The Genocide Convention

Tams / Berster / Schiffbauer

2. Auflage 2024
ISBN 978-3-406-81272-9
C.H.BECK

The striking openness of the term '**inflicting conditions of life**' was deliberately chosen at the behest of the Soviet delegation in order to cover forms of genocide not explicitly foreseen at the time of the drafting.[437] In a general manner, such acts can be negatively defined as all fatal measures that do not immediately lead to the death of members.[438] According to the *Ad Hoc* Tribunals, this includes the deprivation of resources indispensable for survival, such as food, medication, proper housing, clothing and hygiene, as well as excessive work or physical exertion.[439] The ICC Elements of Crimes additionally mentions the 'systematic expulsion from homes',[440] which shall be addressed in the following under 'ethnic cleansing' (→ mn. 110). In *Kayishema and Ruzindana,* 'rape' was also considered as a potential act under paragraph (c),[441] although as a usually non-lethal, non-permanent and individual-oriented mean, it stands out in this context. In fact, as measured by the requirements outlined above, its potential scope of application is extremely narrow and limited to situations where, for instance, rape is committed on such a large scale as to drive a substantial part of the group to commit suicide or so that contagious deadly diseases are transmitted to a substantial proportion of the group.[442] **96**

Although the ordinary meanings of 'causing' and 'inflicting' may broadly be the same,[443] the divergent use of the two terms in paragraphs (b) and (c) suggests divergent connotations for the purposes of the Convention. The word 'inflicting' can be traced back to a Belgian amendment proposing its insertion, as it was felt that criminal responsibility could only be established in cases where measures or conditions of life had actually been imposed ('*réellement imposés*') upon a group.[444] The **specific nuances of 'inflicting'** can, thus, be concretised as requiring that the measures imposed must have started to take actual effect on the physical conditions of the group-members. Against this backdrop the *Brđanin* Trial-Chamber judgment seems unconvincing as it lays out that the 'denial of the *right* to medical services' would complete the crime of genocide according to paragraph (c).[445] **97**

d) Imposing measures intended to prevent births within the group. Paragraph (d) addresses the **'biological' variant of genocide**, covering measures directed against the capacity of group-members to procreate. These measures can be divided into two different categories: Methods devised to destroy the reproductive capacity of a group by *physical* means, and the setting up of insurmountable *psychological* obstacles to have children.[446] Among physical measures, the following can be named: sexual mutilation, the practice of **98**

---

[437] UN Doc. A/C.6/SR.81, 173 (Morozov, USSR).

[438] ICTR Kayishema and Ruzindana, TC, 21 May 1999, para. 116. Similarly: ICTY Brđanin, TC, 1 September 2004, para. 691: 'methods of destruction apart from direct killings'.

[439] ICTR Akayesu, TC, 2 September 1998, paras 505–6; ICTR Rutaganda, AC, 26 May 2003, para. 50; ICTR Kayishema and Ruzindana, TC, 31 May 1999, paras 115–6; ICTY Stakić, TC, 31 July 2003, para. 517; ICTY Brđanin, TC, 1 September 2004, para. 691.

[440] ICC Elements of Crimes, Article 6 lit. (c), fn. 4: 'The term 'conditions of life' may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.'

[441] ICTR Kayishema and Ruzindana, TC, 31 May 1999, para. 116; Similarly: Bassiouni/McCormick, Sexual Violence, p. 32 et seq.

[442] According to Takai *TempIntlCLJ* 2011, 401, and Sharlach *NPolS* 2000, 99, indications exist that the transmission of the human immunodeficiency virus (HIV) by means of rape was indeed applied during the genocide in Rwanda in 1994 as a slow-death-method.

[443] Oxford English Dictionary, p. 896 ('inflict').

[444] UN Doc. A/C.6/SR.76, p. 176 (Kaeckenbeeck, Belgium).

[445] Emphasis added.

[446] ICTR Akayesu, TC, 2 September 1998, p. 508: '[M]easures intended to prevent births within the group may be physical, but can also be mental.' ICTY Tolimir, TC, 12 December 2012, para. 743.

sterilization, involuntary birth control and the separation of sexes.[447] Additionally, forced pregnancy (i. e. forced impregnation of the victim followed by her detainment beyond the point where the pregnancy can be terminated[448]) may be classified as a physical means of preventing births within a group, as during the time of pregnancy women are physically unable to procreate with members of their own group.[449] In regard to psychological measures, two types can be distinguished. First, a mental obstacle can be created by making use of deep-rooted social rules and conventions, for instance the prohibition of marriage within societies where extramarital procreation is considered shameful,[450] or the raping of women who are consequently regarded as untouchable within the group they belong to.[451] Second, measures devised to traumatise a victim to the point that they lose the will, desire or psychological ability to procreate,[452] such as systematic rape.

99 Pursuant to the wording of the provision, these measures must be **'imposed' upon the victims**. It is debatable whether this term bears connotations that reach beyond mere causation. The ILC held that '[t]he phrase 'imposing measures' is used in this subparagraph to indicate the necessity of an element of coercion. Therefore, this provision would not apply to voluntary birth control programmes sponsored by a state as a matter of social policy.'[453] This stance is supported by the Chinese authentic version which involves an element of compulsion, employing the term 强制 (*qiángzhì*).[454] As opposed to this, the authentic French, Spanish and Russian versions of the Convention do not offer the slightest indication for such an interpretation. Moreover, an element of force is explicitly contemplated within paragraph (e), thereby indicating *e contrario* that measures under paragraph (d) do not necessarily imply force. From the perspective of *effet utile*, it may also be worth considering that the clandestine administration of contraceptive agents to protected groups by deceptive rather than forcible means is not an unthinkable scenario and should hence remain within the Convention's purview. Finally, the ILC's underlying concern that voluntary governmental birth control programs could risk being considered genocidal can easily be dispersed, since such measures can be ruled out through the failure to satisfy the requirement of 'intent to destroy'.[455] Therefore, it would seem preferable not to exclude voluntary measures from the scope of paragraph (e).

100 At times, there has been a viewpoint suggesting that the apparent *mens rea* element **'intended to'** should be interpreted in a manner that necessitates the imposed measures to be *objectively* effective in preventing births.[456] However, certain factors indicate a contrary perspective. Firstly, the plain and ordinary meaning of the provision's language

---

[447] ICTR Akayesu, TC, 2 September 1998, 507 (employing 'forced birth control' instead of 'involuntary' birth control. ICTR Kayishema and Ruzindana, TC, 21. May 1999, para. 117.

[448] Takai *TempIntlCLJ* 2011, 403; Engle *AJIL* 2005, 792.

[449] Takai *TempIntlCLJ* 2011, 404; Sharlach *NPolS* 2000, 93. In Akayesu (2 September 1998, para. 507) the ICTR Trial Chamber held that '[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.' Raising the number of children deemed to belong the perpetrator's kin, even if effectuated by abusing and instrumentalising women of another group, however, cannot as such be subsumed under the wording of Article II lit. (d). For a different opinion see: Kittichaisaree, International Criminal Law, 81.

[450] ICTR Akayesu, TC, 2. September 1998, 507, generally speaking of 'prohibition of marriages'.

[451] Satzger, Int'l and Eur. Crim. Law (2nd edn), § 14 mn. 22.

[452] Short *MichJRaceL* 2008, 511.

[453] ILC Draft (1996) Commentary, p. 46. See also ICTR Akayesu, TC, 2 September 1998, para. 507, 'forced birth control'.

[454] '*Qiángzhì*': to enforce; enforcement; forcibly.

[455] See: Schabas, Genocide (2nd edn), p. 293 et seq.

[456] Kreß *IntCrimLRev* 2006, 461 (483).

does not support the inclusion of objective elements. Moreover, it should also be recalled that a hybrid element, composed of a subjective intent-requirement and an objective capacity-requirement, is in fact recognised by the Convention in the guise of the 'calculated-to-bring-about'-element within Article II lit. (c) (→ mn. 90). In light of this background, adopting the aforementioned interpretation would lead to inconsistency in assigning identical meanings to fundamentally different terms, which is not in accordance with established standards of interpretation. A further indication can be drawn from the ICC Elements of Crimes, referring to Article 6 lit. (d) ICC Statute, which employs the term 'intended to' to both genocidal intent and the intent to prevent births.[457] This also draws the conclusion that 'intended to' under paragraph (d) in fact depicts a purely subjective element.

The intended result must consist of the 'prevention of births within the group'. For the same reasons as outlined above (→ mns 76–80) the plural form 'births' is to be taken literally and requires the intention of **preventing at least *two* births** within the group. **101**

e) Forcibly transferring children of the group to another group. The circumscribed act in this sub-paragraph constitutes an **umbrella offence**, spanning two kinds of mechanisms of destruction: **biological and cultural genocide**. In regards to the former, the transfer of children may be considered a twofold encroachment upon the group's reproductive capacity, as the effects of the postnatal abduction of children are practically identical to the termination of pregnancies, and the separation of pubescent children from their group may serve to prevent pregnancies within the group. Secondly, the prevention of social interaction between children and other group-members is a means of undermining the social persistence of a group that can be considered to be a form of cultural genocide. In light of the fact that the Sixth Committee, after lengthy discussion, resolved to exclude acts pertaining to 'cultural genocide' from the Convention, one could be inclined to reduce the scope of paragraph (e) to scenarios of biological genocide. However, this argumentation overlooks the fact that the Sixth Committee did not reject the rationale of cultural genocide as such but merely excluded the acts contemplated by Article III of the *Ad Hoc* Committee Draft Convention (→ mn. 11). This is also illustrated by the inclusion of causing mental harm under paragraph (b), which does not target the *physical* state of a group but rather its members' *social* capacity to interact and hence constitutes a means of cultural genocide in the broader sense. **102**

As to the notion of '**children**', reference can be made to Article 1 of the UN Convention on the Rights of the Child, according to which 'child' means every human being below the age of eighteen years. The ICC Elements of Crimes repeats this definition, indicating a broad international consensus of its applicability for the purposes of genocide.[458] The wording 'human being' suggests that foetuses should not be considered to be covered. Thus, the forcible transfer of pregnant women does not constitute a crime under paragraph (e). With regard to the upper age limit, *Schabas* advocates a more restrictive approach, proposing that the age-requirement should be measured according to the potential loss of cultural identity. Evidently, children at a very receptive age will readily adopt the language, culture and religion of their new environment, while older children are far less likely to lose their cultural identity through such transfer.[459] Although this view allows for flexible risk-assessment as to the cultural integrity of a group, its criteria are highly speculative and lacking in certainty. Moreover, it disregards the biological dimen- **103**

[457] ICC Elements of Crime, Article 6 lit. (d), Element No. '3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such. 4. The measures imposed were intended to prevent births within that group.'

[458] ICC Elements of Crimes, Article 6 lit. (e), Element No. 5.

[459] Schabas, Genocide (2nd edn), p. 203.

sion of paragraph (e), i.e. the fact that children, as future parents, constitute the 'reproductive reserve' of a group, irrespective of their status of infants or near-adults.[460]

104 For the same reasons outlined above (→ mns 76–80), the plural form 'children' is to be taken literally and requires the forcible transfer of at least *two* children from one group to another.

105 The words '**children *of the group***' clarify that prior to being transferred, the children must have belonged to the targeted group. This seeming truism gains relevance in the context of so-called 'procreative rape', i.e. the forced impregnation of women of the targeted group with the intent of 'diluting' this group within patriarchal societies where membership of a group is determined by the identity of the father.[461] In the ICJ *Bosnian Genocide* case, the Applicant argued that children born as a result of these 'forced pregnancies' would not be considered to be part of the protected group and opined that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.[462] However, this view is unconvincing irrespective of the approach chosen to determine group-membership. Pursuant to the objective approach (→ 52, 59–61) proposed here, whether or not a child belongs to a protected group must be assessed objectively and without regard to the group's self-perception. Accordingly, children born of Bosnian Muslim women and brought up amidst their mothers' ethnic group should be deemed as belonging to this group, so that the required transfer from one group to another cannot be established.[463] However, if, on the basis of the competing objective-subjective approach, the children were to be regarded as the offspring of the perpetrators, they would not qualify as 'children of the [protected] group', and the requirements of the offence contained in paragraph (e) would also not be fulfilled.

106 At the outset, the concept of '**transferring to another group**' encompasses the need for a geographical and communicative dissociation of children from the remainder of their group. While the term 'transfer' might imply otherwise, this disconnection does not necessarily mandate physical relocation of the children; rather, it can be achieved when the children are left in a particular location while the rest of the group is moved elsewhere.[464] The requisite separation does not entail significant distance or the complete loss of communication. In practical terms, even separating children within the confines of a detention camp would fulfill this criterion, even if clandestine means of communication facilitated some level of contact between the separated children and the rest of their group.

107 In addition to separating children from their original group, a certain **connection between the children and the receptive group** is needed, as indicated by the words 'to another group'. Undoubtedly, one requirement of this connection is that the children are in the other group's effective control.[465] Furthermore, in light of the fact that paragraph (e) also touches on the sphere of cultural genocide, it may not seem far-fetched to require a certain degree of acculturation of the children within the other group. This finds some support in the Secretariat Draft Commentary, which had felt that '[t]he separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents'. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.'[466] However, more convincing aspects factor against such

[460] See also: Mundorff *HarvardILJ* 2009, 92.
[461] ICJ, Bosnian Genocide case, ICJ Reports 2007, 43, para. 362; Short *MichJRaceL* 2003, 512.
[462] ICJ, Bosnian Genocide case, ICJ Reports 2007, 43, para. 362; similarly: Takai *TempIntlCLJ* 2011, 405.
[463] The ICJ apparently took the same position in the Bosnian Genocide case (26 February 2007, paras 366 et seq.).
[464] Kreß *IntCrimLRev* 2006, 484; Mundorff *HarvardILJ* 2009, 91.
[465] Mundorff *HarvardILJ* 2009, 91.
[466] Secretariat Draft Commentary (UN Doc. E/447), p. 27.

an additional requirement. Firstly, the usage of '*to* another group' instead of '*into*' should be considered, as the wording chosen marks motion in the direction of the other group rather than expressing a form of embedding therein. Secondly, requiring cultural assimilation of the children would run counter to the pre-conventional conceptions of cultural genocide. All of these conceptions display the awareness that the phenomenon of (cultural) genocide features a two-part structure. In 1919, the Commission of Responsibility of the Authors of the War and on Enforcements of Penalties held that the German Empire and their allies had committed acts of 'denationalisation' with the purpose of later 'germanizing' the respective territories.[467] Similarly, in 1944 *Lemkin* discerned two phases of genocide: the destruction of the national pattern of the targeted group, and, following up, the imposition of the national pattern of the oppressor.[468] By the same token, before the Nuremberg Military Tribunal, the French prosecutor, *Champetier de Ribes*, defined genocide as 'the extermination of the races or people at whose expense they [the Nazis] intended to conquer the living space they held necessary for the so-called Germanic race.'[469] The proponents of these early conceptions of genocide consistently held that punishment should, in all instances, be attached to the first act of destroying the cultural heritage of groups, not the second act of re-acculturation. Against this backdrop, it would be inappropriate to require the transferred children to have been assimilated into the culture of the receptive group.

A further controversial issue is whether the transfer of children needs to be **permanent** **108**
in order to meet the requirements of this sub-paragraph.[470] During discussions at the Sixth Committee, the question was brought up several times (→ mn. 17) but was ultimately left unanswered. According to the view proposed here, the better case can be made against such a requirement of permanence. The word 'transfer' marks a temporary activity rather than a lasting consequence, which is further emphasised by the use of the gerund form 'transferring'. Moreover, doubts as to whether a **short-term abduction** of children could constitute a suitable means to destroy the group, in whole or in part, can be adequately dealt with on the level of genocidal intent.[471] It may be noted that forgoing a duration-requirement carries a significant consequence. On this basis, the killing of children of a protected group will, in many cases, not only be punishable under paragraph (a), but also qualify as forcibly transferring children under paragraph (e), as the required separation and establishment of effective control (for instance, by rounding up juvenile victims in a certain place) will oftentimes precede the act of killing.

The term '**forcibly**' not only covers the use of coercion and violence but also extends **109**
to the threat of using such means.[472] The use of deceptive means cannot be subsumed under the term. The use or threat of force need only be a concomitant of transferring children, not a causal factor. This is supported by the fact that in most scenarios of forcible transfer, an element of deception will also be present, such as the assertion that the children are being evacuated for humanitarian reasons or that they will be

[467] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties *AJIL* 1920, 114 (*sub* 12).

[468] Lemkin, Axis Rule, p. 79.

[469] IMT, Trial of the Major War Criminals, volume XIX, p. 562.

[470] Werle/Jeßberger, Principles (4th edn), mn. 926: '… permanent transfer done with the specific intent of destroying the group's existence.' For a different view see: Mundorff *HarvardILJ* 2009, 91.

[471] See Mundorff *HarvardILJ* 2009, 91.

[472] This is clearly set out in a footnote to Element 1 of the ICC Elements of Crimes, Article 6 lit. (e): 'The term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.' See also: Satzger, Int'l and Eur. Crim. Law (2nd edn), § 14 mn. 23; Kittichaisaree, International Criminal Law, p. 82; Kreß *IntCrimLRev* 2006, 461, 484; ICTR Akayesu, TC, 2 September 1998, para. 509

immediately returned to their parents. In cases like these, it would be impossible to establish before a court whether or not the deception, hypothetically, would have been sufficient to effectuate the transfer of children. This would invariably lead to unwarranted acquittals and practically undermine the protective goal of paragraph (e).[473]

110 **f) 'Ethnic cleansing'.** The practice of so-called '**ethnic cleansing**' – which consists of 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area'[474] – is a frequent phenomenon in macro-criminal scenarios,[475] and both the Sixth Committee (→ mn. 18) as well as the ILC[476] deliberated as to whether it should be considered as a stand-alone act of genocide. Eventually plans to include it were abandoned, as it was rightly concluded that the punishable aspects of the forcible expulsion of protected groups were already sufficiently embraced by the 'slow-death-methods' under paragraph (c).[477] International jurisprudence has largely adopted this position,[478] as well as adding acts defined by paragraph (b) as a further candidate applicable in situations of ethnic cleansing.[479] To date, such jurisprudence has gained a certain degree of uniformity. Hence, while the forcible expulsion of groups is not punishable as such, its effect on the members of the targeted group may well give rise to criminal responsibility pursuant to Article II of the Convention.

III. Mental elements

111 Broadly, the offense of genocide necessitates the presence of **two distinct mental elements**. Firstly, there is the 'general intent', encompassing the perpetrator's intention aligned with their individual conduct and the factual circumstances specified in the *chapeau* of Article II. Secondly, there exists the 'intent to destroy', which extends beyond the *actus reus* and can be termed as the 'specific' or 'ulterior intent'.[480] It is this

[473] The ICTR Trial Chamber in Akayesu (2 September 1998, para. 509) possibly spoke in favour of a causal element, holding that 'the objective [of Article II lit. (e)] is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma *which would lead to* the forcible transfer of children from one group to another.' Emphasis added.

[474] ICJ, Bosnian Genocide case, ICJ Reports 2007, 43, para. 190; ICTY Jelisić, TC, 2 August 2001, paras 562, 578; ICC Al Bashir, PTC, 4 March 2009, para. 144.

[475] Naimark, Fires of Hatred, *passim*; Bell-Fialkoff *Foreign Affairs* 1993, 110–21; Jackson Preece *HRQ* 1998, 818: '[F]orcibly moving populations defined by ethnicity … has been an instrument of nation-state creation for as long as homogeneous nation-states have been the ideal form of political organisation.'

[476] ILC Yearbook 1989, Vol. I, 2100th meeting, 30, paras 32–4; Yearbook 1991, Vol. I, 2239th meeting, 215, para. 21; ibid., 2251st meeting, 293, paras 15–7.

[477] ILC Yearbook 1991, Vol. I, 2239th meeting, 215, para. 9; Report of the Commission to the General Assembly on the Work of Its Forty-First Session, UN Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), 102, para. 5; Report of the Commission to the General Assembly on the Work of Its Forty-Eighth Session, UN Doc. A/51/10, p. 46, 92.

[478] ICJ, Bosnian Genocide case, ICJ Reports 2007, 43, para. 119; ICTY Stakić, TC, 31 July 2003, paras 517, 519 ('The expulsion of a group or part of a group does not in itself suffice for genocide.'); ICTY Tolimir, TC, 12 December 2012, para. 765; ICTR Akayesu, TC, 2 September 1998, 506; ICTY Krstić, TC, 2 August 2001, para. 508, citing the Eichmann-Trial (Jerusalem District Court, 12 December 1961, *ILR* 1968, 340).

[479] ICTY Krstić, TC, 2 August 2001, para. 513; ICTY Blagojević and Jokić, TC, 17 January 2005, para. 646, 650.

[480] The preferable notion 'ulterior intent' is proposed by Ambos (*IRRC* 2009, 833, 835 with further references). Similarly: ICTY Stakić, TC, 31 July 2003, para. 520 ("surplus' of intent'). International jurisprudence features a wealth of different terms, e.g.: 'genocidal intent' (ICTR Kayeshema and Ruzindana, 21 May 1999, para. 91), 'exterminatory intent' (ICTY Jelisić, TC, 14 December 1999, para. 83), 'specific intention' (ICTR Akayesu, TC, 2 September 1998, para. 498); 'dolus specialis' (ICTR Kajelijeli, TC, 1 December 2003, para. 803).

latter 'transcending internal tendency'[481] of genocide that constitutes its character as a goal-oriented crime.[482] Finally, in addition to the general intent and the ulterior intent to destroy, paragraph (d) contains a further specific intent element in that the perpetrator must have 'intended to' prevent births within the targeted group.

1. Mental elements of the individual act

112 In congruence with other offences acknowledged within the domain of international criminal law, the crime of genocide necessitates the presence of a subjective component to complement its objective elements ('**general intent**'). Regarding Article II, the precise content of this subjective element can only be ascertained on the basis of the subsequent development of international criminal law, since the creators of the Convention did not address the issue in detail. Of paramount significance as a point of reference in this regard is **Article 30 ICC Statute**[483], which encapsulates the first codified definition of general intent, while also reflecting the consensus of a substantial number of states. This provision is structured in a manner that, on one hand, dissects general intent in para. 1 into its subcomponents of 'intent' (commonly understood as the volitional aspect) and 'knowledge' (the cognitive element). On the other hand, it adopts the 'element analysis' used, among others, by the US Model Penal Code, which differentiates the necessary subjective aspects according to the classification of corresponding objective elements into 'conduct', 'consequences', and 'circumstances'.[484] As regards criminal conduct, Article 30 para. 2 lit. (a) ICC Statute stipulates that the individual 'means to engage in the relevant conduct', requiring that the conduct be performed wilfully.[485] Concerning consequences, it is essential that a person either intends to bring about the consequence (first alternative of para. 2 lit. (b)) or is aware that a consequence will occur in the ordinary course of events (second alternative of para. 2 lit. (b) and second alternative of para. 3). Lastly, in relation to circumstances, para. 3 demands that there be an awareness on the part of the individual that a specific circumstance exists.

113 Despite its significant weight, the provision of Article 30 ICC Statute is **widely considered as flawed** in several respects.[486] One of the evident shortcomings of its formulation, which will be revisited below, is that it deems both 'intent' and 'knowledge' necessary for the criminal outcome, but it defines them partially identically. As a consequence, the requirement of 'means to cause that consequence' (para. 2 (b)) becomes

---

[481] Ambos *IRRC* 2009, 833 (835), translating the German term 'überschießende Innentendenz'.

[482] Gil Gil *ZStW* 2000, 394 et seq.; Ambos *IRRC* 2009, 833 (835).

[483] Article 30 ICC Statute reads as follows:

Mental element

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

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

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

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

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

[484] Model Penal Code § 2.02 (2). For critique see: Stuckenberg, *ZIS* 2018, 531.

[485] Satzger, Int'l and Eur. Crim. Law (2nd edn), § 13 mn. 24.

[486] For critique see Eser in Cassese/Gaeta/Jones, The Rome Statute of the International Criminal Court Vol. I (2002), p. 889 et seqq; Schabas, *NewEngLRev* 2003, 1015 (1025); *Werle/Jeßberger JIntCrimJust* 2005, 35; Stuckenberg, *ZIS* 2018, 531; Ambos, Der Allgemeine Teil des Völkerstrafrechts, p. 758 et seqq.

logically superfluous.[487] Furthermore, it is subject to criticism that the phrasings of the provision, concerning foreseeing outcomes (i.e., 'awareness, that a consequence *will* occur in the ordinary course of events') and the existence of factual circumstances (i.e., 'awareness, that a circumstance *exists*'), appear to demand the offender's near certainty, thereby excluding cases in which they only consider the fulfillment of the offense through their conduct as possible or probable.[488] As a result, the provision imposes significantly higher requirements on general intent than practically all major national criminal law systems and the jurisprudence of all international criminal tribunals, except the ICC. This is scarcely persuasive, given that the previous jurisprudence of international criminal tribunals can be interpreted as an expression of a ***desideratum* for a lower threshold of general intent**.[489] It is not surprising, therefore, that within the international jurisprudence and the literature, there is a struggle to establish approaches that justify a reduction in the overly restrictive standard of Article 30 ICC Statute.

114 A bold initiative was taken by the ICC Pre-Trial Chamber I in the *Lubanga* case, where the Chamber approached the general intent requirements to the standard of ***dolus eventualis*** and assumed that the conditions of Article 30 would be fulfilled even if the perpetrator was merely aware of the risk that their conduct would fulfill the objective elements of the crime but acquiesced to or accepted this possibility. According to this approach, the assumption of a heightened probability of the occurrence of the result – the Chamber referred to it as 'substantial likelihood' – is not necessary but merely facilitates the proof of general intent. It suffices, however, to consider the occurrence of the result as possible: '[T]he suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions.' The Pre-Trial Chamber, however, based its deviation from the wording of Article 30 of the ICC Statute solely on corresponding decisions of the *Ad Hoc* Tribunals,[490] providing no justification for the departure from the textual provisions of Article 30 of the ICC Statute. Consequently, this initiative was promptly rejected by the Pre-Trial Chamber II in the *Bemba*[491] case and subsequently by the *Lubanga* Trial Chamber[492] and Appeals Chamber.[493]

115 Certain parts of the literature attempt to deliver the justification that the Pre-Trial Chamber I omitted and refer to the opening clause of Article 30 para. 1 of the ICC Statute, which states that the restrictive requirements are only prescribed '**unless otherwise provided**.' Such other provisions, the argument runs, can arise not only from the statute itself or the ICC Elements of Crimes but also from all other sources of international law, including customary international law.[494] This opens up a gateway for any potentially established customary standards regarding general intent in interna-

[487] Stuckenberg, *ZIS* 2018, 532.

[488] Piragoff/Robinson in Ambos, Rome Statute (4th edn), Art. 30 mn. 26; Werle/Jeßberger, Principles (4th edn), mn. 573, 603; ICC Lubanga, TC, 14 March 2012, para. 1012; ICC Lubanga, AC, 1 December 2014, para. 447.

[489] For further critique see: Cassese *EJIL* 1999, 144 (153 et seq.); Cassese, Int'l Criminal Law (3rd edn), 39, 56 et seq.; Werle/Jeßberger, Principles (4th edn), mn. 576; Stuckenberg, *ZIS* 2018, 531–4.

[490] ICC Lubanga, PTC, 29 January 2007, para. 352 (drawing largely on the findings of ICTY Stakić, TC, 31 July 2003 para. 587).

[491] ICC Bemba, PTC, 15 July 2009, paras 357–66.

[492] ICC Lubanga, TC, 14 March 2012, para. 1011 et seq.

[493] ICC Lubanga, AC, 1 December 2014, paras 447 et seqq.

[494] Favourable to the inclusion of international customary law: Werle/Jeßberger *JIntCrimJust* 2005, 35, 45 et seq.; Werle/Jeßberger, Principles (4th edn), mn. 584; Roßkopf, Die innere Tatseite des Völkerrechtsverbrechens, p. 105 et seqq; Finnin *ICLQ* 2012, 351 et seqq.; opposed: Ambos, Treatise I (2nd edn), p. 291; Cryer/Robinson/Vasiliev, Introduction (4th edn), p. 367: 'Article 30 applies in the ICC absent specific provision *in its documents*.' (emphasis added); Jesse, Der Verbrechensbegriff des Römischen Statuts, p. 221 et seq.; Porro, Risk and Mental Element, p. 105 et seq.; Ohlin *MichJIL* 2013, 107 et seqq.