The *Mens Rea* Element of Intent in the Context of International Criminal Trials in Sweden

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1 Introduction

A basic prerequisite for a conviction in all criminal justice systems is that the defendant acted with the requisite *mens rea* for the offence; usually a form of intent, recklessness, or negligence. This article discusses the way intent has been, and should be, dealt with by Swedish courts when it comes to international crimes. The main purpose of this article is to clarify whether Swedish courts should apply intent according to international criminal law[1] or according to Swedish criminal law when adjudicating cases concerning these crimes. This discussion is important since international criminal law requires a higher form of intent than Swedish criminal law. The application by Swedish courts of intent as articulated in international criminal law would therefore have consequences for the prosecution of international crimes and would lead to fragmentation of the Swedish legal system.

Central to this discussion are Article 30 of the Rome Statute of the International Criminal Court, which provides a definition of intent in international criminal law, and Swedish criminal law regulations. The present analysis regarding intent is based primarily on Swedish criminal cases concerning intent for international crimes, and cases from the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).

Regarding Swedish criminal law, these issues will be discussed in relation to Swedish criminal regulations applicable before and after 1 July 2014. This date is important, since it marks the entry into force of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), which applies to offences committed after 1 July 2014. However, the previous offence "crime against international law" (Swedish Criminal Code, Ch. 22 Sec. 6), still applies to acts committed before 1 July 2014. Generally, there is also an important difference between the regulations applicable before and after 1 July 2014. The regulation applicable to offences committed before 1 July 2014 directs the courts to consider customary international law when adjudicating international crimes at the national level. This follows from the wording of the provision on crime against international law and the *travaux préparatoires*. However, the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) does not refer to customary international law.[2]

Our review of both international and Swedish legislation and criminal case law shows no support for the view that Swedish courts should apply existing rules of international criminal law concerning intent when adjudicating

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1 We here refer to international criminal law as regulated in international treaties and customary international law and as interpreted by international criminal tribunals and international criminal courts.

2 On the differences between the regulations applied before and after 1 July 2014, see further prop. 2013/14:146, p. 68; Klamberg, Mark, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, International Criminal Law Review, 2009, vol. 9, no. 2, p. 397–398, 402, 405; Klamberg, Mark, *The Evolution of Swedish Legislation on International Crimes*, Scandinavian Studies in Law, 2020, vol. 66, Sections 5 and 6.

international crimes at the national level.[3] Furthermore, nothing suggests that international rules regarding intent have reached the level of customary international law, or that Swedish courts are in any way legally bound to apply Article 30 of the Rome Statute. Consequently, Swedish courts are not obliged to apply existing international criminal law rules regarding intent.

2 Intent in Common and Civil Law Systems

To understand the meaning of intent in international criminal law it is first necessary to have basic knowledge of how intent is perceived in different jurisdictions. This varies both between common law and civil law systems and between countries within each of these legal traditions.[4] It is therefore not entirely easy to translate the terminology used for terms/concepts that are perceived as intent according to current Swedish criminal law. A concrete example of this difficulty is that what is called reckless intent[5] in Swedish criminal law is best compared to the common law term "recklessness" or the civil law term *dolus eventualis*. The problem with recklessness is that this term would correspond in Swedish criminal law to something between the lowest form of intent (reckless intent) and conscious negligence,[6] which is a different form of *mens rea* than intent.[7] This article will therefore begin with a brief discussion of the terminology used in common law and civil law systems, which will highlight commonalities and differences. We emphasise again that writing about intent in different jurisdictions and legal systems entails great challenges. With this in mind, the discussion below offers a basic overview of the different concepts and terms used in different legal systems. This is necessary in order to understand the concept of intent in international criminal law.

In English, the legal term *mens rea* denotes the mental element necessary for a conviction for a particular offence, e.g. intent, recklessness, or negligence. Common law and civil law jurisdictions use different categories to describe *mens rea*, which might be similar but are not necessarily complete equivalents, and which cause difficulties for any discussion regarding intent. Indeed, there is deep ambiguity over what is meant by the concept of intent. The tension is

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3 As will be seen below the exception is for the crime of genocide, which in Swedish law is defined exactly as in international instruments and requires special intent.

4 For a review of intent in selected common law and civil law countries that shows these differences, see e.g. Marchuk, Iryna, *The Fundamental Concept of Crime in International Criminal Law. A Comparative Law Analysis*, Berlin, Heidelberg: Springer Berlin Heidelberg, 2014, p. 7–67.

5 In Swedish "likgiltighetsuppsåt".

6 In Swedish "(medveten) oaktsamhet".

7 It is however more complicated than this. For a thorough discussion about how "recklessness" should be understood in a Swedish context, see Jareborg, Nils & Ulväng, Magnus, *Tanke och uppsåt*, Uppsala: Iustus, 2016, p. 246–268. In particular, see the illustration on p. 256 showing how the English criminal law terms "intent", "recklessness" and "negligence" can be categorised from a Swedish perspective.

compounded by the fact that the ambiguity stretches along two axes: across legal cultures and across bodies of law.[8]

In Anglo-American common law, intent can be divided into two categories: direct intent and indirect/oblique intent.[9] Direct intent is where a person intended the outcome or result of his/her act or omission.[10] For example, in English criminal law direct intent is where the defendant's aim, purpose, or objective is to bring about a consequence or result. The leading authority defines direct intent as:

> a decision to bring about, insofar as it lies within the accused's power, [a particular consequence], no matter whether the accused desired that consequence of his act or not.[11]

Other common law systems use similar explanations for direct intent. For example, the Criminal Code of Australia speaks of what can be considered direct intent when the defendant means to engage in a conduct or means to bring about a certain result.[12] In addition, in the US Model Penal Code direct intent is where the defendant's conscious object is 'to engage in [a particular] conduct … or to cause [a particular] result'.[13]

Indirect intent is where the defendant does not have the aim, purpose, or objective to bring about a particular result, but where the result is a virtually certain consequence of the defendant's conduct, and the defendant realises this,[14] or the defendant is aware that a result will occur 'in the ordinary course of events'.[15]

Recklessness is another form of *mens rea* used in common law systems. It is about foresight of a risk and the unjustifiable or unreasonable taking of that risk,[16] and is thus different from intent. One question regarding recklessness is

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8 Ohlin, Jens David, *Targeting and the Concept of Intent*, Michigan Journal of International law, 2013, vol. 35, no. 1, 79, p. 82.

9 For the purposes of this article, we will use the term "indirect intent", since this is the term used in international criminal law; and to minimise confusion.

10 Guilfoyle, Douglas, *International Criminal Law*, Oxford: Oxford University Press, 2016, p. 188.

11 *R v. Mohan* [1976] QB 1 (CA).

12 Criminal Code Act 1995 (2019) Australian Government, Compilation No. 127, Section 5.2(1) and (3).

13 US Model Penal Code (1985) The American Law Institute, Section 2.02(2)(a).

14 *R v. Nedrick* [1986] 1 WLR 1025 (CA); *R v. Woollin* [1998] AC 82 (HL); Child, John & Ormerod, David, *Smith, Hogan and Ormerod's Essentials of Criminal Law*, 3 edn., Oxford: Oxford University Press, 2019, p. 97–99. In *Nedrick* the trial judge had directed the jury that the defendant could be liable for murder if he foresaw death or serious bodily harm as *highly probable*. This was overruled by the Court of Appeal, which stated that foresight of virtual certainty was necessary.

15 Australian Criminal Code, Section 5.2(3). See also US Model Penal Code, (1985) The American Law Institute, Section 2.02(2)(b): 'if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.'

16 Cassese, Antonio & Gaeta, Paola, *Cassese's International Criminal Law*, 3 edn., Oxford: Oxford University Press, 2013, p. 41; Guilfoyle, 2016, p. 188; *R v. Cunningham* [1957] 2 QB

the level of risk that must be foreseen by the defendant, and common law systems take different views. Australian law requires awareness of a 'substantial risk',[17] while the US Model Penal Code requires the conscious disregard of 'a substantial and unjustifiable risk'.[18] However, in English law the foresight of *any risk* is sufficient.[19] According to some scholars, recklessness requires either foresight of a probable risk or simply of a possible risk.[20] Sometimes recklessness will also cover failure to give an obvious and unjustifiable risk any thought (wilful blindness).[21] In English law the defendant will be reckless even if he or she did not foresee the risk at the time of the offence because he or she had 'closed his [or her] mind to the obvious'.[22]

Some scholars argue that common law systems, generally speaking, recognise three forms of intent: direct intent, indirect intent and recklessness.[23] However, the above shows that this appears not to be true – at least regarding the common law jurisdictions discussed above, since these clearly view recklessness as a separate form of *mens rea* and not a form of intent. Thus, while both intent and recklessness are clearly included in the concept of *mens rea*, it is in our view clear that recklessness cannot be viewed as a form of intent.

In civil law systems there are three categories of *mens rea* that are largely seen as intent. The first is *dolus directus* (or *dolus directus* in the first degree), which can be said to correspond to direct intent in common law, i.e. where the outcome is intended by the defendant.[24] This is also seemingly how *dolus directus* has been explained at the ICC, as will be seen below in Section 4.3 (Intent at the ICC). The second form of intent in civil law is *dolus indirectus* (or *dolus directus* in the second degree). This has been said to be where the defendant is indifferent to the result of his or her conduct, but knew it to be a certain or highly probable consequence. This is similar to indirect intent in common law, but does not appear to require foresight of a virtual certainty.[25]

The lowest form of intent in civil law is *dolus eventualis*, of which there are competing versions.[26] According to one, *dolus eventualis* is where the defendant foresees the result as being reasonably probable, or at least possible, as the consequence of his or her act, and accepts or reconciles him- or herself to the

396 (CA); *R v. G* [2003] UKHL 50. See also US Model Penal Code (1985) The American Law Institute, Section 2.02(2)(c); Australian Criminal Code, Section 5.4.

17 Australian Criminal Code, Section 5.4.

18 Model Penal Code (1985) The American Law Institute, Section 2.02.(2)(c).

19 *R v. Brady* [2006] EWCA Crim 2413 (CA).

20 Guilfoyle, 2016, p. 188.

21 Guilfoyle, 2016, p. 188–189.

22 *R v. Parker* [1977] 1 WLR 600 (CA).

23 Finnin, Sarah, *Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: a Comparative Analysis*, International & Comparative Law Quarterly, 2012, vol. 61, no. 2, p. 328.

24 Guilfoyle, 2016, p. 189. See also Cassese & Gaeta, 2013, p. 41.

25 Guilfoyle, 2016, p. 189.

26 Ohlin, 2013, p. 83. See also Finnin, 2012, p. 334.

fact that this may occur.[27] Some scholars have therefore noted that if this version is not what in common law is described as recklessness, it is at least as close to recklessness as one can get in civil law. [28]

However, it has been questioned whether *dolus eventualis* qualifies as a form of intent in civil law.[29] Some have noted that *dolus eventualis* is included in the definition of intent in German and Dutch law, but is excluded from intent in French law.[30] Others have noted that *dolus eventualis* (or versions of it) is used in Danish, Norwegian, Swedish, and German law, but not in Russian law (or is not used in the same way).[31] It has also been pointed out that, for example, 'to a U.S. criminal lawyer [as a common law lawyer], the idea that *dolus eventualis* is a form of "intent" is nonsensical', as only acting with purpose and knowledge constitute forms of intent in common law.[32] This is probably true generally for lawyers trained in common law systems.

There has also been much debate among international lawyers as to whether recklessness and *dolus eventualis* are the same or whether *dolus eventualis* is a distinct form of *mens rea* which, in a cognitive sense, is higher than recklessness but lower than the other forms of *dolus*.[33] For lawyers from the common law tradition it probably seems obvious that *dolus eventualis* is more like recklessness than intent.[34] However, for lawyers from at least some civil law countries it is probably just as obvious that *dolus eventualis* is a form of intent.

3 Intent in Swedish Law

Two types of *mens rea* exist in Swedish criminal law: intent and negligence. According to the Swedish Criminal Code, Ch. 1 Sec. 2 para. 1, intent is the standard form of *mens rea* and negligence can only be applied if it is explicitly stated in a certain provision that this form of *mens rea* is enough to establish liability. Since this article only concerns intentional conduct, it does not discuss negligence as a form of *mens rea*. The following section offers a brief, general overview of the meaning of intent as a *mens rea* element in Swedish criminal law.[35]

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27 Guilfoyle, 2016, p. 189.

28 Cassese & Gaeta, 2013, p. 41; Finnin, 2012, p. 334.

29 Ohlin, 2013, p. 83.

30 van Sliedregt, Elies, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague: T.M.C. Asser Press, 2003, p. 46.

31 Marchuk, 2014, p. 66.

32 Ohlin, 2013, p. 83.

33 Ohlin, 2013, p. 89. See also Finnin, 2012, p. 330.

34 See e.g. Ohlin, 2013, p. 89.

35 For a more thorough read on intent in Swedish criminal law, see e.g. the following cases from the Swedish Supreme Court: NJA 2002 s. 449; NJA 2004 s. 176 and NJA 2016 s. 763. See also the *travaux préparatoires*: SOU 1996:185, part I, p. 81–145. See also Asp, Petter, Ulväng, Magnus & Jareborg, Nils, *Kriminalrättens grunder. Svensk straffrätt I*, 2 edn, Uppsala: Iustus, 2013, p. 284–314; Ulväng & Jareborg, 2016; Bäcklund, Agneta, et al., Brottsbalken (17 April 2019, Zeteo), commentary to the Swedish Criminal Code, Ch. 1 Sec. 2, under the heading *Första stycket*; Ågren, Jack, Leijonhufvud, Madeleine & Wennberg,

When the courts assess whether a defendant acted with intent, the so-called "principle of correspondence"[36] is essential. Correspondence here basically means that the court should assess whether the way the defendant perceived the course of events is in line with the wording of the provision in question. For the court to find that the defendant acted with intent, the defendant's perception of the course of events should be reasonably consistent with what the prosecutor is able to prove. In the literature, this is often expressed as the defendant's intent needing to "correspond" to what can be proven in court.[37] However, the principle only states that the defendant needs to have acted with intent; it does not clarify what degree of intent is necessary.

Although Sweden is usually categorised as a civil law jurisdiction, it should be noted that no provision in Swedish law defines intent.[38] The different forms of intent and their meaning have been developed mainly through the case law of the Swedish Supreme Court. The case law has also been influenced to some degree by literature. The scholarly discussion in Sweden, as well as that in the case law, has focused mainly on the difference between intent and negligence, where the primary question has been to clarify the lowest form of intent (to differentiate this from the highest form of negligence). Currently in Swedish criminal law, intent can be divided into three categories: direct intent, indirect intent, and reckless intent. Unless otherwise provided, the main rule is that reckless intent is sufficient to prove that the defendant acted with intent.

Direct intent is where a person means to perform a criminal act with a certain objective or purpose, which would for example be the case if the defendant, out of jealousy, killed another human being. In that case, the result (i.e. death) is the purpose of the defendant's act. In Swedish criminal law direct intent is only applicable if the elements of the offence are expressed in such a way that they

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Suzanne, *Straffansvar*, 10 edn., Stockholm: Norstedts Juridik, 2018, p. 92–97; Strahl, Ivar, *Allmän straffrätt i vad angår brotten*, Stockholm: Norstedt, 1976, p. 89–128; Thyrén, Johan C W, *Principerna för en strafflagsreform III. Brottsbegreppets subjektiva sida. Försök. Subjektsflerhet. Sammanfattning av de legislativa resultaterna i delarne I–III*, Lund: Gleerup, 1914, p. 3–46; Hagströmer, Johan, *Svensk straffrätt. Föreläsningar. Första bandet*, Uppsala: Almqvist & Wiksell, 1901–1905, p. 176–211.

[36] In Swedish "täckningsprincipen". The principle of correspondence is the term used in some common law jurisdictions, see e.g. Horder, Jeremy, *Ashworth's Principles of Criminal Law*, 9 edn., Oxford: Oxford University Press, 2019, p. 176. The principle of correspondence and "täckningsprincipen" are equivalent. For the purpose of this article, we use the English term to avoid confusion.

[37] See further e.g. Agge, Ivar, *Straffrättens allmänna del. Föreläsningar. Andra häftet*, Stockholm: Norstedt, 1961, p. 255–264; Strahl, 1976, p. 119–127; Asp et al., 2013, p. 64, 270, 323–361; Bäcklund, Agneta, et al., Brottsbalken (17 April 2019, Zeteo), commentary to the Swedish Criminal Code, Ch. 1 Sec. 2, under the heading *Vad ska uppsåtet täcka?*.

[38] A government inquiry proposed that the following definition of intent should be introduced: 'A deed [i.e. criminal act or crime of omission] is committed with intent if it is deliberate or if it corresponds to what the perpetrator has realised, perceived or accepted about the deed.' [Our translation from Swedish.] See SOU 1996:185, p. 55, 108–127. However, the definition was not introduced in the written Swedish law, see prop. 2000/01:85, p. 9–13. The *rationale* for this was the government's opinion that the existing forms of intent were well defined and that an amendment of the statutory law required a more thorough analysis of the consequences of an amendment, in particular in relation to various offences. A definition of intent has also been suggested by a previous government inquiry, see SOU 1923:9, p. 8.

require a particular result or effect. This normally follows from the wording of the provision in question. The following phrases are examples of what is generally viewed as an expression of a requirement of direct intent: with the intention of, for the purpose of, seek to. Thus, direct intent in Swedish criminal law is essentially equivalent to direct intent in common law and *dolus directus* in civil law.

Indirect intent in Swedish law is where the defendant is practically certain that a result or an effect will occur or that a condition exists.[39] In that case, the defendant has no doubt that a result or an effect will occur as a consequence of his or her conduct, or that a condition exists. An example that is commonly used in Swedish criminal law textbooks to illustrate indirect intent is a ship-owner who places a bomb on a ship, with the purpose of causing the ship to explode at sea and sink, so that the owner can claim compensation through his insurance.[40] Thus, the aim of the conduct is to get insurance money, not to kill or seriously harm the people on board. However, in this case, the ship-owner acts with indirect intent since, even though his purpose is not to kill anyone, he is practically certain that this will be the result when the ship sinks.[41] Thus, indirect intent in Swedish law is the equivalent to indirect intent in common law and *dolus indirectus* in civil law.

As mentioned above, the lowest form of intent in Swedish law is reckless intent, which was confirmed by the Supreme Court in NJA 2004 s. 176.[42] The Supreme Court stated the following:

> In order to conclude that the defendant acted with intent in relation to the effect or to the circumstance in question, indifference is required not only to the existence of the risk, but also to the realisation of the effect or the occurrence of the circumstance (…) The decisive element is that the realisation of the effect or the occurrence of the circumstance at the time of the crime did not constitute a relevant reason for the defendant to abstain from the act. If the defendant acted with the assurance that the effect would not be realised or that the occurrence of the circumstance was not present, he is not considered indifferent in this sense, although his attitude may appear to be irresponsible.[43]

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39 See e.g. NJA 2004 s. 176, particularly at p. 194–195; NJA 1977 s. 630, particularly at p. 638.

40 The case of the ship-owner is, for example, used by Asp et al., 2013, p. 289.

41 Compare NJA 1927 s. 1, where the defendants blew up a car with the intention of killing the passenger in the car. The driver was wounded in the explosion, which was not something that the defendants intended. The Supreme Court held that the driver's injuries were, in relation to the death of the passenger, a necessary effect. Thus, the defendants were found guilty of attempt to murder.

42 In an earlier Supreme Court case, NJA 2002 s. 449, the matter of the lowest form of intent (so as to differentiate between the lowest form of intent and the highest form of negligence) was raised. However, in that case the Supreme Court seems to have remained undecided as to whether reckless intent should be held as the lowest form of intent or not. It should also be noted that the Supreme Court has previously reasoned in terms of reckless intent, see e.g. NJA 1975 s. 594; NJA 1985 s. 757; NJA 1990 s. 210; NJA 1996 s. 509.

43 NJA 2004 s. 176, at p. 198. In Swedish: 'För att uppsåt till effekten eller omständigheten skall anses föreligga krävs dock likgiltighet inte endast till risken utan också till förverkligandet av effekten eller förekomsten av omständigheten. (…) Det avgörande är således att förverkligandet av effekten eller förekomsten av omständigheten, vid

From this statement it is possible to draw two conclusions. First, the defendant must be indifferent to the existence of a certain effect, result or circumstance. According to Swedish law, this is the same thing as being consciously negligent. Second, the defendant must also be indifferent to the realisation of the effect, result or circumstance, i.e. the defendant simply accepts the effect, result or circumstance that occurs – or might occur – as a consequence of his or her conduct. In Swedish law, it is thus the second point that determines whether the defendant acted with intent or negligence.

As mentioned above (Section 2, Intent in Common and Civil Law Systems), it is somewhat difficult to compare reckless intent with forms of *mens rea* in other jurisdictions. From a common law perspective, Swedish reckless intent could – at least partly – be categorised as recklessness.[44] From a civil law perspective, it would be correct to claim that reckless intent is a kind of *dolus eventualis*.[45]

Even though the Swedish Supreme Court in NJA 2004 s. 176 held that reckless intent is the lowest form of intent in Swedish criminal law, the matter of reckless intent was again raised in a later case. In NJA 2016 s. 763 the Supreme Court held that it was necessary to clarify the meaning and scope of reckless intent. The Court held that reckless intent should be applied when the defendant perceived that it was highly probable that a result would occur (as a consequence of his or her conduct). However, the Court further stated that reckless intent should also be applied when the defendant otherwise assumed – in the sense that he or she calculated or assumed – that a result would occur.[46] However, it is rather unclear whether this case actually contributed to clarifying the meaning and scope of reckless intent as formulated in NJA 2004 s. 176.[47]

Finally, other aspects regarding reckless intent deserve mentioning. The prevailing opinion amongst legal scholars seems to be that the reasoning in NJA 2004 s. 176 to some extent clarified the division between the lowest form of intent and the highest form of negligence.[48] However, the significance of the

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gärningstillfället inte utgjorde ett för gärningsmannen relevant skäl för att avstå från gärningen. Har gärningsmannen handlat i förlitan på att effekten inte skulle förverkligas eller gärningsomständigheten föreligga har han inte varit likgiltig i denna mening även om hans inställning kan framstå som lättsinnig.'

44 Compare for example how recklessness in English common law is described by Horder, 2019, p. 196–202.

45 See Ulväng & Jareborg, 2016, p. 116, stating that it is evident that reckless intent is a form of *dolus eventualis*.

46 NJA 2016 s. 763, particularly at p. 775 (para. 22).

47 The decision in NJA 2016 s. 763 raised the question of whether the decision actually clarified the meaning of reckless intent, as stated in NJA 2004 s. 176. See further Wennberg, Suzanne, *Likgiltighetsuppsåtet igen – en ny dom som inte kommer att bli vägledande?*, Juridisk Tidskrift, 2016/17, no. 3, p. 722–727; Borgeke, Martin, *Ett förtydligande av uppsåtets nedre gräns*, Svensk juristtidning, 2017, no. 2, p. 93–105; Svensson, Erik, *Ett förtydligande av uppsåtets nedre gräns?*, Svensk juristtidning, 2017, no. 3, p. 182–190; Wennberg, Suzanne, *Replik till Martin Borgeke – likgiltighetsuppsåtet igen*, Svensk juristtidning, 2017, no. 4, p. 269–173; Borgeke, Martin, *Slutreplik till Suzanne Wennberg om likgiltighetsuppsåtet*, Svensk juristtidning, 2017, no. 7, p. 441–444. It should be noted that Borgeke was one of the judges on the Supreme Court panel that decided the case.

48 See e.g. Asp et al., 2013, p. 290–293.

verdict in NJA 2004 s. 176 was not only the Swedish Supreme Court's definition of reckless intent. From the ruling in NJA 2004 s. 176, as well as in NJA 2016 s. 763, it is quite clear that another (more) important matter was what evidence generally could be used to prove whether the defendant acted with intent.[49] It is also rather evident that neither the definition of reckless intent nor other ways of defining the lowest form of intent can solve the evidential difficulties that (generally) arise.[50] A clear indication of this is that the Swedish Supreme Court in NJA 2004 s. 176 stated that the previous lowest form of intent (*dolus eventualis* with a hypothetical test)[51] can *still* largely be used to argue that the defendant acted with intent. Thus, one could argue that the ruling in NJA 2004 s. 176 means mainly that the issues involved in the previous ways of defining the lowest form of intent simply shifted to being a question of evidence. This can also be observed in the reasoning of the Swedish Supreme Court in NJA 2016 s. 763.

4 Intent in International Criminal Law

4.1 Introductory Remarks

Various forms of *mens rea* apply to international crimes, from intent to recklessness and, it has been argued, negligence.[52] The *mens rea* in international criminal law, like in criminal law in domestic jurisdictions, varies depending on the offence and modes of liability in question and will thus be addressed when dealing with that specific offence or liability issue.[53]

As was noted in Section 2 (Intent in Common and Civil Law Systems) there are different views in national legal systems about what is meant by the concept of intent. The ambiguity that exists among the different national jurisdictions is reflected in international criminal law. Indeed, there is some ambiguity regarding intent in international criminal law, which is understandable since judges from different countries serving at international courts and tribunals are probably influenced by how this concept is defined and understood in their respective legal systems. The same is probably true among scholars.

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49 NJA 2004 s. 176, particularly at p. 199–200; NJA 2016 s. 763, particularly at p. 775–776.

50 For some general thoughts on how to prove that the defendant acted with intent, in particular how to prove reckless intent, see Asp et al., 2013, p. 294–300; Ulväng & Jareborg, 2016, p. 208–245.

51 The previous lowest form of intent – *dolus eventualis* with a hypothetical test, also known as conditional intent – is when the defendant appreciated that it was possible that the effect would occur, i.e. that there was a risk of that effect. In addition, it was required that the court conduct a "hypothetical test". The court had to conclude that it could be assumed with certainty that the defendant would have committed the act even if he/she had been sure that the effect would occur. See e.g. SOU 1996:185, part 1, p. 86; Wennberg, Suzanne, 'Criminal Law', in Bogdan, Michael (ed.), *Swedish Legal System*, Stockholm: Norstedts Juridik, 2010, p. 164–165; Asp et al, 2013, p. 302–304.

52 Cryer, Robert, Robinson, Darryl, & Vasiliev, Sergey, *An Introduction to International Criminal Law and Procedure*, 4 edn., Cambridge: Cambridge University Press, 2019, p. 365.

53 Cryer et al., 2019, p. 365.

It has also been pointed out that some of the discussion in the case law of international courts regarding *mens rea*, particularly from the ICTY and the ICTR, is confused because these tribunals appear to have used the term intent to refer to *mens rea* generally.[54] In addition, while "intention" and "intent" may sometimes be used interchangeably, for clarity, this article will use the term *mens rea* to mean the mental element of an offence, and "intent" to mean the highest form of *mens rea*, particularly since this is how the term is used in the Rome Statute of the ICC.

4.2 Intent at the ICTY and the ICTR

Except for in relation to the crime of genocide,[55] the statutes of the ICTY and the ICTR did not address *mens rea* and consequently this had to be addressed through jurisprudence.[56] According to some scholars, the Tribunals have been reticent in setting out the elements of intent.[57]

The ICTY and the ICTR have both held that the required *mens rea* for international crimes may be satisfied either by intent or a lesser form of intent that is greater than negligence.[58] It is however not always easy to understand how intent has been interpreted. This is partly because these tribunals often do not seem to have defined intent, and partly because they have not always clearly distinguished between direct and indirect intent. The earliest cases stated that intent 'involves awareness of the act […] coupled with a conscious decision to participate [in a crime]'.[59] Some chambers have instead held that 'the result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events,'[60] or that intent means that the defendant acted 'with his mind on the act and its consequences, and willing them'.[61] In *Strugar*

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[54] Cryer et al., 2019, p. 366. See in particular early cases, e.g. *Prosecutor v. Delalić et al. ("Čelebići case")*, (Case No. IT-96-21), ICTY T. Ch., judgment, 16 November 1998 para. 326, 439; *Prosecutor v. Aleksovski*, (Case No. IT-95-14/1), ICTY T. Ch., judgment, 25 June 1999, para. 55; *Prosecutor v. Blaškić*, (Case No. IT-95-14), ICTY T. Ch., judgment, 3 March 2000, para. 153.

[55] Statute of the International Criminal Tribunal for the former Yugoslavia, 1993, Article 4.2; Statute of the International Criminal Tribunal for Rwanda, 1994, Article 2.2.

[56] Cryer et al., 2019, p. 366.

[57] Cryer et al., 2019, p. 366. It should however be pointed out that it is somewhat unclear whether the authors mean intention or intent. For the sake of clarity it should also be noted that this statement does not apply to genocide, which clearly specifies the requisite *mens rea*.

[58] Guilfoyle, 2016, p. 190. See e.g. *Prosecutor v. Musema*, (Case No. ICTR-96-13), ICTR T. Ch., judgment, 27 January 2000; *Prosecutor v. Stakić*, (Case No. IT-97-24), ICTY T. Ch., judgment, 31 July 2005.

[59] *Prosecutor v. Tadić*, (Case No. IT-94-1), ICTY T. Ch., judgment, 7 May 1997, para. 674; *Aleksovski*, ICTY T. Ch., judgment, 25 June 1999, para. 61.

[60] *Prosecutor v. Kayishema and Ruzindana*, (Case No. ICTR-95-1), ICTR T. Ch., judgment, 21 May 1999, para. 139; *Prosecutor v. Kupreškić et al*., (Case No. IT-95-16), ICTY T. Ch., judgment, 14 January 2000, para. 561.

[61] *Prosecutor v. Hadžihasanović and Kubura*, (Case No. IT-01-47), ICTY T. Ch., judgment, 15 March 2006, para. 40.

the ICTY Trial Chamber referred to direct intent, but without defining it.[62] However, in *Delić* and in *Perišić* the Chamber defined direct intent as the defendant's desire to cause a particular consequence as the result of his act or omission.[63] Consequently, it could be argued that the jurisprudence somewhat reflects the common law definition of direct intent, i.e. that the defendant acted with an aim, purpose, or objective to bring about a result, as seen above.

However, it is not always easy to categorise what the ICTY and the ICTR have considered to be an alternative to direct intent.[64] According to some, the jurisprudence is inconclusive since the Tribunals have also accepted recklessness for many crimes, and have not drawn any clear boundaries between intent and recklessness.[65] Indeed, some of the jurisprudence seems to be particularly confused regarding indirect intent (*dolus indirectus*) and recklessness (*dolus eventualis*).

For example, in *Čelebići* the ICTY Trial Chamber stated that 'under the theory of indirect intention (*dolus eventualis*), should an accused engage in life-endangering behaviour, his killing is deemed intentional if he "makes peace" with the likelihood of death.'[66] However, making peace with the consequence of one's conduct seems to be very different to the standard of indirect intent or *dolus indirectus*. There, the result is a virtually certain consequence or a probable outcome of the conduct, and thus, the *Čelebići* definition seems closer to the *mens rea* category of recklessness than to indirect intent. Subsequent cases provided little clarity. The Trial Chamber thus appears to have stated that where a defendant made peace with the likelihood of a consequence of his or her conduct, e.g. death, he or she had the *mens rea* of *dolus eventualis*, meaning recklessness. This in turn meant that the killing became intentional, even if the conduct was of minimal risk.[67] The interpretation of *dolus eventualis* thus appears to have included both recklessness and intent.

Later cases have, however, brought a certain measure of clarity. In *Strugar*, the ICTY Trial Chamber appeared to suggest that the use of the term *dolus eventualis* by the Tribunal had caused confusion and that "indirect intent" was the preferred term.[68] The Chamber stated that to prove murder, absent direct intent, it was required that death resulted from an act or omission, 'in the

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62 *Prosecutor v. Strugar*, (Case No. 01-42), ICTY T. Ch., judgment, 31 January 2005, para. 235-236.

63 *Prosecutor v. Delić*, (Case No. 04-83), ICTY T. Ch., judgment, 15 September 2008, para. 48; *Prosecutor v. Perišić*, (Case No. 04-81), ICTY T. Ch., judgment, 6 September 2011, para. 104.

64 Guilfoyle, 2016, p. 190.

65 Cryer et al., 2019, p. 366. See also Cassese & Gaeta, 2013, p. 48.

66 *Čelebići*, ICTY T. Ch., 16 November 1998, para. 435.

67 *Stakić*, ICTY T. Ch., 31 July 2005, para. 587; *Prosecutor v. Radoslav Brđanin*, (Case No. 99-36), ICTY T. Ch., judgment, 1 September 2004, para. 386; *Hadžihasanović and Kubura*, ICTY T. Ch., 15 March 2006, para. 31.

68 Cassese & Gaeta, 2013, p. 49; Guilfoyle, 2016, p. 191; *Strugar*, ICTY T. Ch., 31 January 2005, para. 235.

knowledge that death is a probable consequence.'[69] The Trial Chamber stressed that

> knowledge by the accused that his act or omission might possibly cause death is not sufficient to establish the necessary mens rea. The necessary mental state exists when the accused knows that it is probable that his act or omission will cause death.[70]

This approach was supported by the Trial Chamber in *Delić* and in *Perišić*, where the Chamber held that indirect intent comprises knowledge that the death of a victim was a probable or likely consequence of the defendant's act or omission.[71]

The cases mentioned above show that indirect intent at the ICTY thus appears to require knowledge that the consequence of one's conduct is at least probable.[72] This seems to be closer to *dolus indirectus* than to *dolus eventualis*, at least as classified above. However, in comparison to the common law standard of "indirect intent", the standard in *Strugar* and in *Delić* would not quite reach the level of the virtual certainty test required in English law, as seen above. Thus, the ICTY used a degree of culpability in its interpretation of indirect intent that is lower than in for example English common law, but that is higher than recklessness.[73]

4.3 Intent at the ICC

Unlike the statutes of the ICTY and the ICTR, the Rome Statute of the ICC specifies the default *mens rea* to be intent, which is to be applied unless otherwise indicated.[74] Article 30 states that:

> 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.

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69 *Strugar*, ICTY T. Ch., 31 January 2005, para. 236.

70 *Strugar*, ICTY T. Ch., 31 January 2005, para. 236.

71 *Delić*, ICTY T. Ch., 15 September 2008, para. 48; *Perišić*, ICTY T. Ch., 6 September 2011, para. 104.

72 Guilfoyle, 2016, p. 191.

73 See also Guilfoyle, 2016, p. 191.

74 Genocide, for example, requires a different form of *mens rea*, see Rome Statute, 1998, Article 6, which specifies that genocide requires special intent.

> 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.

The Elements of Crimes[75] further clarify that 'where no reference is made in the Elements … to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in Article 30 applies.'[76] By requiring intent for the offences listed in the Rome Statute, 'unless otherwise provided', the Statute adopts as default a highly culpable form of *mens rea*. This may have important effects in relation to the offences for which customary international law and many domestic systems differ from the provision in the Statute and the ICC Elements of Crimes as to the *mens rea* required.[77] This issue will be discussed below in Section 6. For example, in customary international law recklessness is enough to establish the *mens rea* for the war crime of intentionally attacking civilians.[78] However, as a result of the Rome Statute and the Elements of Crimes, the same crime, in Article 8(2)(b)(i), requires the higher *mens rea* of intention. The Rome Statute thus requires a higher level of culpability on the part of the defendant than customary international law.[79]

Pre-Trial Chambers at the ICC have stated that the requirements of "intent and knowledge" in Article 30 'reflect the concept of *dolus*, which requires the existence of a volitional as well as a cognitive element.'[80] It is generally acknowledged that the concept of *dolus* (i.e. intent) in Article 30 includes at least two categories: (1) *dolus directus*, interpreted as direct intent, and (2) *dolus indirectus*, interpreted as indirect intent.[81]

According to ICC jurisprudence, *dolus directus* means that the defendant (1) 'knows that his or her acts of omissions will bring about the material elements of the crime', and (2) 'carries out these acts or omissions with the purposeful

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75 The Elements of Crimes is a document separate from the Rome Statute intended to assist the ICC in the interpretation and application of Articles 6, 7, and 8 on genocide, crimes against humanity, and war crimes. The document contains more detailed definitions of the offences and is intended to be used together with the Rome Statute.

76 Elements of Crimes, 2013, General introduction, para. 2.

77 Cryer et al., 2019, p. 367.

78 Regarding the issue of attacks on civilians and *mens rea*, Ohlin, 2013.

79 Cryer et al., 2019, p. 367.

80 *Prosecutor v. Bemba Gombo*, ICC PT. Ch. I, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 357. See also *Prosecutor v. Lubanga Dyilo*, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007, para. 351; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, para. 529.

81 See e.g. *Lubanga Dyilo*, ICC PT. Ch. I, ICC-01/04-01/06, 29 January 2007, paras 351-352; *Katanga and Ngudjolo Chui*, ICC PT. Ch. I, ICC-01/04-01/07, 30 September 2008, para. 529; *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 357; *Prosecutor v. Muthaura, Kenyatta and Ali*, ICC PT. Ch. II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, 23 January 2012, para. 411.

will (intent) or desire to bring about those material elements of the crime.'[82] However, as has been pointed out by some scholars, the ICC's view on *dolus directus* appears to be more stringent than direct intent in either common or civil domestic law.[83] As discussed above (Section 2, Intent in Common and Civil Law Systems), civil law and common law systems do not require knowledge of a consequence, but only that the defendant commits and act or omission with the intent, i.e. the object, purpose, or aim, to bring about a certain consequence or result. Knowledge of a particular degree of likelihood that the consequence will in fact occur is not necessary in either system. Consequently, in this regard the ICC requirements are higher than those in civil law and common law.

The ICC has also explained how it views *dolus indirectus*. According to the Court, Article 30(2)(b) of the Rome Statute should be read to mean that *dolus indirectus* 'does not require that the [defendant] has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his [or her] acts or omissions, *i.e.*, "the suspect is aware that [...] [the consequence] will occur in the ordinary course of events"'.[84] The words 'will occur in the ordinary course of events' in Article 30 were held by the Pre-Trial Chamber in *Bemba* to clearly indicate that the standard required is close to certainty.[85]

The Chamber defined 'this standard as "virtual certainty" or "practical certainty", namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent [sic] its occurrence.'[86] Indirect intent as defined at the ICC thus appears to be in line with English law, according to which indirect intent means that the consequence of the defendant's conduct is a virtual certainty and that the defendant appreciates this.

Despite this relatively clear view of the ICC, there are examples where the Court has interpreted things differently. One Pre-Trial Chamber tried to use the jurisprudence of the ICTY and the ICTR to read recklessness (*dolus eventualis*) into Article 30.[87] In the decision on confirmation of charges in the *Lubanga* case, the Pre-Trial Chamber stated that the *mens rea* of "intent and knowledge" in Article 30,

> encompasses, first and foremost, those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about

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82 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 358. See also *Lubanga Dyilo*, ICC PT. Ch. I, ICC-01/04-01/06, 29 January 2007, para. 351; *Katanga and Ngudjolo Chui*, ICC PT. Ch. I, ICC-01/04-01/07, 30 September 2008 para. 529; *Muthaura, Kenyatta and Ali*, ICC PT. Ch. II, ICC-01/09-02/11, 23 January 2012, para. 411.

83 See Finnin, 2012, p. 342–343.

84 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 359. See also *Lubanga Dyilo*, ICC PT. Ch. I, ICC-01/04-01/06, 29 January 2007, para. 352: the defendant 'without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions'.

85 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 362.

86 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 362.

87 Cryer et al., 2019, p. 367. *Dolus eventualis* has been held to mean recklessness, see *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 357.

> the objective elements of the crime (also known as *dolus directus* of the first degree).[88]

The Chamber then stated that the *mens rea* also included other forms of *dolus*, which had been used by the ICTY. The first is where the defendant does not have 'the concrete intent to bring about' the crime, but 'is aware that [this] will be the outcome of his or her actions or omissions (also known as *dolus directus* of the second degree).'[89] The second form is where the defendant '(a) is aware of the risk that 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*).'[90]

In the *Katanga* case the same Pre-Trial Chamber stated that a majority of the Chamber still endorsed this view. However, the Chamber found that for the purposes of the charges discussed it was 'not necessary to determine whether situations of *dolus eventualis* could also be covered by this offence, since, as shown later, there are substantial grounds to believe that the crimes were committed with *dolus directus*.'[91]

The interpretation of Article 30 by the Pre-Trial Chamber in *Lubanga* has been criticised for not being supported by either the wording of Article 30 ('will occur in the ordinary course of events') or its drafting history, and in fact being explicitly rejected by the drafters of the Rome Statute.[92] Indeed, as some commentators stated, unless otherwise provided, Article 30 'leaves no room for *dolus eventualis* or recklessness.'[93]

In addition, this was also the opinion of a different Pre-Trial Chamber. In the *Bemba* case the Chamber concluded that 'with respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability' was not included in Article 30.[94]

To arrive at this conclusion the Chamber used the *travaux préparatoires* of the Rome Statute, as well as methods of interpretation of international law established by the Vienna Convention on the Law of Treaties in Articles 31 and 32. These Articles allow for a literal (textual) interpretation of treaty terms and for interpretation of the *travaux préparatoires* of international conventions or treaties. In view of these methods of interpretation the Pre-Trial Chamber found that 'the words "will occur", read together with the phrase "in the ordinary

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88 *Lubanga Dyilo*, ICC PT. Ch. I, ICC-01/04-01/06, 29 January 2007, para. 351.

89 *Lubanga Dyilo*, ICC PT. Ch. I, ICC-01/04-01/06, 29 January 2007, para. 352.

90 *Lubanga Dyilo*, ICC PT. Ch. I, ICC-01/04-01/06, 29 January 2007, para. 352.

91 *Katanga and Ngudjolo Chui*, ICC PT. Ch. I, ICC-01/04-01/07, 30 September 2008, para. 251, footnote 329.

92 See e.g. van der Vyver, Johan D, *The International Criminal Court and the Concept of* Mens Rea *in International Criminal Law*, University of Miami International and Comparative Law Review, 2004, vol. 12, no. 1, p. 66, 70–71; Werle, Gerhard & Jessberger, Florian, *Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law*, Journal of International Criminal Justice, 2005, vol. 3, no. 1, p. 51–53; Ohlin, 2013, p. 100–103; Cryer et al., 2019, p. 367.

93 Werle & Jessberger, 2005, p. 53.

94 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 360. See also paras 364–369.

course of events" [in Article 30], clearly indicate that the required standard of occurrence is close to certainty.'[95] The Chamber held that the standard was '"virtual certainty" or "practical certainty", namely that the consequences will follow, barring an unforeseen or unexpected intervention that prevents its occurrence.'[96] This standard, the Chamber stated, is 'undoubtedly higher' than the standard commonly agreed upon for *dolus eventualis*, namely 'foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility.'[97] The Pre-Trial Chamber also stated that the language of Article 30, 'does not accommodate a lower standard than the one required by *dolus directus in the second degree* [indirect intent].'[98] In addition the Chamber stated that interpretation of Article 30 ensured that the concept of *de lege lata* was not substituted by the concept of *de lege ferenda* 'only for the sake of widening the scope of Article 30 of the Statute and capturing a broader range of perpetrators.'[99]

The same Pre-Trial Chamber seemingly continued this approach in its decision on the confirmation of charges in *Kenyatta* case, where the Chamber did not even discuss *dolus eventualis* as a possible form of intention.[100] The approach was also endorsed by the Trial Chambers in the *Lubanga* and *Katanga* cases.[101]

In conclusion, from the jurisprudence discussed above some patterns emerge. First, intent in the Rome Statute has been interpreted to refer only to direct and indirect intent. Second, it is clear that *dolus eventualis*, which in many (but not all) civil law countries is the lowest degree of intent, is too low a form of *mens rea* to be the basis of criminal responsibility. Nor does recklessness suffice for criminal responsibility. From a Swedish perspective this is interesting since the starting point in Swedish law is that if intent is required, the lowest form of intent (i.e. reckless intent) is enough. This applies as long as the provision in question does not require a different – higher – degree of intent.

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95 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 361-362.

96 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 362.

97 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 363.

98 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 360.

99 *Bemba Gombo*, ICC PT. Ch. I, ICC-01/05-01/08-424, 15 June 2009, para. 369.

100 *Muthaura, Kenyatta and Ali*, ICC PT. Ch. II, ICC-01/09-02/11, 23 January 2012.

101 *Prosecutor v. Thomas Lubanga Dyilo*, ICC T. Ch. I, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012, para. 1011; *Prosecutor v. Katanga*, ICC T. Ch. II, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07, 7 March 2014, para. 774-776.

5 Intent in Swedish Legislation and Case Law Regarding International Crimes

5.1 Some Remarks on the Relationship Between the General and Special Parts of Criminal Law

In many civil law jurisdictions, including Sweden, a distinction is made between the general part and the special part of criminal law. The general part includes provisions, principles etc. that should be applied regardless of the offence. Matters concerning the applicable forms of *mens rea* usually belong to this part. The special part of criminal law, on the other hand, includes definitions of offences i.e. the *actus reus* elements that need to be fulfilled. When analysing the special part of criminal law, the analysis thus needs to focus on the *actus reus* elements required for a particular offence.

Before turning to the Swedish case law concerning intent for international crimes, some general remarks regarding the relationship between the general and special parts of criminal law should be noted. When analysing the general part of criminal law it is necessary to observe how it relates to the special part, since the two are highly intertwined and cannot be separated from each other. It is thus arguably impossible to analyse matters that belong to the general part in isolation from the special part. For example, when addressing a certain offence, i.e. the *actus reus* elements of the offence, the general part of criminal law might need to be understood in a certain way for one type of offence and in a different way for another offences.[102]

The above-mentioned issues concerning the relationship between the general and special parts of criminal law may occur in relation to intent. The Swedish Criminal Code, Ch. 1 Sec. 2 para. 1 simply states that the *mens rea* to be applied is intent. Furthermore, unless otherwise stated in a specific provision, the lowest form of intent (i.e. reckless intent) is sufficient to conclude that the defendant acted with intent. Thus, there is a certain margin for both the legislator and the judiciary to apply different forms of intent to different offences. If this happens, the issue of intent, which usually belongs to the general part of criminal law, has arguably become a matter concerning the special part. In such cases, the offence has been constructed in a way that ties a particular form of intent to that particular

[102] One example of the difficulty in trying to separate the general part of criminal law from the special part is the general provision on attempt, in particular whether the defendant has reached the starting-point of an attempt, i.e. the point when the planning or preparation of the offence ends and the commission begins. From Swedish criminal law textbooks, one could easily get the impression that the starting-point simply "belongs" to the general part of criminal law, see e.g. Asp et al., 2013, p. 402–406; Ågren et al., 2018, p. 144–150. Some support for this opinion can be found in a fairly recent Supreme Court case, see NJA 2017 s. 531, where Asp was the reporting judge. An alternative view, where the starting-point "belongs" to the special part of criminal law, is perhaps preferable. It is very difficult to determine whether the starting-point of an attempt is reached without considering the wording of the offence in question. Therefore, it would be more suitable to claim that the starting-point for an attempted robbery is reached at a different time than that for fraud. The commentary of the Swedish Criminal Code seems to support this view, see Bäcklund, Agneta, et al., Brottsbalken (17 April 2019, Zeteo), commentary to the Swedish Criminal Code, Ch. 23 Sec. 1, under the heading *Påbörjat utförande av visst brott*.

offence, and thus not the general intent as otherwise expressed in the general part of criminal law.

One example is the offence of terrorism, which consists of already criminalised acts. The distinctive characteristic of the offence lies in that the defendant must have acted with a special terrorism purpose. According to the Swedish Act on Criminal Responsibility for Terrorist Offences (2003:148) Sec. 2, the terrorism offence is applicable when the defendant acted with the specific purpose of e.g. seriously intimidating a population or a population group. This is similar to the crime of genocide, which requires that the defendant committed certain acts with a special intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group'.[103]

5.2 Intent in the Swedish Travaux Préparatoires to the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes

We now turn to the general observations that can be made from Swedish legal sources regarding intent for international crimes. In this context, it is interesting to investigate how Swedish law is intended to interact with international law. As mentioned in the Introduction, there is an important difference between the regulations applicable before and after 1 July 2014. The former, i.e. the provision on crime against international law, in the Swedish Criminal Code, Ch. 22 Sec. 6, allows Swedish courts to consider international customary law when adjudicating international crimes at the national level. However, according to the *travaux préparatoires* this is not possible in relation to the general part of criminal law, which includes intent.[104] Therefore, when applying the provision on crime against international law, Swedish courts apply intent as discussed in Section 3 of this article.

The question of intent for international crimes was raised in more detail in the *travaux préparatoires* of the newer regulation, i.e. the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406). The Swedish government stated that the Rome Statute consists of general principles of criminal law and that the Statute does not require this part to be incorporated in the national legislation. The Swedish government therefore concluded that it was neither necessary nor appropriate to introduce a specific provision on intent for the international crimes regulated by the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406). The government considered that the general part of Swedish criminal law should be applied in relation to these crimes.[105] A similar opinion had also been expressed in a previous government inquiry.[106] This inquiry suggested that some differences existed between the Rome Statute and Swedish criminal law concerning the scope and meaning of intent. However, since these

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[103] See e.g. Rome Statute, Article 6.

[104] Prop. 1953:142, p. 19.

[105] Prop. 2013/14:146, p. 71, 56.

[106] See SOU 2002:98, p. 321–322. However, note that this inquiry focused mainly on the construction of future legislation dealing with international crimes.

differences were negligible there was no need for a particular provision in the Swedish law to clarify the meaning and scope of intent in relation to international crimes.[107]

Although a general provision on intent for international crimes has not been introduced into Swedish law, some provisions concerning international crimes do include a specific form of intent applicable to that offence. One example is *genocide*, which in Swedish law requires, as it does in international law, that the defendant acted with the intent to destroy a national, ethnical, racial or religious group.[108] With reference to international case law, the Swedish *travaux préparatoires* of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), state that when assessing whether the defendant acted with this special intent, the court should take into account both objective circumstances (e.g. the existence of a plan or policy to destroy a national, ethnical, racial or religious group) and subjective circumstances relating to the defendant (e.g. in what position he or she acted).[109]

Statements were also made in the *travaux préparatoires* about intent in regard to crimes against humanity,[110] i.e. certain enumerated acts as part of a widespread or systematic attack on a civilian population with knowledge of the attack. According to the *travaux préparatoires* the defendant does not need to have knowledge of every circumstance regarding the attack or understand that it constitutes an attack according to law. The defendant acted with intent if he or she had knowledge of the factual circumstances of the attack.[111] The Swedish government further stated in the *travaux préparatoires*, with reference to ICTY case law, that the defendant's conduct must be connected to the attack by virtue of its character or its result, and that the defendant must have knowledge of these circumstances or have acted with intent as to the circumstances.[112] Regarding the act of killing as a war crime, the *travaux préparatoires* state that the defendant should be considered to have acted with the requisite intent if he or she intended the result i.e. the death of another person.[113] However, the *travaux préparatoires* do not mention which form of intent is required in relation to war crimes. Therefore, it is enough if the defendant acted with reckless intent.

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[107] SOU 2002:98, p. 334. But note that this inquiry was presented around the time when the Rome Statute came into effect. Thus, when the inquiry presented it results there was for example no case law from the ICC that clarified the meaning of intent in the Rome Statute. The statements made in the inquiry should therefore be viewed with some caution.

[108] Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), Sec. 1.

[109] Prop. 2013/14:146, p. 80–82, 231–233.

[110] Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), Sec. 2.

[111] Prop. 2013/14:146, p. 97, 241.

[112] Prop. 2013/14:146, p. 97, 241. The *travaux préparatoires* here refer to ICTY, Appeal Judgement, *The Prosecutor v. Dragoljub Kunarac and Others*, 2002, IT-96-23 -A and IT-96-23/1-A, paras 99–101; ICTY, Appeal Judgement, T*he Prosecutor v. Dusko Tadic*, 1999, IT -94-1-A, para. 271; ICTY, Trial Judgement, *The Prosecutor v. Dragoljub Kunarac and Others*, 2001, IT-96-23-T and IT-96-23/1-T, para. 418.

[113] Prop. 2013/14:146, p. 132.

After this discussion of the Swedish *travaux préparatoires* and the statements of the Swedish government in relation to the matter of intent regarding for international crimes, we now examine how this matter has been dealt with by Swedish courts.

5.3 Intent in Swedish Case Law on International Crimes

Several trends can be observed about intent in Swedish case law concerning international crimes. One is that the courts rarely conduct a thorough assessment regarding intent. There are several examples where the courts provide no analysis regarding which form of intent is applicable in the case or whether the defendant has acted with the intent required to find him or her liable.[114]

Another trend is that in several cases the courts focus on whether there is enough evidence in the individual case to determine whether the defendant acted with intent. Thus, it seems that the matter of intent may in many cases get little attention, but that the important question is rather whether the prosecutor has brought forward enough evidence to allow the court to conclude that the defendant acted with intent.[115] In addition, in some cases the courts assess whether the defendant acted with 'necessary intent', without clarifying the meaning and scope of the intent required.[116] When the courts do to some extent assess the defendant's intent, the indictment concerns crimes that require a specific intent, such as the terrorist offence[117] mentioned above, or genocide.[118]

Yet another trend concerns cases where the indictment includes co-perpetration. In these cases, the courts state that a 'joint intent' exists, or use similar phrasing.[119] Lastly, it is very clear from the Swedish case law examined for this article that the courts do not refer to international criminal law; there is a complete lack of references to international case law from the ICTY, the ICTR, and the ICC.

A majority of the Swedish cases reviewed were decided based on the law in force *until* 1 July 2014, i.e. applying the provision on crime against international

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[114] In several cases the courts do not mention anything in particular about the intent or the type of intent, see e.g. *Åklagaren ./. Mohamad Abdullah*, Södertörns District Court, Case B 11191-17, judgment, 25 September 2017; *Åklagaren ./. Mouhannad Droubi*, Södertörns District Court, Case B 2639-16, judgment, 11 May 2016; *Åklagaren ./. Mouhannad Droubi*, Södertörns District Court, Case B 13656-14, judgment, 26 February 2015; *Åklagaren ./. Kurda Bahaalddin H Saeed*, Örebro District Court, Case B 1662-18, judgment, 19 February 2019.

[115] See e.g. *Åklagaren ./. Jackie Arklöv*, Stockholm District Court, Case B 4084-04, judgment, 18 December 2006.

[116] See e.g. *Åklagaren ./. Omar Sakhanh Haisam*, Svea Court of Appeal, Case B 3787-16, judgment, 16 February 2017, p. 5 ff.; *Åklagaren ./. Claver Berikindi*, Svea Court of Appeal, Case B 4951-16, judgment, 15 February 2017, p. 20.

[117] See e.g. *Åklagaren ./. Hassan Al-Mandlawi*, Gothenburg District Court, Case B 9086-15, judgment, 14 December 2015, p. 34–36.

[118] See e.g. *Åklagaren ./. Theodore Tabaro*, Stockholm District Court, Case B 13688-16, judgment, 27 June 2018, p. 175–176.

[119] See e.g. *Åklagaren ./. Claver Berinkindi*, Stockholm District Court, Case B 12882-14, judgment, 16 May 2016, p. 87, 100, 102, 111, 123, 132, 135.

law.[120] Only two cases were decided after the entry into force of the new regulation, i.e. the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406).[121] Therefore, some precaution is necessary when drawing conclusions about how Swedish courts have assessed intent in relation to the new regulation. Further, considering the limited number of cases decided by Swedish courts so far regarding international crimes, it is difficult to reach any clear conclusions about how the courts have reasoned in matters regarding intent, whether the 2014 Act or the previous legislation was applied. Since Swedish courts do not usually conduct a thorough assessment of intent, the discussion will focus on cases where the courts have provided reasoning about intent.

In *Droubi*,[122] the indictment concerned the offence of crime against international law (Swedish Criminal Code, Ch. 22 Sec. 6 para. 1, applicable before 1 July 2014), for acts of, *inter alia*, "gross assault"[123] allegedly committed in Syria. The defendant had joined an armed group fighting the Syrian regime

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[120] According to the translation by the Swedish government in Ds 1999:36, p. 102–103, *crime against international law* (Swedish Criminal Code, Ch. 22 Sec. 6) was defined as:

'A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian Law concerning armed conflicts shall be sentenced for *crime against international Law* to imprisonment for at most four years. Serious violations shall be understood to include:

1. use of any weapon prohibited by international law,
2. misuse of the insignia of the United Nations or of insignia referred to in the Act on the Protection of Certain International Medical insignia (Law 1953:771), parliamentary flags or other internationally recognised insignia, or the killing or injuring of an opponent by means of some other form of treacherous behaviour,
3. attacks on civilians or on persons who are injured or disabled,
4. initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property,
5. initiating an attack against establishments or installations which enjoy special protection under international law,
6. occasioning severe suffering to persons enjoying special protection under international law; coercing prisoners of war or civilians to serve in the armed forces of their enemy or depriving civilians their liberty in contravention of international law; and
7. arbitrarily and extensively damaging or appropriating property which enjoys special protection under international law in cases other than those described in points 1–6 above.'

[121] See *Åklagaren ./. Raed Abdulkareem*, Scania and Blekinge Court of Appeal, Case B 3187-16, judgment, 4 April 2017; *Åklagaren ./. Raed Abdulkareem*, Blekinge District Court, Case B 569-16, judgment, 6 December 2016; *Åklagaren ./. Kurda Bahaalddin H Saeed H Saeed*, Örebro Court of Appeal, Case B 1662-18, judgment, 19 February 2019.

[122] *Åklagaren ./. Mouhannad Droubi*, Svea Court of Appeal, Case B 4770-16, judgment, 5 August 2016; *Droubi*, 11 May 2016.

[123] According to the translation by the Swedish government, available at https://www.government.se/49f780/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf (Accessed 6 July 2020), the Swedish Criminal Code, Ch. 3 Sec. 6, p. 19–20, gross assault is defined as 'If an offence referred to in Section 5 is considered gross, the person is guilty of gross assault and is sentenced to imprisonment for at least one year and six months and at most six years. When assessing whether the offence is gross, particular consideration is given to whether the act was life-threatening or whether the perpetrator inflicted severe bodily injury or serious illness or otherwise displayed particular ruthlessness or brutality.'

and had severely abused the victim through physical violence aimed at the victim's head and body. The defendant had also threatened to kill the victim, thus causing the victim to feel severe agony. The gross assault was allegedly of such nature that it amounted to torture and therefore a breach of the 1949 Geneva Conventions.[124] The Court of Appeal held that the defendant acted with reckless intent. In the Court's opinion the defendant was aware of the existence of fighting between the Syrian regime and the opposition and that the defendant, at least, must have been aware of the risk that the circumstances were such that there was an internal armed conflict. The Court also held that the defendant must have accepted the risk that the victim belonged to the protected category. Lastly, the Court of Appeal held that the defendant was reckless both as to the fact that he tortured a helpless person and as to the consequences of this deed (i.e. risk that the victim would die as a result of the defendant's actions).[125]

Another case where the court provided reasoning about intent was *Tabaro*. The indictment concerned the offences of genocide (Act on Criminal Responsibility for Genocide (1964:169) Sec. 1, applicable before 1 July 2009) and "gross crime against international law" (Swedish Criminal Code Ch. 22 Sec. 6 paras 1 and 2, applicable before 1 July 1995),[126] for acts allegedly committed during the genocide in Rwanda.[127] According to the indictment, the defendant had allegedly participated in several attacks on members of the Tutsi ethnic group. The attacks occurred at several locations, including several villages in a certain region, a school, and an abbey.

The District Court presented a rather detailed reasoning when assessing whether the defendant acted with the special intent required for genocide. The Court held that the defendant, who had a leading role at the local political level, executed the policy of the government by killing members of the Tutsi ethnic group. The defendant had, among other things, unlawfully deprived Tutsis of their liberty by limiting their access to food, water, and health care necessary for their survival. The attacks that the defendant took part in were systematic and were executed continuously and in a manner that led to the death of a large number of Tutsis. The District Court thus held that the defendant had committed the acts with intent to destroy, in whole or in part, the ethnical group of Tutsis, thus having the required special intent for genocide.[128] The defendant appealed against the decision. Although the Court of Appeal partly acquitted the defendant, it still found the defendant guilty of genocide and gross crime against

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[124] Note that in Swedish criminal law there is no specific offence of torture. Torture is nevertheless criminalised in Sweden as the underlying act of other offences. Depending the circumstances, a case of torture could in Swedish criminal law be considered as the offence of gross assault, the offence of exceptionally gross assault, or attempt to murder. If the victim dies during the torture, it is clearly a case of murder.

[125] *Droubi*, 5 August 2016, p. 7–8.

[126] According to the translation by the Swedish government in Ds 1999:36, p. 103, 'If the crime is gross, imprisonment for at most ten years, or for life shall be imposed. In assessing whether the crime is gross, special consideration shall be given to whether it comprised a large number of individual acts or whether a large number of persons were killed or injured, or whether the crime occasioned extensive loss of property.'

[127] *Tabaro*, 27 June 2018.

[128] *Tabaro*, 27 June 2018, p. 176.

international law. Regarding the parts of the judgment in which the Court of Appeal agreed with the assessment of the District Court, the Court of Appeal merely stated that it agreed with the District Court's assessment of the defendant's intent without any further reasoning.[129]

The indictment in the case of *Berikindi* also concerned acts of genocide (Act on Criminal Responsibility for Genocide (1964:169) Sec. 1, applicable before 1 July 2009) and gross crime against international law (Swedish Criminal Code, Ch. 22 Sec. 6 paras 1 and 2, applicable before 1 July 1995), committed while participating in massacres and killings during the Rwanda genocide. The judgments of the District Court and Court of Appeal are quite complicated to summarise, since the indictment included several events that occurred at nearby – but separate – locations. The case also included extensive testimonial evidence, which contributes to the difficulties in summarising it. However, concerning the question of whether the defendant acted with the requisite intent, both courts held that, regarding genocide, the defendant acted with the intent to destroy, in whole or in part, the Tutsi ethnic group.[130] The Court of Appeal concluded that the evidence in the case showed that the defendant had expressed Hutu-extremist opinions, that he had participated in the arrangement of various activities in the genocide against Tutsis, and that he had acted together with other people with leading roles at the local political level during the genocide.[131]

In addition, where the courts found that the defendants acted with special intent, there are examples where the courts seem to have concluded that the defendant acted with indirect intent. The case of *Haisam* is an example of this. The indictment concerned gross crime against international law (Swedish Criminal Code, Ch. 22 Sec. 6 paras 1 and 2, applicable before 1 July 2014) through participating in the execution of seven soldiers belonging to the Syrian army, and through killing one of them by shooting the victim, during the Syria conflict.[132] The assessment of the Court of Appeal concentrated on the evidence in the case, including a film of the alleged conduct. The Court of Appeal held that the defendant had participated in the events in the film and therefore was aware of what had happened. Thus, the defendant could not avoid being aware of the fact that the Syrian soldiers had been assaulted before they were executed. In addition, the defendant shot one victim several times and after the execution raised his weapon as a sign of victory. The Court of Appeal held that the content of the film clearly supported the conclusion that the killings were unlawful. The Court also stated that the defendant must have realised that the soldiers were executed merely because of their status as soldiers of the Syrian regime and that the defendant realised that their execution was unlawful,[133] thus acting with indirect intent. The defendant sought permission to appeal from the Swedish

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[129] *Åklagaren ./. Theodore Tabaro*, Svea Court of Appeal, Case B 6814-18, judgment, 29 April 2019, e.g. p. 66.

[130] *Berinkindi*, 15 February 2017, p. 47, where the Court of Appeal refers to – and agrees with – the assessment of the District Court; *Berinkindi*, 16 May 2016, p. 12, 135–136.

[131] *Berinkindi*, 15 February 2017, p. 13–14, 45–46, 47.

[132] *Haisam*, 31 May 2017; *Åklagaren ./. Omar Sakhanh Haisam*, Stockholm District Court, Case B 3787-16, judgment, 16 February 2017.

[133] *Haisam*, 31 May 2017, p. 6–7.

Supreme Court, but the request was denied.[134] Thus, the Swedish Supreme Court did not try the case.

The case of *Saeed* is another case where the court seems to have found that the defendant acted with indirect intent.[135] The defendant had joined the Iraqi army and fought against Daesh, or the Islamic State. The indictment concerned war crimes (Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (2014:406), Sec. 1, para. 1 p. 7, and Sec. 2), alleged to have taken place in Iraq through the participation in humiliating treatment of four dead victims, members of an armed opposition group, by posing and publishing pictures of the victims' corpses. The District Court did not mention intent as such, or forms of intent, and the matter of criminal liability mainly relied on technical evidence consisting of photographs and films. The evidence showed that the defendant had e.g. stamped on body parts of deceased victims, had spoken in derogatory terms about the deceased and had spat on them. The defendant had also aimed a rifle barrel at a lifeless body. The defendant had stated when questioned by the police, but not at trial, that he had stamped on dead bodies and/or body parts.[136] The District Court found the defendant guilty of the indicted crimes. The Court of Appeal concurred with the assessment of the District Court. The Court of Appeal stated nothing in particular regarding intent, but concluded, *inter alia*, that the defendant was aware of his conduct. Thus, the Court of Appeal upheld the conviction.[137] It should be noted that the defendant sought permission to appeal from the Swedish Supreme Court and the request was granted.[138] However, the Supreme Court has not yet (in July 2020) pronounced a judgment in the case.

The District Court's assessment and reasoning as regarding the evidence in *Saeed* must, in our opinion, reasonably be interpreted to mean that the Court considered that the defendant was practically certain – and aware – of the facts that the indictment was based on, thus acting with indirect intent. However, note that the District Court did not explicitly formulate this in the written judgment. Nevertheless, it is difficult to draw any other conclusion from the wordings of the judgment.

In conclusion, the general impression from Swedish case law concerning intent in the context of international crimes is that the courts do not refer at all to the concept of intent as it exists and is defined in international criminal law. This position seems, as will be seen below, to be rather reasonable. However, it should be emphasised that in the cases examined above, the courts generally do not elaborate on the matter of intent. The only obvious conclusion is that the courts seem largely to treat the issue of intent as a matter of evidence. This appears to be in line with the approach of the Swedish Supreme Court (see above,

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[134] *Åklagaren ./. Omar Sakhanh Haisam Sakhanh*, Supreme Court, Case B 3157-17, decision, 20 July 2017.

[135] *Kurda Bahaalddin H Saeed H Saeed*, 19 February 2019.

[136] *Kurda Bahaalddin H Saeed H Saeed*, 19 February 2019, p. 11–14.

[137] *Åklagaren ./. Kurda Bahaalddin H Saeed H Saeed*, Göta Court of Appeal, Case B 939-19, judgment, 24 September 2019, p. 3–5.

[138] *Åklagaren ./. Kurda Bahaalddin H Saeed H Saeed*, Supreme Court, Case B 5595-19, decision, 23 March 2020.

Section 3, Intent in Swedish Law). However, the case law of the Supreme Court mainly concerns reckless intent, while international crimes, such as genocide, sometimes require a higher form of intent. Therefore, it would be desirable for Swedish courts to be clearer regarding the issue of intent in future cases, and not it simply as a matter of evidence. In doing so Swedish courts could, in our view, contribute to a clearer development regarding intent in the context of international crimes adjudicated at the national level.

6 Analysis: Reflections Regarding how Swedish Courts Should Deal with Intent When Adjudicating International Crimes

Previous sections have shown how intent is defined in Swedish and in international criminal law. They have also shown how Swedish courts have dealt with intent in cases involving international crimes, and have concluded that no reference is made to international criminal law in these cases. In view of this, we will now discuss how Swedish courts *should* deal with intent for international crimes and whether Swedish courts should apply international criminal law rules regarding intent.

As mentioned in the Introduction, the regulation applicable to offences committed before 1 July 2014 allows the courts to consider, to a certain extent, customary international law when adjudicating international crimes at the national level. This follows from the wording of the provision on crime against international law (Swedish Criminal Code, Ch. 22 Sec. 6) and the *travaux préparatoires*. During the work on the *travaux préparatoires* the question was raised whether national law or general principles of international law should be applied by national courts with regard to international crimes. Ultimately, the *travaux préparatoires* stated that the general part of national criminal law should be applied to international crimes.[139] Particular reference was made to the *travaux préparatoires* of the 1949 Geneva Conventions, from which it is clear that no agreement could be reached regarding issues relating to the general part of national criminal law. In addition, it was pointed out that these issues should be left to national courts.[140] Regarding the regulation applicable before 1 July 2014, it therefore appears clear that the general part of Swedish criminal law, which includes intent, should be applied to international crimes adjudicated before Swedish courts.

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[139] Prop. 1953:142, p. 19.

[140] Final record of the diplomatic conference of Geneva of 1949 vol. II, section B, p. 114-115: 'The Netherlands Delegation had tabled the International Committee of the Red Cross' Articles as their own amendment. This amendment has been replaced by the joint amendment submitted by the Netherlands, Australia, Belgium, Brazil, the United States of America, France, Italy, Norway, the United Kingdom and Switzerland. The Netherlands Delegate presented the joint amendment with the following introduction: […] The word 'crime' instead of 'breach' did not seem to be an improvement, *nor could general agreement be reached at this stage regarding the notions of complicity, attempted violation, duress or legitimate defence or the plea 'by orders of a superior'. These should be left to the judges who would apply the national laws. The Diplomatic Conference is not here to work out international penal law.* Bodies far more competent than we are have tried to do it for years. […] This was adopted.' [Emphasis added.]

However, it may be worth noting that the previous offence of crime against international law was, *inter alia*, defined as a "serious violation" of customary international law.[141] Even if one considers the *travaux préparatoires* mentioned above, does this reference to customary international law warrant a different assessment? Does it relate only to the definition of the *actus reus* of an international crime, or does it also relate to the question of intent? And if intent is also decided by customary international law, where is this customary international law found?

A reading of the provision in question (crime against international law, Swedish Criminal Code, Ch. 22 Sect. 6, applicable before 1 July 2014) indicates that the mention of customary international law must refer to conduct that is prohibited under customary international law. In other words, it is the *actus reus* parts of the offence that are defined by customary international law, not issues relating to intent, which falls under the *mens rea* parts of the offence. However, *if* one wants to argue that also the issue of *mens rea* is defined by customary international law, one has to investigate where such a definition could be found. Could, for example, the Rome Statute be considered customary international law?

Since the Rome Statute is the only document that provides a definition of intent in international criminal law, and which – at least partly – constitutes customary international law, it could be questioned whether Article 30 of the Statute does in fact include a definition of intent that can be considered customary law. This is however doubtful for several reasons.

First, Article 30 of the Rome Statute is found in Part 3 of the Statute, containing general principles of criminal law. In our view, these principles do not all – unlike the provisions on genocide, crimes against humanity, and war crimes – necessarily reflect customary international law. Furthermore, many of these general principles of the Rome Statute are the result of negotiations and compromises,[142] and are contained in a document which primarily governs a court's administration of law.[143] Consequently, it is difficult to argue that they constitute customary international law.

It should also be recalled that customary international law, somewhat simplified, consists of rules that have emerged through continuing practice by States and the conviction that such practice is a legal obligation.[144] Regarding

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[141] According to the translation by the Swedish government in Ds 1999:36, p. 102–103, *crime against international law* was defined as: 'A person guilty of *a serious violation* of a treaty or agreement with a foreign power or *an infraction of a generally recognised principle* or tenet relating to international humanitarian Law concerning armed conflicts shall be sentenced for *crime against international Law* to imprisonment for at most four years (…)'.

[142] Scheffer, David, 'The International Criminal Court', in Schabas, William & Bernaz, Nadia (eds.), *Routledge Handbook of International Criminal Law*, London: Routledge 2011, p. 76. This is also the view of the Swedish government, see prop. 2013/14:146, p. 71, 212.

[143] See e.g. Scheffer, 2011, p. 76.

[144] Cassese, Antonio, *International Law*, 2 edn., Oxford: Oxford University Press, 2005, p. 156; Thirlway, Hugh, 'The Sources of International Law', in Evans, Malcolm D., (ed.), *International Law*, 4 edn., Oxford: Oxford University Press, 2014, p. 98. See also Roberts, Anthea & Sivakmaran, Sandesh, 'The Theory and Reality of the Sources of International Law', in Evans, Malcolm D., (ed.), *International Law*, 5 edn., Oxford: Oxford University Press, 2018, p. 92–97.

intent, it should be noted that, as mentioned above, Article 30 of the Rome Statute is the result of a compromise between the negotiating parties and thus a compromise between common law and civil law systems. In addition, as shown above in Section 2 (Intent in Common and Civil Law Systems), there is no clear, common view among these systems about the exact meaning of intent. Furthermore, there is no exact definition of intent even among countries within these legal systems. This makes it difficult to view Article 30 of the Rome Statute as a customary international law rule regarding intent. Thus, in our view it is clear that the general part of Swedish criminal law should be applied by courts when deciding cases regarding international crimes based on the Swedish regulation applicable before 1 July 2014.

The general part of Swedish criminal law should also be applied to the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406). The primary reason for this is that the Rome Statute is not a legally binding treaty for States Parties in the same way as is, e.g. an international convention on human rights, which imposes certain obligations on States. Instead, the Rome Statute specifies rules and principles governing the work of the ICC.[145] States Parties to the Statute recognise the ICC's jurisdiction and competency, and are indeed obliged to cooperate with the Court.[146] However, this does not entail a legal obligation on States Parties to incorporate the provisions of the Rome Statute into national law. This is also the view of the Swedish government. As seen above, in the *travaux préparatoires* to the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), the government emphasised in particular that the Rome Statute does not impose any obligation on States to incorporate into national law the provisions relating to the Statute's general principles of criminal law.[147] The government was therefore of the opinion that it was not necessary to develop special provisions regarding, *inter alia*, intent and that the Swedish provisions on the general part of criminal law should, as a starting point, be applied by Swedish courts when adjudicating international crimes.[148]

Furthermore, the government was of the view that it would also not be appropriate to introduce special rules about for example intent for international

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[145] This is obvious from Article 1 of the Rome Statute. See also Cassese & Gaeta, 2013, p. 10: 'It is also important to note that many criminal lawyers, particularly in countries of Romaneo-Germanic tradition, being used to interpreting and applying criminal rules laid down in written criminal codes, tend to believe that the major source of ICL can be found in the Statute of the ICC, or at least that such Statute is a sort of "code of international criminal law". This is a wrong assumption, although admittedly that Statute is the only international written instrument laying down international rules on both the "general part" of ICL and a fairly comprehensive definition of international crimes. The truth of the matter is, however, *that the ICC Statute embraces a set of rules only applicable by the ICC itself*: the Statute does not apply to other international criminal courts'. [Emphasis added.] It is our view that this quote is also applicable to national courts dealing with international crimes.

[146] See part 9 of the Rome Statute about international cooperation and judicial assistance.

[147] Prop. 2013/14:146, p. 71, 212–213.

[148] Prop. 2013/14:146, p. 71, 212–213. However, the government pointed out that in some respects other considerations are made, e.g. for military and civilian command responsibility and inchoate offences, as well as incitement of genocide. See further prop. 2013/14:146, p. 200–216.

crimes into national law.[149] The government did not elaborate further on this position. However, others have discussed the fragmentation that may occur when dealing with international crimes at the national level, and States feel obliged to apply principles for international crimes that are incompatible with those otherwise applied at the national level.[150] Some of the principles that could cause problems are those that fall under part 3 of the Rome Statute on general principles of criminal law, which include intent. If intent according to Article 30 of the Rome Statute were to be applied in Swedish law in cases concerning international crimes, parallel systems would be created within the national legal system regarding the rules of which form of *mens rea* would be required. In cases regarding international crimes, a national court would then apply different rules of intent depending on whether the offence in question was an international crime or not. This would be problematic since general principles of criminal law within a national system should be universally applicable to all offences prosecuted within that system. An exception would of course be those offences which specify a particular form of *mens rea*, for example *genocide*. Intent should thus, in general, mean the same thing within a legal system, regardless of the offence.

More specifically the above means the following. As concluded in Section 4.3 (Intent at the ICC), Article 30 of the Rome Statute includes *dolus directus* and *dolus indirectus*, i.e. what in Swedish law corresponds to direct intent and indirect intent. Thus, Article 30 of the Rome Statute does not include the lowest degree of intent in Swedish law, i.e. reckless intent. If Article 30 of the Rome Statute were to be applied to international crimes brought before Swedish courts, this would in practice mean that a higher degree of intent would be required for these crimes than what is otherwise required in Swedish criminal law. This would make it more difficult to convict somebody in Sweden of an international crime than it would of other crimes. Consequently, the coherence of the national criminal justice system would be eroded. In conclusion, for the reasons stated above, and as stated by the Swedish government, it cannot be considered appropriate to introduce into Swedish law special rules regarding intent for international crimes.

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[149] Prop. 2013/14:146, p. 71, 212–213. For a more in-depth discussion, see Klamberg, Mark, *The Evolution of Swedish Legislation on International Crimes*, Scandinavian Studies in Law, 2020, vol. 66, Section 6.

[150] See Greenawalt, Alexander, *The Pluralism of International Criminal Law*, Indiana Law Journal 2011, vol. 86, no. 3, 1064, p. 1068. See also van Sliedregt, Elies, *Individual Criminal Responsibility in International Law*, Oxford: Oxford University Press, 2012, p. 9–12.

Bibliography

Agge, Ivar, *Straffrättens allmänna del. Föreläsningar. Andra häftet*, Stockholm: Norstedt, 1961

Asp, Petter, Ulväng, Magnus & Jareborg, Nils, *Kriminalrättens grunder. Svensk straffrätt I*, 2 edn., Uppsala: Iustus, 2013

Borgeke, Martin, *Ett förtydligande av uppsåtets nedre gräns*, Svensk juristtidning, 2017, no. 2, p. 93–105

Borgeke, Martin, *Slutreplik till Suzanne Wennberg om likgiltighetsuppsåtet*, Svensk juristtidning, 2017, no. 7, p. 441–444

Bäcklund, Agneta, et al., *Brottsbalken* (17 April 2019, Zeteo)

Cassese, Antonio, *International Law*, 2 edn., Oxford: Oxford University Press, 2005

Cassese, Antonio & Gaeta, Paola, *Cassese's International Criminal Law*, 3 edn., Oxford: Oxford University Press, 2013

Child, John & Ormerod, David, *Smith, Hogan and Ormerod's Essentials of Criminal Law*, 3 edn., Oxford: Oxford University Press, 2019

Cryer, Robert, Robinson, Darryl, & Vasiliev, Sergey, *An Introduction to International Criminal Law and Procedure*, 4 edn., Cambridge: Cambridge University Press, 2019

Finnin, Sarah, *Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: a Comparative Analysis*, International & Comparative Law Quarterly, 2012, vol. 61, no. 2, 325–359

Greenawalt, Alexander, *The Pluralism of International Criminal Law*, Indiana Law Journal 2011, vol. 86, no. 3, p. 1063–1130

Guilfoyle, Douglas, *International Criminal Law*, Oxford: Oxford University Press, 2016

Hagströmer, Johan, *Svensk straffrätt. Föreläsningar. Första bandet*, Uppsala: Almqvist & Wiksell, 1901–1905

Horder, Jeremy, *Ashworth's Principles of Criminal Law*, 9 edn., Oxford: Oxford University Press, 2019

Jareborg, Nils & Ulväng, Magnus, *Tanke och uppsåt*, Uppsala: Iustus, 2016

Klamberg, Mark, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, International Criminal Law Review, 2009, vol. 9, no. 2, p. 395–409

Klamberg, Mark, *The Evolution of Swedish Legislation on International Crimes*, Scandinavian Studies in Law, 2020, vol. 66

Marchuk, Iryna, *The Fundamental Concept of Crime in International Criminal Law. A Comparative Law Analysis*, Berlin, Heidelberg: Springer Berlin Heidelberg, 2014

Ohlin, Jens David, *Targeting and the Concept of Intent*, Michigan Journal of International law, 2013, vol. 35, no. 1, p. 79–130

Roberts, Anthea & Sivakmaran, Sandesh, 'The Theory and Reality of the Sources of International Law', in Evans, Malcolm D., (ed.), *International Law*, 5 edn., Oxford: Oxford University Press, 2018, p. 89–118

van Sliedregt, Elies, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague: T.M.C. Asser Press, 2003

van Sliedregt, Elies, *Individual Criminal Responsibility in International Law*, Oxford: Oxford University Press, 2012

Scheffer, David, 'The International Criminal Court', in Schabas, William & Bernaz, Nadia (eds.), *Routledge Handbook of International Criminal Law*, London: Routledge 2011, p. 67–84

Strahl, Ivar, *Allmän straffrätt i vad angår brotten*, Stockholm: Norstedt, 1976

Svensson, Erik, *Ett förtydligande av uppsåtets nedre gräns?*, Svensk juristtidning, 2017, no. 3, p. 182–190

Thirlway, Hugh, 'The Sources of International Law', in Evans, Malcolm D., (ed.), *International Law*, 4 edn., Oxford: Oxford University Press, 2014, p. 91–117

Thyrén, Johan C W, *Principerna för en strafflagsreform III. Brottsbegreppets subjektiva sida. Försök. Subjektsflerhet. Sammanfattning av de legislativa resultaterna i delarne I–III*, Lund: Gleerup, 1914

Wennberg, Suzanne, 'Criminal Law', in Bogdan, Michael (ed.), *Swedish Legal System*, Stockholm: Norstedts Juridik, 2010, p. 149–198

Wennberg, Suzanne, *Likgiltighetsuppsåtet igen – en ny dom som inte kommer att bli vägledande?*, Juridisk Tidskrift, 2016/17, no. 3, p. 722–727

Wennberg, Suzanne, *Replik till Martin Borgeke – likgiltighetsuppsåtet igen*, Svensk juristtidning, 2017, no. 4, p. 269–173

Werle, Gerhard & Jessberger, Florian, *Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law*, Journal of International Criminal Justice, 2005, vol. 3, no. 1, p. 35–55

Ågren, Jack, Leijonhufvud, Madeleine & Wennberg, Suzanne, *Straffansvar*, 10 edn., Stockholm: Norstedts Juridik, 2018