Justice* 1029.

needs to *approve* of the result of their conduct or whether *indifference* to the result is enough to constitute this form of intent.<sup>26</sup>

As Finnin observes, most of the debate in the literature comes down to the interpretation of the wording ‘will occur’ in Article 30.<sup>27</sup> Akin to the *Bemba* Pre-Trial Chamber decision, some commentators have expressed the view that Article 30 cannot encompass *dolus eventualis*, as the wording requires certainty in respect to the consequence foreseen by the perpetrator, and, that *dolus eventualis* could only be interpreted in Article 30 if the wording was ‘may occur’ not ‘will occur’.<sup>28</sup> Interestingly, some commentary is critical of both interpretations of Article 30 provided by the ICC, stating that the interpretation in both the *Bemba* and *Lubanga* confirmation of charges’ hearings is problematic — the interpretation being too narrow in the *Bemba* decision where ‘virtual certainty’ or ‘practical certainty’ that a certain consequence will occur is required and too broad in the *Lubanga* decision that simply incorporated the concept of *dolus eventualis* into Article 30.<sup>29</sup>

Other commentators have looked to different parts of Article 30, such as the starting words ‘[u]nless otherwise provided’ in order to assess whether *dolus eventualis* should be incorporated as part of this Article or whether this form of intent can be found in other Articles of the Rome Statute.<sup>30</sup> Werle and Jessberger note that the starting words ‘[u]nless otherwise provided’, can result in both an expansion and narrowing of criminal liability through other articles in the Rome Statute. An expansion of liability occurs when a particular article incorporates the concepts of *dolus eventualis* and recklessness into the crime, for example, the standard of recklessness is considered sufficient for the war crime of destruction of property<sup>31</sup> which uses the term ‘wanton’ to describe the criminal behaviour.<sup>32</sup> A narrowing of

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<sup>26</sup> M Bohlander, *Principles of German Criminal Law* (Hart Publishing, 2009) 63-4, quoted in Finnin above n 15, 334.

<sup>27</sup> Finnin above n 23, 346.

<sup>28</sup> Werle and Jessberger, above n 25, 53; Albin Eser, ‘Mental Elements: Mistake of Fact and Mistake of Law’ in A Cassese, P Gaeta and J Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford University Press, 2002) 907; K Ambos, ‘General Principles of Criminal Law in the Rome Statute’ (1999) 10 *Criminal Law Forum* 1,21.

<sup>29</sup> Barbara Goy, ‘Individual Criminal Responsibility before the International Criminal Court: A Comparison with the ad hoc tribunals’ (2012) 12 *International Criminal Law Review* 1, 23; see David Bederman (ed), ‘International Decisions’ (2010) 104 *American Journal of International Law* 241.

<sup>30</sup> Werle and Jessberger, above n 25, 53.

<sup>31</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 8 (2) (a) (vi).

<sup>32</sup> Werle and Jessberger, above n 25, 47.

liability occurs when other articles contain additional requirements for criminal liability to be established, for example, the ‘intent to destroy’ requirement for the crime of genocide<sup>33</sup> which includes having an aim to destroy a particular group of people.<sup>34</sup>

Other commentators have ventured beyond the wording of Article 30, utilising the rules of treaty interpretation expressed in the Vienna Convention, which allow recourse to preparatory materials when subsequently interpreting a treaty.<sup>35</sup> They point to the drafting process of the Rome Statute during which a definition of ‘recklessness’ (which is one way that *dolus eventualis* is sometimes expressed) was deliberately removed from the draft. However, commentators have reached alternative conclusions on this removal. Werle and Jessberger have argued, for instance, that the removal of the definition of ‘recklessness’ in the draft does not mean that it cannot now be used as a basis for criminal intent in the Rome Statute as in force.<sup>36</sup> Other commentators disagree and consider the removal of this term from the draft supports their argument that *dolus eventualis* is not meant to be included as a form of intent in the Statute.<sup>37</sup>

### C *Comparative Studies of Intent in National Legal Systems*

As well as looking at the context and text of the Rome Statute, a small number of other commentators have focused on *dolus eventualis* in various national legal systems. Firstly, Badar conducted a comparative study of the use of *dolus eventualis* in several national criminal jurisdictions.<sup>38</sup> He also examined the ICTY and ICTR

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<sup>33</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 5.

<sup>34</sup> Werle and Jessberger above n 25, 48.

<sup>35</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980) art 32.

<sup>36</sup> Werle and Jessberger, above n 25, 52.

<sup>37</sup> Roger S. Clark, ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences’ (2001) 12 *Criminal Law Forum* 291; K. Ambos, ‘General Principles of Criminal Law in the Rome Statute’ (1999) 10 *Criminal Law Forum* 1, 21; see also Adil Haque, ‘Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute’ (2011) 14 *New Criminal Law Review* 519; see also Jens Ohlin, ‘Targeting and the Concept of Intent’ (2013-14) 35 *Michigan Journal of International Law* 79.

<sup>38</sup> Mohamed Badar, ‘The *Mens Rea* Enigma in the Jurisprudence of the International Criminal Court,’ Chapter 17 in Van den Herik and Stahn (eds) *The Diversification and fragmentation of international criminal law*, 2012, Koninklijke Brill nv, isbn 978 9004 21459 0 available online at <http://booksandjournals.brillonline.com.dbgw.lis.curtin.edu.au/content/books/b9789004236912s019?showFullText=pdf> Badar examined the legal systems of Egypt, France, Italy, South Africa and Germany.

and found that both tribunals recognise *dolus eventualis* in their jurisprudence.<sup>39</sup> His conclusions led him to issue ‘a plea’ to the ICC to recognise that *dolus eventualis* is ‘a form of intent that has its distinct identity [sic].’<sup>40</sup> Badar voiced his concerns that if *dolus eventualis* is excluded from the interpretation of Article 30, and thus from the intent required for the commission of offences under the Rome Statute, that this will result in a ‘dual system of criminality under international criminal law.’<sup>41</sup> He pointed out that the situation could arise where perpetrators could be acquitted by the ICC for the same crime and intent which would convict them in the *ad hoc* tribunals and various national courts, which consider *dolus eventualis* as a form of intent.

In 2014, Sara Porro went on to further explore the concept of criminal intent and whether criminal intent encompasses risk-taking by an individual. Porro examined the level of awareness that an individual has to have of a particular risk in order to be held criminally responsible for a certain result. Porro noted that the very serious crimes of international concern (or ‘core crimes’ as she termed them) were usually the result of group activity, with some participants not having full knowledge of what was planned. Porro noted that in these situations risk-taking can have a critical impact on the scope of criminality for these crimes.<sup>42</sup>

Porro conducted a comparative study on the domestic jurisdictions of Germany, the United States of America (USA) and the *ad hoc* international criminal tribunals. In her study of Germany, Porro found that criminal intent appears capable of accommodating more mental states than practical certainty, such as the case where a perpetrator administers a substance to the victim knowing that it will cause a fatal allergic reaction in some people.<sup>43</sup> Porro concluded that in Germany, forms of conscious risk-taking may play a significant role in criminal law and that the threshold of *dolus eventualis* could be met.<sup>44</sup>

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<sup>39</sup> Ibid 533; see also Mohamed Badar, ‘Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia’ (2006) 6 *International Criminal Law Review* 313.

<sup>40</sup> Badar, above n 38, 533; see also Mohamed Badar, ‘*Dolus eventualis* and the Rome Statute without it?’ (2009) 12 *New Criminal Law Review* 43.

<sup>41</sup> Badar, above n 38, 534.

<sup>42</sup> Sara Porro, *Risk and Mental Element: An Analysis of National and International Law on Core Crimes* (Nomos Verlagsgesellschaft, 2014) 17-19.

<sup>43</sup> Ibid 28-9.

<sup>44</sup> Ibid 68.



Porro then examined the USA and found that it has a demanding standard of criminal intent with unconscious risk-taking excluded.<sup>45</sup> In respect to conscious risk-taking, Porro found that intent would only be established if the person ‘clearly wanted’ the result or, ‘aware of the high probability’ of the circumstances of the result, chose to ignore this and proceeded anyway.<sup>46</sup> Porro found that recklessness is recognised in the USA in situations where a person takes the risk of a crime occurring without aiming to have this as the outcome of their actions.<sup>47</sup> Porro also noted that the ‘concept of a standard *mens rea*’ is ‘less relevant’ in common law countries and that American jurisprudence is starting to ‘widen the scope of criminal responsibility to include forms of both conscious and unconscious risk-taking.’<sup>48</sup>

Porro, like Badar, moves beyond national jurisdictions to examine the ICTY and the ICTR. Porro found that there were no specific general intent provisions at these tribunals; rather, customary international law was applied.<sup>49</sup> Porro noted the form of indirect intent used in the *ad hoc* tribunals in which the person did not seek to cause a specific result nor knew that it was certain to occur but was aware that the result would have occurred in terms of ‘probability, likelihood or substantial likelihood’ (although this has to be more than a mere possibility that the criminal outcome would occur).<sup>50</sup> Porro noted that the *ad hoc* tribunals have used the terms *dolus eventualis* or recklessness interchangeably with indirect intent. This form of intent was described as where an offender decides to act ‘despite having foreseen the result as probable’ and, in doing so, ‘must have accepted the occurrence of that outcome’ or ‘reconciled himself’ with the likelihood of it occurring.<sup>51</sup> Porro suggests that in 2014, at the time she was writing, customary international law, on which the ICTY and ICTR were reliant, would not accept mental attitudes that did not reach the ‘threshold of foresight of the outcome in terms of a substantial certainty.’<sup>52</sup>

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<sup>45</sup> Ibid 83.

<sup>46</sup> Ibid 83.

<sup>47</sup> Ibid 86.

<sup>48</sup> Ibid 113.

<sup>49</sup> Ibid 117.

<sup>50</sup> Ibid 119 -120.

<sup>51</sup> Ibid 122, see *Prosecutor v Milomir Stakic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case IT-97-24-A, 22 March 2006).

<sup>52</sup> Porro, *ibid* 132.

Porro also examined the concept of joint criminal enterprise and ‘acts that go beyond the shared plan.’<sup>53</sup> Porro noted that Article 30 of the Rome Statute appears to exclude ‘mental attitudes that do not reach the level of foresight of the criminal outcome as a substantial certainty;’ however, in respect to ‘group criminality’, the *ad hoc* tribunals were of the view that responsibility for core crimes ‘should not be limited to where the individual was practically sure about the criminal outcome.’<sup>54</sup>

Porro then examined the ICC jurisprudence in respect to Article 30. She observed that there was a major interpretative issue in respect to the meaning of the phrase ‘will occur in the ordinary course of events.’ Porro argued that either this meant that: 1) intent was only satisfied if the person ‘foresaw the result as a virtual or practical certainty;’ or 2) the concept of intent was enlarged to include situations where the person ‘was aware of a risk that the result could have occurred’.<sup>55</sup> Porro concluded that the Pre-Trial Chamber in the 2007 *Lubanga* decision ‘disregarded the plain meaning’ of the phrase ‘will occur in the ordinary course of events’ in Article 30 when it applied a less demanding threshold than ‘practical certainty.’<sup>56</sup> Porro noted that the Rome Statute itself requires that the definitions of crimes are to be ‘strictly construed’ and not extended by analogy.<sup>57</sup> Porro concluded that to reach the *mens rea* threshold, it is necessary that the individual recognised the result as an almost inevitable outcome of the conduct and in respect to Article 30, ‘forms of risk taking have no place within the notion of intent.’<sup>58</sup> Porro’s views in this regard align with the ICC jurisprudence decided *after* the 2007 *Lubanga* decision. Porro acknowledged, however, that there may be situations where the threshold for the required *mens rea* is different, such as for crimes with a group design under Article 25 of the Rome Statute or crimes involving the added element of Superior Responsibility under Article 28 of the Rome Statute.<sup>59</sup>

Porro concluded that intent and risk-taking are treated differently in different legal systems and that other legal systems do accept that responsibility can ‘occur in the

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<sup>53</sup> Ibid 152.

<sup>54</sup> Ibid 174.

<sup>55</sup> Ibid 180-82.

<sup>56</sup> Ibid 184-86

<sup>57</sup> Ibid 184; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 22 (2).

<sup>58</sup> Porro *ibid* 232.

<sup>59</sup> Ibid 233.

absence of a clear perception of the unlawful outcome.’<sup>60</sup> Porro noted the principle of complementarity in respect to the ICC supplementing national courts and argued that domestic courts can extend liability to individuals who foresee a result as a possible consequence. Porro also concluded that the gravity of the crimes should not rule out certain situations as exceptions to the default mental element and that there may be situations where the scope of criminal liability should be widened.<sup>61</sup>

#### D Conclusion

Since Badar and Porro published their analyses, the Appeals Chamber of the ICC has reaffirmed in 2014 its view that Article 30 of the Rome Statute does not incorporate *dolus eventualis* as a mental element.<sup>62</sup> This interpretation of Article 30 has since been followed in several subsequent decisions, without substantive discussion about the interpretation of *dolus eventualis*.<sup>63</sup>

Badar and Porro’s research makes it clear that of the limited number of nations studied, several national legal systems do recognise the concept of *dolus eventualis* or recklessness in criminal offences. Porro’s research appears to confirm that national legal systems do have a differing standard to the ICC in respect to risk-taking and the requisite criminal intent, which suggests that Badar’s notion of a dual system of criminality developing between the ICC and national legal systems may be occurring. However, the countries studied to date in relation to this issue have been predominantly civil law legal systems. Ideally several common law national legal systems should also be assessed in terms of risk-taking and criminal intent in order to gain a fuller picture of whether the exclusion of *dolus eventualis* from the ICC means that a dual system of criminality is broadly emerging in relation to serious crimes of international concern, not one that is merely limited to civil law countries. Unfortunately, the scope of this thesis does not allow for such a complete assessment. Instead, Canada, as an example of a common law national legal system,

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<sup>60</sup> Ibid 237.

<sup>61</sup> Ibid 239, 241.

<sup>62</sup> *Prosecutor v Thomas Lubanga Dyilo (Judgement)* (International Criminal Court, Appeals Chamber, Case No. ICC-01/04-01/06A5, 1 December 2014).

<sup>63</sup> See eg *Prosecutor v Jean Pierre Bemba Gombo et al (Judgement pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber VII, Case No. ICC- 01/05-01/13, 19 October 2016).

will be examined in detail in the next chapter to ascertain whether *dolus eventualis* is incorporated into its forms of criminal responsibility.

## CHAPTER 3: CRIMINAL INTENT AND CANADIAN LAW

To understand whether fears about the emergence of a dual system of criminality are well-founded, it is necessary to examine not only civil law jurisdictions, which previous researchers have done, but also to examine common law jurisdictions. This chapter contributes to this examination by assessing the common law jurisdiction of Canada. The chapter will assess: 1) whether *dolus eventualis* or recklessness is recognised as a form of criminal intent in Canada; and 2) if this form of intent is recognised, how this form of intent has been interpreted in case law relating to Canada's implementing legislation for the Rome Statute.

The aim of this assessment is to consider whether, by reason of what is determined about Canadian law, Canada is contributing to the alleged 'dual system of criminality' emerging between the ICC and national legal systems; that is, could an individual be acquitted (or not prosecuted at all) by the ICC for the same conduct which would convict them of an offence in Canada? If this is the case, is it really problematic or does it instead indicate a natural evolution of the caseload division between the ICC and national courts resulting from the system of complementarity? If Canada is contributing to the emergence of a dual system of criminality then this is evidence that this is a consequence not limited to one form of legal system and impacts both civil law and common law jurisdictions.

### I CRIMINAL LAW AND INTENT IN CANADA

In Canada, criminal law and procedure is the responsibility of the Federal Government and is regulated primarily by the *Criminal Code*, 1985 (*Code*).<sup>1</sup> The *Code* sets out a vast array of offences together with some general direction in relation to how these offences are committed.<sup>2</sup> The *Code* is applicable to all of Canada<sup>3</sup> and, as with many common law legal systems, the *Code* is supplemented by common law principles and does not override these principles unless expressly stated in the *Code*.<sup>4</sup>

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<sup>1</sup> *Criminal Code*, RSC 1985, c. C-46.

<sup>2</sup> For example, *Criminal Code*, RSC 1985, c. C-46, s21 sets out who is considered to be a party to an offence.

<sup>3</sup> *Criminal Code*, RSC 1985, c. C-46, s 8.

<sup>4</sup> *Criminal Code*, RSC 1985, c. C-46, s 8(3). There is a clear distinction in the Code between the matters regulated by the Code and matters involving the Canadian military, which is not affected by the operation of the Code. *Criminal Code*, RSC 1985, c. C-46, s 5 states the following 'Nothing in this Act affects any law relating to the government of the Canadian Forces.' The definition section of

While the *Code* details the actions or omissions that constitute various criminal offences, there is little guidance in relation to the intent necessary for criminal responsibility to attach to this conduct. The *Code* is quite general when it refers to criminal intent, for example, Section 21 of the *Code* sets out who is considered to be a party to an offence which includes all people who share a common intention to commit a certain course of conduct.<sup>5</sup>

A significant part of the law in Canada relating to the required intent for criminality to be established has thus been provided by judicial interpretation of the *Code* through case law. The *Code*'s relative silence on criminal intent has even led to the judiciary commenting on the call from academics for the *Code* to be clarified in terms of the intent required for certain crimes, such as the offence of arson under Section 434 of the *Code*.<sup>6</sup>

## II FORMS OF INTENT

In *R v Chartrand* [1994],<sup>7</sup> the Supreme Court of Canada (Supreme Court) observed that the *Code* has no general definition of 'intent' and that the courts have 'not found it necessary to fill the gap.'<sup>8</sup> Judge L'Heureux-Dube commented that general principles of *mens rea* apply to the phrase 'with intent to.' He referred to earlier case law which defined 'with intent to' in the following way:

as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence.<sup>9</sup>

In *Daviault v Her Majesty the Queen* [1994], Justice Cory of the Supreme Court described *mens rea* in this way:

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*Criminal Code*, RSC 1985, c. C-46 defines Canadian Forces as 'the armed forces of Her Majesty raised by Canada.'

<sup>5</sup> *Criminal Code*, RSC 1985, c. C-46, s 21(2) states: 'Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.'

<sup>6</sup> *R v Tatton* [2015] 2 SCR 574, 580 and 586 (Moldaver J).

<sup>7</sup> [1994] 2 SCR 864.

<sup>8</sup> *Ibid* 891.

<sup>9</sup> *Ibid* 890, citing *R v Buzzanga and Durocher* (1979), 49 CCC (2d) 369 (Ont. C.A.) and *R v Keegstra* [1990] 3 SCR 69.

*Mens rea*, on the other hand, refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent - those who do not understand or intend the consequences of their acts. Typically, *mens rea* is concerned with the consequences of the prohibited *actus reus*.<sup>10</sup>

Justice Cory also commented that the distinction between crimes of specific and general intent has been well established by the court on several occasions.<sup>11</sup> An example of this distinction being made can be seen in the Supreme Court case, *R v George* [1960]:

In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.<sup>12</sup>

While the phrases specific intent and general intent are used in Canada, these are analogous to the phrases direct intent and indirect intent, which are used in common law jurisdictions and which were compared to their civil law counterparts in Chapter 1.<sup>13</sup>

Canadian case law also confirms the place of recklessness as a form of intent within the nation's criminal law. In *Sansregret v The Queen* [1985],<sup>14</sup> a clear distinction is made between negligence and recklessness. The Supreme Court commented that negligence is a civil law concept while recklessness is part of the criminal law and cautions that the two concepts can be confused as if they were the same.<sup>15</sup> Justice

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<sup>10</sup> [1994]3 S.C.R 74.

<sup>11</sup> *Ibid* 77, see *R v George*, [1960] SCR 871, 877 (Fauteux J); and subsequent cases such as *Leary v The Queen* [1978] 1 SCR 29; *Swietlinski v The Queen* [1980] 2 SCR 956; *R v Chase* [1987] 2 SCR 293; *R v Bernard* [1988] 2 SCR 833; and *R v Quin* [1988] 2 SCR 825.

<sup>12</sup> *R v George* [1960] SCR 871, 877.

<sup>13</sup> In the United Kingdom, for example, direct (or specific) intent involves situations where the accused seeks a certain result to occur as a result of their conduct and indirect (or general or oblique) intent where there can be a number of outcomes as a result of an action by the accused person and 'the actor's purpose is not to cause a result, but he realises that by his act that result is very likely.' Simon Parsons, 'Intention in Criminal Law: why is it so difficult to find' (2000) 4(1&2) *Mountbatten Journal of Legal Studies* 5, 6.

<sup>14</sup> [1985]1 SCR 570.

<sup>15</sup> *Ibid* 581.

McIntyre described negligence as being ‘tested by the objective standard of the reasonable man.’<sup>16</sup> Justice McIntyre defined recklessness in the following way:

In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.<sup>17</sup>

The case of *Sansregret* also confirmed that the concept of wilful blindness is part of Canadian criminal law, as Justice McIntyre described in the following way:

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.<sup>18</sup>

It is important to note the distinction between direct and indirect intention and recklessness in most common law legal systems. Lafontaine describes this difference as being the degree of likelihood that a particular consequence will occur, with intent requiring that the result be certain or substantially certain whereas recklessness is less strict with the result only needing to be a possibility or probability.<sup>19</sup>

This examination of criminal case law indicates that Canada is a jurisdiction which incorporates conscious forms of risk-taking into the mental element of the *mens rea*

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<sup>16</sup> Ibid 581-2.

<sup>17</sup> Ibid 582.

<sup>18</sup> Ibid 584; see also Mohamed Elewa Badar and Iryna Marchuk, ‘A Comparative Study of The Principles Governing Criminal Responsibility in The Major Legal Systems of The World (England, United States, Germany, France, Denmark, Russia, China, and Islamic Legal Tradition)’ (2013) 24 *Criminal Law Forum* 1, 12.

<sup>19</sup> Fannie LaFontaine, ‘Parties to Offences under the Canadian Crimes against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity’ (2009) 50 *Les Cahiers de Droit* 967, 989.



required for a person to be criminally responsible for certain conduct. This conscious risk-taking is incorporated into the mental element of *mens rea* through the concepts of recklessness and wilful blindness. Whilst there remains some debate as to whether recklessness can properly be compared to *dolus eventualis*,<sup>20</sup> it is clear that Canadian law allows for criminal responsibility to be attached to situations where the likelihood of the prohibited outcome is less than a practical certainty.

The question now to be considered is whether this concept of intent in Canadian law, which does encompass some degree of risk-taking, has permeated into the interpretation of criminal intent for the domestic prosecution of serious crimes of international concern. If it has, then Canada is contributing to the divergence between national legal systems and the ICC in respect to the recognition of *dolus eventualis* as a form of criminal intent.

### III IMPLEMENTATION OF THE ROME STATUTE INTO CANADIAN LAW

Canada's record of prosecuting serious crimes of international concern, such as crimes against humanity and war crimes, has been poor. Apart from the trials that occurred immediately after the Second World War,<sup>21</sup> there was little activity thereafter to prosecute such offences.<sup>22</sup> As a consequence, Canada became, in the post-war period, a refuge for war criminals seeking to escape trial and punishment by the Allied Powers. The Canadian government responded to growing public concern about the presence of alleged war criminals by amending the *Code* in 1987 to extend retrospectively the criminal jurisdiction to include crimes against humanity and war crimes that had taken place outside of Canada.<sup>23</sup> Several prosecutions for war crimes committed during the Second World War then took place.<sup>24</sup> These prosecutions were unsuccessful in obtaining convictions, with each accused acquitted by a jury. The government therefore changed tactics in respect to offending of this nature. Instead of prosecuting individuals for war crimes under the *Code*, the focus moved to

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<sup>20</sup> See Mohamed Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 *Criminal Law Forum* 473, 492-3.

<sup>21</sup> Patrick Brode, *Casual Slaughters and Accidental Judgments: Canadian War Crimes Prosecutions, 1944-1948* (The Osgoode Society for Canadian Legal History, 1997).

<sup>22</sup> William A Schabas, 'Canada' in Ben Brandon and Max du Plessis (eds), in *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (Commonwealth Secretariat, 2005) 153.

<sup>23</sup> *Ibid* 156.

<sup>24</sup> For example, *R v Finta* (1992) 92 DLR (4<sup>th</sup>) 1 (CA Ont); *R v Finta* [1994] 1 SCR 701.

immigration law, to prohibit entry to refugees who had participated in certain criminal behaviour.<sup>25</sup>

Canada's general lack of success in domestically prosecuting international crimes has not affected its enthusiasm for trying to end the impunity for such criminal behaviour. Canada showed strong support for the establishment of the ICC, which included taking an active role in the drafting process of the Rome Statute<sup>26</sup> and was the first State party to the Rome Statute to pass national implementing legislation.<sup>27</sup>

Canada's implementing legislation in respect to the Rome Statute is the *Crimes against Humanity and War Crimes Act 2000 (War Crimes Act)*.<sup>28</sup> The *War Crimes Act* was designed to replace the 1987 *Code* amendments. Bayley has observed that while the *War Crimes Act* incorporates substantive parts of the Rome Statute, it still fulfils the stated purpose of 'creating a unique criminal law regime wholly consistent with the rest of Canadian law.'<sup>29</sup> The *War Crimes Act* covers the crimes of genocide, crimes against humanity and war crimes which are committed within and outside Canada.<sup>30</sup> The offences include breach of responsibility by a military commander or superior.<sup>31</sup> The *War Crimes Act* also confirms the crimes listed in the Rome Statute as being crimes according to customary international law from the date the Rome Statute came into force and possibly before this.<sup>32</sup>

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<sup>25</sup> Fannie Lafontaine, 'Canada's Crimes against Humanity and War Crimes Act on Trial: An Analysis of the Munyaneza Case' (2010) 8 *Journal of International Criminal Justice* 269, 270-1; see Mitch Eisen, 'Recklessness' (1989) 31 *Criminal Law Quarterly* 347.

<sup>26</sup> See William Schabas, 'Canadian Implementing legislation for the Rome Statute.' (2000) 3 *Yearbook of International Law* 337; Lafontaine, *ibid*.

<sup>27</sup> Canada follows the dualist model in respect to incorporating treaty obligations into domestic law where international treaties do not take automatic effect and implementing legislation is required. See Stephane Beaulac and John H. Currie, 'Canada' in Dinah Shelton, *International law and domestic legal systems: Incorporation, Transformation and Persuasion*. Oxford Scholarship Online, January 2012.

<<http://www.oxfordscholarship.com/dbgw.lis.curtin.edu.au/view/10.1093/acprof:oso/9780199694907.001.0001/acprof-9780199694907-chapter-5>>.

<sup>28</sup> The full title of this legislation is: *An Act respecting genocide, crimes against humanity, and war crimes and to implement the RS of the International Criminal Court, and to make consequential amendments to other Acts*; Schabas above n 22, 155-6.

<sup>29</sup> Deborah Bayley, 'Six Degrees of Separation: Canadian Accessory Liability in Afghan War Crimes' (2011) 20 *Dalhousie Journal of Legal Studies* 61, 79.

<sup>30</sup> *War Crimes Act*, ss 4, 5, 6-8.

<sup>31</sup> *War Crimes Act*, ss 5 and 7.

<sup>32</sup> *War Crimes Act*, ss 4(4) and 6(4); Section 4 (4) includes, 'For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and *may be crimes according to customary international law before that date.*' (emphasis added).

#### IV INTERPRETATION OF THE *WAR CRIMES ACT*

Analysis of national implementing legislation by States parties to the Rome Statute can often be problematic due to a paucity of cases prosecuted under such legislation – in many states, the regulation of this form of offending is considered to be the responsibility of the military forces whose personnel are active in armed conflict situations where serious, international crimes may be committed. Records of these proceedings are not usually made public.

There has been one, direct prosecution under the *War Crimes Act* relating to the 1994 Rwandan genocide. Mr Munyaneza was arrested and charged in Canada in 2005 with two counts of genocide, two counts of crimes against humanity and three counts of war crimes under the *War Crimes Act*. In 2009, Mr Munyaneza was convicted on all counts and sentenced to life imprisonment.<sup>33</sup> In 2014, in *Munyaneza v R*,<sup>34</sup> the Court of Appeal was asked to review the findings against him. In its decision, the Court explained that Canada had implemented legislation to give full effect to the Rome Statute, which criminalised crimes against humanity, war crimes and genocide, whether these crimes occurred in Canada or elsewhere. The Court held that Canadian courts should take into account developments in international law when interpreting the offences as:

doing otherwise would likely create a dichotomy potentially leading to impunity in Canada for acts committed abroad that are crimes under international law but not under Canadian law.... To put it simply, save where it refers specifically to Canadian law, ..... the Act must be interpreted in a manner consistent with developments in international law, and to this end, the international definitions of crimes and their underlying offences must be applied.<sup>35</sup>

Although there has been only one direct prosecution for war crimes, Canada's redirected focus on using immigration law to refuse entry to individuals who may have been involved in the commission of serious international crimes has created a body of case law interpreting parts of the *War Crimes Act*. Under Article 1(F) of the United Nations Convention relating to the Status of Refugees<sup>36</sup> (Refugee

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<sup>33</sup> *R. v Munyaneza* [2009] QCCS 4865.

<sup>34</sup> [2014] QCCA 906

<sup>35</sup> *Ibid* [124-5] and [128].

<sup>36</sup> *Convention relating to the Status of Refugees*, opened for signature on 28 July 1951, 189 UNTS 137 (entered into force on 22 April 1954).

Convention), to which Canada is a party, the protective provisions of the Refugee Convention are not applicable to those who are considered to have committed crimes against humanity or war crimes.<sup>37</sup> This exclusion to the Refugee Convention is implemented in Canada through s 98 of the *Immigration and Refugee Protection Act* SC 2001, c. 27 (*Immigration Act*).<sup>38</sup> While these are not criminal proceedings, the tribunal or court involved in immigration decision-making is required to interpret and apply the *War Crimes Act* to determine whether a decision to exclude a person from Canada under the *Immigration Act* is lawful. These cases are mainly heard before the Federal Court or the Supreme Court of Canada as they involve judicial review of decisions made under the *Immigration Act* to exclude a person because they are a member of an inadmissible class of persons.<sup>39</sup>

Section 33 of the *Immigration Act* sets out the test to be applied by Visa Officers when assessing claims for protection. This test requires that the Officer rely on facts, which they reasonably believe have occurred, are occurring or may occur that a person may have committed a crime against humanity.<sup>40</sup> It has been held that the ‘reasonable grounds to believe’ standard requires, ‘something more than mere

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<sup>37</sup> The full text of Article 1(F) is as follows: ‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’

<sup>38</sup> The full text of Article 98 is as follows: ‘A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.’ The full text of sections E and F are as follows:

‘E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country’ and

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’

<sup>39</sup> The full test is stated as ‘There are reasonable grounds to believe that you are a member of the inadmissible class of persons described in section 35(1)(a) of the *Immigration and Refugee Protection Act* which states that a permanent resident or foreign national is inadmissible on grounds of violating human or international rights for committing an act outside Canada that constitutes an offence referred to in ss 4 to 7 of the *Crimes Against Humanity and War Crimes Act*.’ See *Obita v Canada* (Minister of Citizenship and Immigration) [2006] FC 178 [8]; see also James Simeon, ‘The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have committed War Crimes and/or Crimes Against Humanity in Canada’ (2015) 27(1) *International Journal of Refugee Law* 75.

<sup>40</sup> *Obita*, *ibid* [15].

suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities.<sup>41</sup> Given the potential impact that these visa decisions have on individuals, it appears to be a relatively low standard of proof that is required for the admissibility test. The policy reasons for this standard are explained in the Federal Court case of *Obita* [2006]<sup>42</sup> where the Court commented that Parliament has indicated that:

these most serious crimes deserve extraordinary condemnation. As a result, no person will be admissible to Canada if there are reasonable grounds to believe that he or she has committed a crime against humanity, even if the crime is not made out on a higher standard of proof.<sup>43</sup>

This body of immigration case law provides a broad perspective on the interpretation and application of the *War Crimes Act*. The cases deal with a variety of factual situations, ranging from individuals suspected of participating in the 1992 Balkans conflict<sup>44</sup> or the 1994 Rwandan Genocide<sup>45</sup> to individuals who allegedly assisted the Security Agency in Iraq<sup>46</sup> or worked for the police in Pakistan.<sup>47</sup> This case law mainly deals with matters of complicity; that is, where an individual intentionally shares or encourages another person/s to commit a crime.<sup>48</sup>

Out of the tranche of cases relating to inadmissible classes of persons due to the commission of war crimes, several provide some detailed analysis of the intent required for an individual to be complicit in such crimes and whether recklessness is sufficient for this.

## V *EZOKOLA V CANADA (CITIZENSHIP AND IMMIGRATION)*

The defining immigration case in this area is *Ezokola v Canada (Citizenship and Immigration)*<sup>49</sup> which was handed down in 2013 by the Supreme Court. Mr Ezokola sought refugee status but had been excluded from Canada, as a finding had been

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<sup>41</sup> Ibid [15]; see also *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FCR 433 (C.A.) 445; *Chiau v Canada (Minister of Citizenship and Immigration)* [2001] 2 FCR 297 [60].

<sup>42</sup> *Obita v Canada* (Minister of Citizenship and Immigration) [2006] FC 178.

<sup>43</sup> Ibid [15].

<sup>44</sup> *Blazic v Canada (Citizenship and Immigration)* [2016] FC 901.

<sup>45</sup> *R. v Munyaneza* [2009] QCCS 4865.

<sup>46</sup> *Al Khayyat v Canada (Citizenship and Immigration)* [2017] FC 175.

<sup>47</sup> *Talpur v Canada (Citizenship and Immigration)* [2016] FC 822.

<sup>48</sup> Sanford H Kadish, 'Criminal Law: Reckless Complicity' (1997) 87(2) *The Journal of Criminal Law and Criminology* 369.

<sup>49</sup> *Ezokola v Canada (Citizenship and Immigration)*, [2013] 2 SCR 678, 2013 SCC 40.

made that he had been complicit in crimes against humanity committed by the Democratic Republic of the Congo government for which he had previously worked.

In its decision, the Supreme Court examined how the Canadian authorities have been reviewing cases similar to that of *Ezokola* and considered that decision makers have been over-extending the applicable test for excluding an individual from refugee protection in Canada with the effect of capturing ‘individuals on the basis of complicity by association’ and that the applicable test needed to be brought into line with the purpose of the Refugee Convention.<sup>50</sup> In making this assessment, the Supreme Court acknowledged that ‘complicity is a defining characteristic of crimes in the international context, where some of the world’s worst crimes are committed often at a distance, by a multitude of actors.’<sup>51</sup>

The Supreme Court acknowledged the ‘extraordinary nature of international crimes’<sup>52</sup> and that these crimes cannot be assessed in terms of one legal system only or by interpreting and applying the domestic law of Canada to these crimes.<sup>53</sup> The Supreme Court observed that Article 1(F) of the Refugee Convention requires that crimes excluding people from refugee status must be defined ‘as in the international instruments’ meaning that the court must refer to international criminal law for these definitions. The Supreme Court then turned to what sources of international law should be used. The first source identified was the Rome Statute, which has clearly been accepted by Canada in ratifying the Rome Statute and enacting implementing legislation.<sup>54</sup> Importantly, the Supreme Court then stated that while its main focus would be on the Rome Statute, other sources of international law would be considered as the Rome Statute, ‘cannot be considered as a *complete* codification of international criminal law.’<sup>55</sup>

The Supreme Court closely analysed Article 25 of the Rome Statute which sets out when an individual will be held responsible for the commission of a crime if that person contributes to this crime as part of a group with a common purpose. In the Supreme Court’s view, Article 25 captures offending both where the individual

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<sup>50</sup> Ibid [9].

<sup>51</sup> Ibid [1].

<sup>52</sup> Ibid [44].

<sup>53</sup> Ibid [46].

<sup>54</sup> Ibid [42-50].

<sup>55</sup> Ibid [51] emphasis added

makes an essential contribution to the commission of the crime as a co-perpetrator *and* more indirect contributions to the commission of the crimes ‘in any other way’ with the aim of ‘furthering the criminal activity or criminal purpose of the group.’<sup>56</sup> The Supreme Court concluded that the *mens rea* for Article 25 must be that the individual intends to further the criminal purpose of the group or does something in the knowledge of the common criminal purpose of the group.

On recklessness, the Supreme Court noted that the broadest part of Article 25 permits an individual to either intend to further the criminal purpose of the group or have knowledge or awareness of the group’s criminal intent and stated that ‘recklessness is likely insufficient.’<sup>57</sup> The Supreme Court stated:

The text of art. 25(3)(d) itself does not refer to conduct that *might* contribute to a crime or criminal purpose, and the mental element codified by art. 30 has been held to exclude *dolus eventualis*, that is, the awareness of a mere risk of prohibited consequences.<sup>58</sup>

The Supreme Court then referred to the jurisprudence of the *ad hoc* tribunals, the ICTY and the ICTR, in respect to the concept of joint criminal enterprise. As it did so, the Supreme Court crucially acknowledged that the *ad hoc* tribunals have included the element of recklessness in their definition of what is included in the commission of a crime by a group for a criminal purpose.<sup>59</sup> The three forms of joint criminal enterprise were explained by the Supreme Court and, in particular, Joint Criminal Enterprise III (JCE III) was described as capturing ‘not only knowing contributions but reckless contributions.’ The Supreme Court noted that the modes of commission under Article 25 and under JCE III have been kept separate in jurisprudence despite their similarities and that commentators do not think that JCEIII will become part of the ICC jurisprudence due to this involving the element of recklessness.<sup>60</sup>

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<sup>56</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art. 25 (3)(d); see also *Ezokola*, *ibid* [54-55].

<sup>57</sup> *Ezokola*, *ibid* [60].

<sup>58</sup> Italics in the original, *ibid* [60]. The Court cited the following ICC authorities: *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the *Rome Statute*, 15 June 2009 (ICC, Pre-Trial Chamber II), [360]. The Court also noted that the Pre-Trial Chamber I took a different view of art.30 in *Lubanga*, [351-55].

<sup>59</sup> *Ibid* [65].

<sup>60</sup> *Ezokola* *ibid* [66]; *Prosecutor v Dusko Tadic*, IT-94-1-A, Judgment, 15 July 1999 (ICTY, Appeals Chamber) [229].

The Supreme Court then observed that the ICC itself has referred to the jurisprudence of the *ad hoc* tribunals when interpreting the Rome Statute<sup>61</sup> and that it had previously recognised the importance of the jurisprudence of the *ad hoc* tribunals.<sup>62</sup> In *Mugasera* [2005]<sup>63</sup> the Supreme Court had noted the jurisprudence from the ICTY which included a person knowing or taking *a risk* that their actions will form part of an attack against the civilian population.<sup>64</sup> This case also confirmed that that the individual need only to be aware that their particular actions will be linked to the attack in some way and there is no requirement that the person actually intends that the attack happen:

The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard.<sup>65</sup>

The Supreme Court in *Ezokola* then summarised the definition of complicity in international law in the following way:

In sum, while the various modes of commission recognized in international criminal law articulate a broad concept of complicity, individuals will not be held liable for crimes committed by a group simply because they are associated with that group, or because they passively acquiesced to the group's criminal purpose. At a minimum, complicity under international criminal law requires an individual to knowingly (*or, at the very least, recklessly*) contribute in a significant way to the crime or criminal purpose of a group.<sup>66</sup>

The Supreme Court referred to Article 30 of the Rome Statute when considering that the person involved must be *aware* that their conduct will assist in the furthering of the criminal purpose:

In our view, this approach is consistent with the *mens rea* requirement under art. 30 of the *Rome Statute*. Article 30(1) explains that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court

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<sup>61</sup> *Ezokola*, *ibid* [51].

<sup>62</sup> *Mugasera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40 [82] and [126].

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

<sup>64</sup> *Ibid* [173]; see also *Prosecutor v Dusko Tadic*, IT-94-1-A, Judgment, 15 July 1999 (ICTY, Appeals Chamber) [248].

<sup>65</sup> *Mugasera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40 [174].

<sup>66</sup> *Ezokola*, above n 49 [68] Emphasis added



only if the material elements are committed with intent and knowledge'. Article 30(2)(a) explains that a person has intent where he 'means to engage in the conduct.' With respect to consequences, art. 30(2)(b) requires that the individual 'means to cause that consequence or is aware that it will occur in the ordinary course of events.' Knowledge is defined in art. 30(3) as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events.'<sup>67</sup>

The *Ezokola* decision is important as it demonstrates that the Canadian courts are prepared to consider *all* international jurisprudence when interpreting the *War Crimes Act* and do not feel compelled to rely on ICC jurisprudence only. As a result, the concept of recklessness has been incorporated into the definition of complicity for crimes against humanity. The Supreme Court itself has used the jurisprudence of the *ad hoc* tribunals to support the extension of this definition to include forms of conscious risk taking.

The decision in *Ezokola* has been followed by several immigration cases in Canada where the decisions cited *Ezokola* as authority for the definition of complicity being:

[a]t a minimum, complicity under international criminal law requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group.<sup>68</sup>

The Federal Court in the case of *Blazic [2016]*, for example, noted that the person involved was considered in the Visa Officer's decision to be 'aware' of the war crimes and crimes against humanity which were being committed in the conflict in Bosnia by the members of his military unit; however the Court was of the view that the *Ezokola* standard requires more than membership of a group or a failure to dissociate from a group carrying out these activities.<sup>69</sup> The Court did not elaborate on what more needs to be shown to satisfy the *Ezokola* standard and remitted the matter to be re-determined by another Visa Officer.

In the case of *Shalabi [2016]*,<sup>70</sup> the Federal Court reviewed a decision by the Immigration and Refugee Board of Canada, Immigration Division (ID) to exclude

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<sup>67</sup> Underlining in the original *ibid* [90].

<sup>68</sup> Underlining in the original *Blazic v Canada (Citizenship and Immigration)* [2016] FC 901[18]; *Concepcion v Canada (Citizenship and Immigration)* [2016] FC 544; *X (Re)* [2015] CanLII 107819 (CA IRB); *Talpur v Canada (Citizenship and Immigration)* [2016] FC 822.

<sup>69</sup> *Blazic v Canada (Citizenship and Immigration)* [2016] FC 901 [20].

<sup>70</sup> *Shalabi v Canada (Public Safety and Emergency Preparedness)* [2016] FC 961.

Mr Shalabi from Canada on the basis that he had been complicit in the commission of crimes against humanity. Mr Shalabi had previously served in the Palestinian National Security Force and had been responsible for manning checkpoints in Gaza and the West Bank. Mr Shalabi had been responsible for arresting specified individuals when they came through the checkpoints. Once arrested, the individuals were eventually taken into custody by the General Security Services (GSS). It was alleged that the GSS was involved in torturing these detainees and had committed crimes against humanity. Mr Shalabi contended that his role was limited to handing detainees over to the GSS, that he was a ‘secondary actor’ and not part of or directly concerned with the GSS’s activities. The court observed that the Applicant, Mr Shalabi:

stressed that he never saw an act of torture. However, he neither had to see such an act nor commit one in order to be aware of and complicit in the torture of detainees. In *Ezokola*, ... the requirement is stated to be that he had to ‘knowingly (or, at the very least, recklessly contribute in a significant way to the crime.’ The ID properly noted that knowledge of a group’s criminal activity can be inferred. The ID found clear evidence from his CBSA interview that the Applicant was aware torture was being used by the security services ... Even though the Applicant did not directly observe torture, it was reasonable for the ID to infer his knowledge of what happened to the detainees he transferred.<sup>71</sup>

The immigration case law has also referred to the concept of wilful blindness which is part of domestic criminal law in Canada. In the 2016 case of *Hadhiri*,<sup>72</sup> the Federal Court was asked to review the decision of the Immigration and Refugee Board, Refugee Appeal Division (RAD) who had excluded Mr Hadhiri from entering Canada in accordance with Article 1(F) of the Refugee Convention and the applicable Canadian legislation. Mr Hadhiri had previously worked as a police officer in Tunisia and was alleged to have participated in crimes against humanity during his career with the police.

The RAD considered that Mr Hadhiri’s contention that he had not been aware of the existence of a ‘widespread practice of torture’ in Tunisia should be rejected. The

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<sup>71</sup> Ibid [49].

<sup>72</sup> *Hadhiri v Canada (Citizenship and Immigration)* [2016] FC 1284.

RAD noted that Mr Hadhiri had heard about the use of torture by the security services but did not inquire further into this.<sup>73</sup> The RAD held that Mr Hadhiri had:

either turned a blind eye when he knew or strongly suspected that if he looked into the matter, he would learn that the practice of torture was widespread in Tunisia under President Ben Ali's regime, or acted recklessly by showing little concern for the fate of the people that he delivered to his colleagues or supervisors after having performed his duties and assumed his own responsibilities within the Ministry of the Interior.<sup>74</sup>

Mr Hadhiri sought a review of this decision on the basis that, *inter alia*, the RAD had erred in its application of wilful blindness and complicity in crimes against humanity.<sup>75</sup> In its decision, the Federal Court referred to the case of *R v Jorgensen* [1995]<sup>76</sup> in which the test for wilful blindness was the following: 'Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?'<sup>77</sup>

In *Hadhiri*, the Federal Court noted that the RAD had confirmed that the issue of wilful blindness was being addressed because it had been raised by the Minister's submissions.<sup>78</sup> The RAD made it clear that wilful blindness had not been 'formally identified' in the *Ezokola* case as a factor to review in determining whether an individual was complicit in crimes against humanity. The RAD also noted that it had been the concept of recklessness which had been identified in the *Ezokola* case which is distinct from wilful blindness.<sup>79</sup> In its decision the RAD found that the applicant had 'demonstrated both wilful blindness and recklessness' in his conduct.<sup>80</sup>

The Federal Court noted that:

Even assuming there was no wilful blindness, it is at least permissible to hold, when the RAD's decision is reviewed on a standard of reasonableness, that there was a form of recklessness supporting a finding of knowing, although secondary, contribution to the abuses committed by the Ministry of the Interior. I would point

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<sup>73</sup> Ibid [9].

<sup>74</sup> Ibid [10].

<sup>75</sup> Ibid [12].

<sup>76</sup> *R v Jorgensen* [1995] 4 SCR 55.

<sup>77</sup> *Hadhiri v Canada (Citizenship and Immigration)* [25].

<sup>78</sup> Ibid [27]

<sup>79</sup> Ibid [27].

<sup>80</sup> Ibid [27]

out that pursuant to *Ezokola*, it is permissible to find individuals guilty of complicity under international law if they have knowingly or recklessly made a significant contribution to a crime or criminal purpose of the group to which they are associated.<sup>81</sup>

As a result, this ground of appeal was dismissed.

It was also argued by Mr Hadhiri that he could not have had the required criminal intent to be complicit in the alleged crimes as recklessness was insufficient to establish intent for international crimes. In responding to this, the Federal Court noted that whilst this may be the case for Article 25 of the Rome Statute, it was not the case for the concept of joint criminal enterprise recognised by the *ad hoc* tribunals and in the *Ezokola* decision which held that ‘*mens rea* may capture not only knowing contributions but, “reckless contributions.”’<sup>82</sup>

This chapter’s review of criminal intent in Canada confirms that recklessness is recognised as an extension of criminal responsibility in this jurisdiction. Further, case law which interprets the *War Crimes Act* clearly shows that recklessness (and wilful blindness) has been incorporated into the meaning of an individual being complicit in the commission of serious international crimes. The concept of risk-taking has been included into this test for cases where an individual intentionally shares or encourages another person or persons to commit a crime. The Canadian courts have not simply followed the ICC case law in this respect; instead they have recognized other sources of international law, particularly, the jurisprudence of the *ad hoc* tribunals.

Canada can therefore be considered as contributing to the ‘dual system of criminality’ emerging between the ICC and national legal systems which has been described in earlier chapters of this thesis. It is entirely feasible that an individual could be convicted of being complicit in the commission of a serious crime of international concern under the *War Crimes Act* in Canada for the same conduct which would not invoke criminal liability by the ICC.

The conclusion to this thesis will consider this divergence between the ICC and national legal systems and question whether this is as problematic as expressed by

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<sup>81</sup> Ibid [36].

<sup>82</sup> Ibid [41].

Badar or whether this should be viewed as a natural progression of the system of complementarity in which national legal systems are developing confidence to manage cases involving serious crimes of international concern.

## CHAPTER 4: CONCLUSION

The drafting of the Rome Statute to constitute the world's first, permanent international criminal court was a process of compromise between States, with each of these States bringing the perspective of their respective legal systems to bear on the process. The nature of this process was fundamentally at odds with criminal law which requires specificity in respect to offences and how responsibility for these offences is established.

The resulting confusion in relation to the correct interpretation of intent under Article 30 has arguably centred on the most complicated form of criminal intent – *dolus eventualis* or recklessness – which incorporates the notion of risk-taking into criminal responsibility. This confusion, and the debate in the literature, has been amplified by the ICC handing down conflicting opinions on whether or not *dolus eventualis* is incorporated into Article 30.

The ICC's interpretation of Article 30 appears to have now crystallised as excluding *dolus eventualis* as a form of criminal intent, which has led to concerns that a dual system of criminality may be emerging between the ICC and those national legal systems which do recognise the concept of *dolus eventualis* or its common law equivalent of recklessness.

The comparative law studies conducted to date demonstrate that a dual system of criminality is developing between certain, generally civil law national systems and the ICC in respect to the recognition of *dolus eventualis* as a form of criminal intent. This thesis has contributed to these studies by examining Canada, a common law national legal system. The examination has shown that recklessness is a form of intent recognised in Canada and that recklessness has been incorporated into the interpretation of intent for criminal offences under Canada's implementing legislation for the Rome Statute, the *War Crimes Act*. It would therefore be possible for the same form of criminality to be punished under the *War Crimes Act* in Canada but not, should its jurisdiction be engaged, by the ICC.

While commentators, such as Badar, have expressed caution about the emergence of a dual system of criminality, this concern seems to partially disregard the reality of the system of complementarity which is a fundamental part of the operation of the Rome Statute. The ICC is not *competing* with national legal systems to try exactly

the same offenders for the same crimes. The ICC is a unique legal system where the international tribunal defers responsibility to member States and their national legal systems to hold those responsible for serious crimes of international concern accountable<sup>1</sup>. The ICC acknowledges that it is a supplementary court which will step in when a State is unable to prosecute or unwilling to do so or a matter is referred to it.<sup>2</sup>

This system of complementarity is demonstrated by the cases that have been prosecuted by the ICC – which predominantly involve individuals in the most senior military or political roles - and the cases prosecuted by national legal systems, such as Canada, which mainly involve the ‘foot soldiers’ or individuals in low to medium level positions of responsibility. This division of cases is particularly demonstrated by the Canadian case law relating to complicity for offences under the *War Crimes Act* and the recognition that crimes against humanity and war crimes are often committed by individuals in groups where levels of awareness of what is happening in the commission of the offence will vary. As such, recklessness has been incorporated into these cases to capture the full criminality of the offending that has occurred.

Article 30 is not the only provision in the Rome Statute defining criminal responsibility. Article 25 defines individual criminal responsibility and those who commit an offence with others (complicity) and Article 28 establishes criminal responsibility for commanders and other superiors. These provisions allow the ICC to capture the criminality of these forms of offending.

A dual system of criminality may indeed be present between several national legal systems that recognise *dolus eventualis* as a form of intent and the ICC when it prosecutes using Article 30 as the intent provision. In theory this appears problematic, especially when consistency of international law is desired. In reality, this divergence is less problematic due to the system of complementarity and the resulting division of cases between the ICC and national legal systems. Rather than being viewed as fragmentation of international criminal law, this divergence should

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<sup>1</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 1.

<sup>2</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002) art 17.

be recognised as a natural progression of the system of complementarity. As the ICC is still a young court, it remains to be seen whether its jurisprudence will develop to incorporate the concept of risk-taking as a form of criminal responsibility or whether the ICC's current position on this will be maintained.



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