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## **Philosophical Foundations of International Criminal Law: Correlating Thinkers**

Morten Bergsmo and Emiliano J. Buis (editors)



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**Front cover:** *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

**Back cover:** *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

## ***Mens Rea*, Intentionality and Wittgenstein's Philosophy of Psychology**

**Jaroslav Větrovský\***

Philosophy is not a body of doctrine but an activity.

Wittgenstein, *Tractatus Logico-Philosophicus*

### **17.1. Introduction**

In many legal systems, including international law, crimes consist of two elements: the *actus reus*, that is, physical behaviour, either an act or omission, which is legally prohibited or gives rise to a legally prohibited result; and the *mens rea*, regarded as the mental state or attitude that a person holds in relation to their criminally relevant behaviour.<sup>1</sup> The Rome Statute of the International Criminal Court (hereinafter, the 'Statute' or the 'Rome Statute') leaves no space for doubt in this regard. A general rule set forth in Article 30(1) of the Statute provides that a person shall be criminally responsible and liable for punishment only if a criminal act (*actus reus*) was committed with intent and knowledge (*mens rea*).

Despite its relatively clear wording, the interpretation of the provision is a rather difficult one. Both key terms determining the scope of the *mens rea* element, that is, the intent and knowledge, are profoundly indeterminate and their use often varies from one context to another. In some cases, interpretive problems are purely technical and can be resolved by means of traditional methods of legal interpretation, in accordance with the judicial policy of the International Criminal Court ('ICC').<sup>2</sup> Often,

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<sup>1</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 53; Gerben Bruinsma and David Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice*, Springer, New York, 2014, p. 4066.

<sup>2</sup> For example, a question arose as to whether the rule expressed in Article 30 of the Rome Statute encompasses all possible forms of *mens rea* pertaining to international crimes, or whether other mental categories commonly recognised in domestic legal systems, namely recklessness, may also be applicable under this provision (cf. *Prosecutor v. Thomas*

however, the character of problems transcends the confines of international criminal law or criminal law in general, which means that tools other than law become necessary to justify their solutions.

For instance, a question has arisen whether the expression “committed with intent and knowledge” embedded in Article 30(1) ought to be interpreted as encompassing two separate conditions, intent and knowledge, or whether the latter condition is in some way incorporated into the former. Some authors argue that intent and knowledge are two distinct concepts which should not be assimilated.<sup>3</sup> This is, without a doubt, a true proposition. Intent and knowledge cannot be seen as one and the same. One can be aware of what one does, however, this can be done without having the intention to do so. For example, one can perfectly know that what they are doing is shooting at a person, and that by shooting at a person they can kill that person; yet they may shoot and kill the person unintentionally, as a result of an accidental shot. In this case, the conditions of intent and knowledge are truly separate, and for a crime to be committed under the Rome Statute, they must be satisfied simultaneously.

On the other hand, a person cannot be said to act intentionally if they are not aware of *what it is* that they are intentionally doing.<sup>4</sup> For example, a person cannot intentionally commit the crime of killing or wounding a combatant who surrendered,<sup>5</sup> if they were not aware of the

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*Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the confirmation of charges, Case No. ICC-01/04-01/06, 29 January 2007, paras. 350 ff. ([www.legal-tools.org/doc/b7ac4f/](http://www.legal-tools.org/doc/b7ac4f/)). In the *Bemba* case, the Pre-Trial Chamber II held that “[w]ith respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute”. The conclusion was based on the Chamber’s proposition that the Rome Statute, “being a multilateral treaty, is governed by the principles of treaty interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties”. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (‘Charging Decision’), Case No. ICC-01/05-01/08, 15 June 2009, paras. 360 ff. ([www.legal-tools.org/doc/07965c/](http://www.legal-tools.org/doc/07965c/)).

<sup>3</sup> Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law*, Springer, New York, 2014, p. 128.

<sup>4</sup> Peter M.S. Hacker, *Wittgenstein: Mind and Will, Volume 4 of An Analytical Commentary on the Philosophical Investigations, Part I: Essays*, Blackwell, Oxford, 2000, p. 240.

<sup>5</sup> Cf. Statute of the International Criminal Court (‘ICC Statute’), 17 July 1998, in force 1 July 2002, Article 8(b)(vi) ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)).

victim's combatant status and/or that the combatant surrendered. In this regard, the intent and knowledge are conceptually interrelated. Knowledge is already included in the concept of intention and, consequently, does not create a separate criterion of one's *mens rea*. It is therefore unsurprising, as some scholars have complained, that despite the wording of Article 30(1), the case law of the ICC ignores the "semantic difference between intent and knowledge", and that the two allegedly "independent entities" have been merged "into the fully-fledged definition of intent".<sup>6</sup> To reiterate, to commit a crime intentionally always means that the person knew about all circumstances to which their intention relates.

The relationship between the concepts of intent and knowledge is, however, only the tip of the iceberg. Probably the most important question that the concept of intent has traditionally raised is how one's intent to engage in criminal conduct might be discerned and evidenced in judicial proceedings. If a person commits an act which itself is legally prohibited or gives rise to a legally prohibited result, then how can judges know, or even legitimately suppose, that the person intended to commit such an act, to cause such a result, or at least, that the person knew that such a result would occur in the ordinary course of events? In other words, is it at all logically and practically possible for an international court to genuinely determine the 'inner' intent of a crime perpetrator, given the fact that such a determination may exclusively be carried out from the court's 'outer' perspective? Is it not true that facts, which can be evidenced in court, solely consist of one's physical or verbal behaviour, but not the intentions behind this behaviour? And, consequently, that in the absence of a confession only a perpetrator of a crime can really know what their intention was when engaging in the criminally relevant behaviour?

These and related issues will be addressed and subjected to a philosophical investigation in the following sections of the present chapter. Section 17.2. outlines the concept of intention<sup>7</sup> as it has generally been depicted in international criminal law. Section 17.3. will then point to the fact that the general approach of international criminal tribunals and doctrine to the concept of intention faithfully reflects the Cartesian account of mind-body dualism, according to which human body consists of two sub-

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<sup>6</sup> Marchuk, 2014, p. 127, see *supra* note 3.

<sup>7</sup> The terms 'intention' and 'intent' are used interchangeably.

stances: the matter of which body is made up, and the mind. Sections 17.4. and 17.5. will focus on *some* characteristic methods of Wittgenstein's philosophical investigations into psychological concepts and explain how the way in which these concepts have been formulated and construed is for the most part based on a misunderstanding of our ordinary language practices.<sup>8</sup> Next, Section 17.6. will specifically deal with Wittgenstein's inquiry into the 'grammar' of the concept of intention and, in particular, into its allegedly 'private' character, according to which only a person whose intention it is, can know what this intention really is. Section 17.7. concludes this chapter.

## **17.2. The Paradigm of Intention in International Criminal Law**

The concept of intent, as traditionally regarded in criminal law, rests on the dichotomy between a criminal act (*actus reus*) and the 'guilty' mind of the perpetrator (*mens rea*). Accordingly, if committing a crime requires that certain conduct takes place (for instance, the conduct resulting in penetration in the case of a rape), then the crime was committed only if a perpetrator intended to engage in such conduct. Similarly, if committing a crime requires that a specific consequence occur (for example, the death of a person in the case of a murder), then the crime was committed only if the perpetrator intended to bring about such a consequence.<sup>9</sup> Hence, engaging in criminal conduct or causing criminal consequences is not the same as engaging in criminal conduct or causing criminal consequences *intentionally*. Intention is ordinarily considered to be something distinct from mere behaviour; it is a separate element which may or may not accompany one's behaviour, depending on the circumstances of a particular situation.

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<sup>8</sup> Wittgenstein's philosophical life is usually divided into two periods. The so-called 'early' period is dated from 1911, when Wittgenstein first came to Cambridge, to 1918 when he completed the *Tractatus Logico-Philosophicus*, the only book published during his lifetime. After completing the *Tractatus*, Wittgenstein abandoned philosophy believing that he succeeded in solving all philosophical problems. Nevertheless, in 1929, he returned to Cambridge and remained there, with short interruptions, until his death in 1951. Wittgenstein's investigations into psychological concepts fall in this second 'late' period.

<sup>9</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, p. 477. For an overview of the distinction between conduct- and result-crimes, see also Mike Molan, Denis Lanser and Duncan Bloy, *Bloy and Parry's Principles of Criminal Law*, Cavendish Publishing, London, 2000, p. 27.

When terms such as *actus reus*, criminal conduct, and so on, are employed in criminal law, they refer to one's physical behaviour (act or omission) or, more broadly, to one's *physical existence*.<sup>10</sup> *Mens rea*, on the other hand, has commonly been used to denote the mental element contained in one's criminally relevant physical behaviour, one's mental state or state of mind, that is, the *mental realm* of one's life. This has been emphasised on many occasions. In the *Bemba* case, for instance, Pre-Trial Chamber II of the ICC recalled that "in order to hold a person criminally responsible for crimes against humanity and war crimes, it is not sufficient that the objective elements are met. [...] Rather, [the Statute] requires also the existence of a certain state of guilty mind [...] commonly known as the *mens rea*".<sup>11</sup>

In the same vein, Article 30(1) of the Rome Statute makes it clear that one can be said to commit a crime "only if the material elements [were] committed with intent and knowledge". To commit material elements "with intent and knowledge" means, according to the wording of Article 30(2), that a person has or had the intent to engage in the legally prohibited conduct or to cause a legally prohibited consequence.<sup>12</sup> Moreover, the wording of Article 30(1) suggests that an act or omission might be called intentional, only if the relevant intention arose before a criminal act was committed and/or in some form existed during the duration of the act that was being committed ("a person shall be criminally responsible [...] only if the material elements *are* committed with intent and knowledge").

The existence of intention is usually associated with the existence of mind. Thus, to have a certain intention amounts to a certain *state of mind*, and to act intentionally, that is, to act with a specific intention, is considered tantamount to acting "with [a specific] purpose in mind".<sup>13</sup>

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<sup>10</sup> Sometimes, the mere physical existence may, in particular circumstances, be considered as criminal conduct for which a person is responsible (the so-called 'state of affairs' cases). For example, a foreigner can be held criminally responsible for a crime of illegal entry and stay, even though they did not enter the territory voluntarily, but were forcibly returned there from another country. Cf. Molan, Lanser and Bloy, 2000, pp. 28–30, *ibid*.

<sup>11</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Charging Decision, 15 June 2009, para. 351, see *supra* note 2.

<sup>12</sup> A person is also deemed to act intentionally if they were aware that the consequence "would occur in the ordinary course of events", see ICC Statute, Article 30(2)(b).

<sup>13</sup> *Prosecutor v. Germain Katanga*, Pre-Trial Chamber II, Judgment, Case No. ICC-01/04-01/07, 7 March 2014, Minority Opinion of Judge Christine Van den Wyngaert, para. 5 ([www.legal-tools.org/doc/9b0c61/](http://www.legal-tools.org/doc/9b0c61/)): "It may well be that among the attackers there was a

Lawyers, unlike philosophers or psychologists, do not seem bothered by the question of where the mind is located. They tacitly adhere to a commonplace opinion that our mind, and consequently our intentions are hidden in our head, most probably in the brain. Yet if a presupposition that people's intentions occur in their brain, head, or to put it simply, their *physical body*, is accepted as true, a question arises as to whether and how one can know what other's intentions are, and *a fortiori*, were. Intent, it has been argued, "is a mental factor which is difficult, even impossible, to determine".<sup>14</sup> By virtue of belonging to the mental sphere, "[a] person's state of mind is no different to any other fact concerning that person which is not usually visible or audible to others".<sup>15</sup> Hence, intent "is not usually susceptible to direct proof",<sup>16</sup> and in the absence of a confession from the accused, it must "be inferred from a certain number of presumptions of fact".<sup>17</sup> As Cassese wrote:

Intention is not capable of positive proof and, accordingly, it is inferred from overt acts. [...] [A]fter all, an individual alone honestly knows what he is thinking. The Court cannot look into the mind to see what is going on there.<sup>18</sup>

### 17.3. The Cartesian Legacy of the Mind-Body Dualism

Cassese's words not only faithfully reflect the general attitude to intentionality in international criminal law but are also strongly reminiscent of the dominant philosophical approaches to the issue. While the views of philosophers on what the human mind or soul is and how it influences

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sizeable group of persons who held a strong grudge against the Hema people and who used the opportunity of the attack to 'settle scores'. However, I do not believe the evidence shows that the attack was conceived and planned with this purpose in mind".

<sup>14</sup> International Criminal Tribunal for Rwanda ('ICTR'), *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I, Judgement, ICTR-96-4-T, 2 September 1998, para. 523 ([www.legal-tools.org/doc/b8d7bd/](http://www.legal-tools.org/doc/b8d7bd/)).

<sup>15</sup> International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Slobodan Milošević*, Appeals Chamber, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder ('Interlocutory Appeal Decision'), IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, 18 April 2002, para. 31 ([www.legal-tools.org/doc/201a8d/](http://www.legal-tools.org/doc/201a8d/)).

<sup>16</sup> ICTY, *Prosecutor v. Radovan Karadžić*, Appeals Chamber, Judgement, IT-95-5/18-AR98bis.1, 11 July 2013, para. 80 ([www.legal-tools.org/doc/84001b/](http://www.legal-tools.org/doc/84001b/)).

<sup>17</sup> ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, para. 523, see *supra* note 14.

<sup>18</sup> Cassese, 2008, p. 75, see *supra* note 1.



one's behaviour have varied considerably over time, most approaches have been built on the common assumption that man is a "composite creature"<sup>19</sup> with body and mind as his two constitutive elements. Body, it has been argued, belongs to the physical world. It has size, weight, colour, shape, as well as limited temporal existence. Mind or soul, on the other hand, is *something* different from the human body. It is intelligence, intellect, or reason,<sup>20</sup> that is, an ethereal substance, which, by its very nature, transcends the spatio-temporal dimension of one's being. In other words, while the characteristic feature of the body is that it exists and acts in the physical world, the essential property of mind is that it thinks, means, intends, or otherwise acts in the mental sphere.<sup>21</sup>

The origins of the outlined dualism have typically been traced to Plato<sup>22</sup> and early Christian philosophers.<sup>23</sup> However, the most influential

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<sup>19</sup> Peter M.S. Hacker, *Wittgenstein on Human Nature*, Phoenix, 1999, p. 14.

<sup>20</sup> See René Descartes, *Meditations on First Philosophy*, John Cottingham (ed.), Cambridge University Press, Cambridge, 1996, p. 18.

<sup>21</sup> Cf. Howard Robinson, "Dualism", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Stanford University, Stanford, Fall 2017.

<sup>22</sup> In Plato's account, "soul is in the very likeness of the divine", that is, immortal, intellectual, uniform, indissoluble, and unchangeable, whereas "the body is in the very likeness of the human", which means mortal, unintellectual, multiform, dissoluble, and changeable. The soul, not the body, is therefore responsible for our acquisition of knowledge, being however constantly distracted from this endeavour by the body, bodily senses, and sensations. The true existence of things, Plato claimed, is revealed to the soul in thought. Therefore, "if we would have pure knowledge of anything we must be quit of the body – the soul in herself must behold things in themselves: and then we shall attain the wisdom which we desire, and of which we say that we are lovers; not while we live, but after death; for if while in company with the body, the soul cannot have pure knowledge, one of two things follows – either knowledge is not to be attained at all, or, if at all, after death". See Plato, *Phaedo*, reprinted in Benjamin Jowett (ed.), *Dialogues of Plato, Vol. II*, Oxford University Press, Oxford, 1931, respectively pp. 223, 204, and 205–206, paras. 80a–b, 65c, 66d.

<sup>23</sup> In the fifth century AD, Augustine of Hippo (Saint Augustine), to whom the introduction of the term *mens rea* into the discourse on culpability has usually been ascribed, expressed the view that a sin can be committed even if no physical behaviour takes place, yet the mind (intention or desire) is sinful. As he explained, with respect to adultery, even "if a man finds no opportunity to lie with the wife of another but shows that he desires to do so and would do it if he got the chance, he is no less guilty than if he were caught in the act". See Augustine, *On Free Will*, reprinted in J.H.S. Burleigh (ed.), *Augustine: Earlier Writings*, Westminster John Knox Press, Louisville, 2006, p. 116, para. 8. Similarly, concerning the sin of perjury, Augustine found that it is not important whether what one says matches reality, but whether what one says matches the speaker's conviction about what reality is. Thus, the sin of perjury does not depend so much on what one utters, as on what one's intention behind the uttering was. In the *Sermon on the Words of the Apostle James*, Augus-

account of the mind-body relationship comes from later times and is to be associated – at least inasmuch as modern Western philosophy is concerned – with René Descartes, a French protestant philosopher of the seventeenth century. Indeed, Descartes' so called 'substance dualism' gradually became a paradigmatic way of investigation into the problem of intentionality not only in philosophy, but also in psychology, law, and other scientific disciplines.

Descartes's dualism is in principle based on the idea of there being two substances: matter, of which the body is made up, and the mind; with each substance characterised by its properties. The essential property of matter is that it is spatially extended. The essential property of the mind is that it thinks.<sup>24</sup> However, being a *substance*, the mind is not the same as a simple collection of thoughts or a "bundle" of ideas.<sup>25</sup> In the Cartesian account, the mind is *that which* thinks, that is, "an immaterial substance over and above its immaterial states".<sup>26</sup> Accordingly, the mind is not only different from the body, in which it is located, but also from the totality of thoughts that makes it up (just like the body is not the same as the collection of organs of which it is composed).

Descartes' essential argument underpinning his mind-body dualism was that, while it is in principle possible to doubt the existence of everything material, including the body, one can never doubt the existence of one's own mind. In his *First Meditation*, Descartes stated:

Whatever I have up till now accepted as most true I have acquired either from the senses or through the senses. But from time to time I have found that the senses deceive, and it is

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tine explained that if someone says "it rained there" and "in fact it did rain there, but he doesn't know it, and thinks it didn't; he's a perjurer". According to Augustine, "[w]hat makes the difference is how the word comes forth from the mind". The famous dictum then follows: "*Ream linguam non facit, nisi mens rea*", which means: "The only thing that makes a guilty tongue is a guilty mind". See Augustine, *Sermon 180: On the Words of the Apostle James*, reprinted in Edmund Hill and John E. Rotelle (eds.), *Sermons III/5 (148-183) on the New Testament*, New City Press, New York, 1992, p. 315, para. 2. The dictum was later turned into the legal maxim '*Actus non facit reum, nisi mens sit rea*' (The act does not make evil unless the spirit is evil). Cf. "Actus Reus", in Berry Gray (ed.), *The Philosophy of Law: An Encyclopedia*, Routledge, London, 2012, p. 18.

<sup>24</sup> Robinson, 2017, see *supra* note 21.

<sup>25</sup> David Hume, *A Treatise of Human Nature*, Book I, Part IV, Lewis A. Selby-Bigge (ed.), Clarendon Press, Oxford, 1896 [1739], p. 252.

<sup>26</sup> Robinson, 2017, see *supra* note 21.

prudent never to trust completely those who have deceived us even once.<sup>27</sup>

Similar to Plato, Descartes therefore accepts that all knowledge that we acquire from and through sensory perception is likely incorrect. Everything we sense is spurious. Perhaps, there is no shape, no extension, no movement, and also no body.<sup>28</sup> Is there, therefore, anything at all? "Am not I, at least, something?"<sup>29</sup> Here, Descartes's investigation takes a new direction. To keep on doubting one's own existence seemed *logically* impossible to him. "[I]f I conceived myself as something", he wrote, "then I certainly existed".<sup>30</sup> And even admitting that there is some "deceiver of supreme power and cunning [...] constantly deceiving me [...], in that case I too undoubtedly exist, if he is deceiving me".<sup>31</sup> Therefore, the "proposition *I am, I exist*, is necessarily true whenever it is put forward by me or conceived in my mind".<sup>32</sup> In his *Second Meditation*, Descartes explained:

Thought; this alone is inseparable from me. I am, I exist – that is certain. But for how long? For as long as I am thinking. [...] I am, then, in the strict sense only a thing that thinks; that is I am a mind, or intelligence, or reason – words whose meaning I have been ignorant until now. But for all that I am a thing which is real and which truly exists. But what kind of a thing? As I have just said – thinking thing (*res cogitans*).<sup>33</sup>

Descartes's identification of individuals with mind or reason (*res cogitans*), which is to be distinguished from their physical body (*res extensa*), has been fundamental for the majority of philosophical as well as extra-philosophical approaches interested in causes of human actions. These are usually based, alternatively or simultaneously, on three categories of duality relating to the mind-body relationship. In the first place, the outlined duality is *ontological*. It means that I, as a thinking thing, am

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<sup>27</sup> Descartes, 1996, p. 12, see *supra* note 20.

<sup>28</sup> *Ibid.*, p. 16.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, p. 17.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 18.

distinct from my body.<sup>34</sup> The accuracy of the distinction seems self-evident: “[E]ven an unphilosophical man soon finds it necessary to recognize an inner world distinct from the outer world, a world of [...] sensations, of feelings and moods, a world of inclinations, wishes and decisions”.<sup>35</sup>

The ontological duality goes hand in hand with a *metaphysical* one. Indeed, once we admit that there are such things as pains, moods, or wishes occupying the inner world, it seems absurd to believe that these “should go around the world without an owner independently”.<sup>36</sup> A sensation, it has been commonly argued, “is impossible without a sentient being. The inner world presupposes somebody whose inner world it is”.<sup>37</sup> Hence, whereas objects in the outer (physical) world can, but need not be owned by anybody, and yet exist, the very existence of the inner world is conditional upon there being a person whose inner world it is. Each person’s inner world, it has been emphasised, is their “metaphysically private property”.<sup>38</sup>

Lastly, if it seems appropriate to think about the inner world in terms of private property, it also seems natural to suppose that the owner of the property has some privileged access to it.<sup>39</sup> They are, so to say, better situated to apprehend what their inner world consists of than those who, as a matter of course, can regard it only from their outer perspective. The duality at stake here is therefore an *epistemological* one. Only the owner of the inner world is able to gain immediate and non-inferential knowledge of objects which are situated there, whereas anyone else’s knowledge of these objects is either mediate or tantamount to mere guessing.

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<sup>34</sup> “I [that is, my soul, by which I am what I am] am really distinct from my body, and can exist without it”. And although “my whole self” is a combination of my body and mind, which are so “closely joined and, as it were, intermingled” with each other as to form the unity, it remains that “I [...] am nothing than a thinking thing”, *ibid.*, pp. 54 and 56 (words in brackets are from the French version of *Meditations*).

<sup>35</sup> Gottlob Frege, “Thought”, reprinted in Michael Beaney (ed.), *The Frege Reader*, Blackwell, Oxford, 1997, p. 334.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> The term is Wittgenstein’s. See Peter M.S. Hacker, *Wittgenstein: Meaning and Mind, Volume 3 of An Analytical Commentary on the Philosophical Investigations*, Blackwell, Oxford, 1990, p. 46.

<sup>39</sup> *Ibid.*

#### 17.4. The Concept of *Mens Rea* and Wittgenstein's Philosophical Methods

The Cartesian account of mind-body dualism has been influential and in more or less subtle ways still dominates contemporary thought.<sup>40</sup> International criminal law is no exception. The fundamental ontological duality between body and mind already determines the very concept of international crime. Under the Rome Statute, a crime can be committed only if criminally relevant physical behaviour was carried out with a certain state of mind (intent and knowledge). The physical and mental are therefore seen as two separate, though interrelated, entities or elements. For a crime to be committed, they must both be satisfied.

Additionally, the idea of ontological duality between a physical act (*actus reus*) and a mental state (*mens rea*) goes hand in hand with the idea of epistemological and, in a subtler way, also metaphysical duality. A person's state of mind is considered to be part of that person's inner world. Yet the inner world, it is argued, is naturally invisible and inaudible to others.<sup>41</sup> Only an individual whose inner world it is can really know what their inner world consists of. Knowledge of other people, such as court witnesses or judges, is in this respect only mediate.<sup>42</sup> It depends on that individual's physical behaviour as well as other circumstances manifesting themselves in the public 'outer' world – circumstances that anyone can *observe* or otherwise perceive by means of senses and from which a conclusion on one's state of mind can be *inferred*.<sup>43</sup>

The outlined 'Cartesian' picture of the body-mind dualism, however, is not unproblematic. The problem is not so much as, for instance, behaviourists claimed, that the mind is a strange concept and that all psychological events can ultimately be explained in terms of behavioural criteria.<sup>44</sup> In fact, whether we accept the Cartesian idea of the mind as an independent substance, or reduce all mental events or acts to mere physical behav-

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<sup>40</sup> *Ibid.*, pp. 15–16.

<sup>41</sup> Cf. *Prosecutor v. Slobodan Milošević*, Interlocutory Appeal Decision, 18 April 2002, para. 31, see *supra* note 15.

<sup>42</sup> Cassese, 2008, p. 75, see *supra* note 1: "The Court cannot look into the mind to see what is going on there".

<sup>43</sup> *Prosecutor v. Radovan Karadžić*, Judgement, 11 July 2013, para. 80, see *supra* note 16.

<sup>44</sup> Wilfrid Sellars, *Science, Perception and Reality*, Ridgeview Publishing Company, Atascadero, 1991, p. 22.

our, the argument is still embedded in the same mind-body dialectic.<sup>45</sup> Yet, as Wittgenstein emphasised, it is the whole picture of the duality separating the inner from the outer, the mental from the physical, which is profoundly misleading.<sup>46</sup> It is therefore the mind-body dialectic itself that must be eliminated, yet not by proposing new theories substituting for previous ones deemed inconvenient, but by attaining clarity in our fundamental concepts, so that our problem disappears completely.<sup>47</sup>

Wittgenstein argued that “a disorder in our concepts” usually starts with the use of words that stand for the concepts or are otherwise employed when the concepts are applied. The nature of the problem is therefore truly “grammatical”,<sup>48</sup> that is, relating to rules (syntactic or semantic) governing the use of our language. For example, when the concept of *mens rea* is applied in criminal law, we are used to saying that “an accused *had* the intention to” commit a crime or that “*her* or *his* intention was to” commit a crime. And we automatically suppose that the auxiliary verb “to have” or possessive pronouns “her” or “his” in these cases fulfil the same function as they do when we say, for instance, “she *had* a penny in her pocket” or “a penny was in *her* pocket”.<sup>49</sup> That is, we suppose that they always refer to some form of ownership between a person and objects that this person has.<sup>50</sup> Yet the function of (these) words is not necessarily the same on every occasion of their use. What usually misleads us in this respect, Wittgenstein wrote, “is the uniform appearance of words

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<sup>45</sup> Hacker, 1990, p. 29, see *supra* note 38.

<sup>46</sup> Brian McGuinness, *Approaches to Wittgenstein*, Routledge, London, 2002, p. 4.

<sup>47</sup> Ludwig Wittgenstein, *Philosophical Investigations*, in Elisabeth M. Anscombe *et al.* (eds.), Blackwell, 2009, p. 56, para. 133. Indeed, Wittgenstein thought that philosophical problems are conceptual, not factual ones. They arise when we become aware “of a disorder in our concepts” and are solved when these concepts are properly ordered. Respectively, Ludwig Wittgenstein, *Zettel*, G.E.M. Anscombe and Georg H. von Wright (eds.), Blackwell, Oxford, 1998, p. 81, para. 458 and Ludwig Wittgenstein, *The Big Typescript*, Grant Luckhardt and Maximilian A.E. Aue (eds.), Blackwell, Oxford, 2005, p. 309, para. 421.

<sup>48</sup> Wittgenstein, 2009, p. 47, para. 90, *ibid.*

<sup>49</sup> Cf. Hacker, 1999, p. 18, see *supra* note 19.

<sup>50</sup> Gordon P. Baker and Peter M.S. Hacker, *Wittgenstein: Understanding and Meaning, Volume 1 of An Analytical Commentary on the Philosophical Investigations, Part I: Essays*, Blackwell, Oxford, 2005, p. 277.



when we hear them in speech, or see them written or in print".<sup>51</sup> In such cases, the correct use (and understanding) of words is not obvious to us.<sup>52</sup>

Hence, according to Wittgenstein, a source of the problems which preoccupy us when we try to *analyse* theoretical concepts consists of misleading features of the grammar of our language. The source of the problem determines its nature and the nature of the problem determines its solution:

Our inquiry is therefore a grammatical one. And this inquiry sheds light on our problem by clearing misunderstandings away. Misunderstandings concerning the use of words, brought about, among other things, by certain analogies between the forms of expression in different regions of our language. – Some of them can be removed by substituting one form of expression for another; this may be called 'analysing' our forms of expression, for sometimes this procedure resembles taking a thing apart.<sup>53</sup>

It must be emphasised, however, that the point of Wittgenstein's *grammatical inquiry* – in general or when applied to the concept of intentionality – is not to subject a concept to criticism for the mere fact that its content does not conform, partly or fully, to the meaning of words by means of which the concept is referred to in ordinary language. Thus, for example, the concept of the mind as a substance needs not to be rejected simply for the reason that we usually do not speak about the mind in terms of a substance. Rather, the point is to emphasise that theoretical concepts, whether philosophical or legal, are in principle not only expressed in ordinary language, but they are, so to speak, *immersed in language* from which they absorb all misconceptions that its incorrect use typically yields.<sup>54</sup> The aim of the grammatical investigation is to get rid of these misconceptions which otherwise accompany a concept in further instances of its application.

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<sup>51</sup> Wittgenstein, 2009, p. 10, para. 11, see *supra* note 47.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, p. 47, para. 90.

<sup>54</sup> For instance, when Cassese wrote that "an individual alone honestly knows what he is thinking", he did not try to introduce a new concept of intentionality specific to international criminal law. Instead, he unwittingly accepted the concept of thought such as the one we are used to speaking about, that is, the concept of thought that we *have* and to which we also have a privileged access.

It follows that the fundamental assumption, on which Wittgenstein's methods of philosophical investigation rest, is that conceptual problems, such as the one at hand, are in large part rooted in our ordinary language.<sup>55</sup> These problems arise when our forms of language are misinterpreted, rules for the use of words misapplied, that is, when "we are, as it were, entangled in our own rules and this entanglement in our rules is precisely what we want to understand: that is, to survey".<sup>56</sup> Philosophy, Wittgenstein argued, "just puts everything before us, and neither explains nor deduces anything".<sup>57</sup> When philosophers are called upon to deal with a certain concept and with grammatical rules in which words standing for the concept are embedded, they should neither evaluate the rules, nor change them, or even stipulate new rules determining how these words ought to be used. The task of philosophers is in this respect purely descriptive. They must not, as Wittgenstein urged, "interfere in any way with the actual use of language, [...] only describe it".<sup>58</sup> They leave everything as it is.<sup>59</sup>

In sum, treating the problem of intentionality in (international) criminal law in accordance with Wittgenstein's philosophical methods means to accept that:

[O]ur considerations must not be scientific ones. [...] And we may not advance any kind of theory. There must not be anything hypothetical in our considerations. All explanation must disappear, and description alone must take its place. And this description gets its light – that is to say, its purpose – from the philosophical problems. These are, of course, not empirical problems; but they are solved through an insight into the workings of our language, and that in such a way that these workings are recognized – despite an urge to misunderstand them. The problems are solved, not by coming up with new discoveries, but by assembling what we have long been familiar with. Philosophy is a struggle

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<sup>55</sup> Wittgenstein, 2009, pp. 52–53, para. 111, see *supra* note 47.

<sup>56</sup> *Ibid.*, p. 55, para. 125.

<sup>57</sup> *Ibid.*, para. 126.

<sup>58</sup> *Ibid.*, para. 124.

<sup>59</sup> *Ibid.* See also p. 56, para. 128: "If someone were to advance *theses* in philosophy, it would never be possible to debate them, because everyone would agree to them".

against the bewitchment of our understanding by the resources of our language.<sup>60</sup>

### 17.5. Going Down to the Foundations (Problem of Inference)

Wittgenstein's philosophy is undoubtedly ground-breaking in many respects. One reason is that, unlike many philosophers or scientists before him, Wittgenstein does not primarily aim his investigation at offering "real understanding" of problems which puzzle us, but rather at removing "particular misunderstandings" which are the sources of these problems.<sup>61</sup> While the difference between the two approaches may seem subtle, the consequences of the shift are enormous. The typical attitude of philosophers or scientists to problems they try to resolve is, in normal circumstances, to compare existing theories and attitudes pertaining to the problem, accept (implicitly or explicitly) what is taken for granted and focus on what is controversial.<sup>62</sup> Wittgenstein, on the other hand, considers such an approach insufficient. In his opinion, the deepest mistakes are typically made before the relevant debate even begins. Their source lies precisely in what all debaters usually take for granted.<sup>63</sup> Consequently, in order to avoid the mistakes, Wittgenstein urged that one must "go down to the foundations".<sup>64</sup> That is, one must focus not on subjects or causes of a disagreement, but on what all sides agree upon, and challenge that.<sup>65</sup> As he noted, one must first "reveal the source of error, otherwise revealing the truth won't do any good".<sup>66</sup>

What does it mean for international criminal law and, in particular, the concept of *mens rea*? For example, there is an ongoing debate in criminal law on circumstances from which one's intention can be best inferred, and how these circumstances ought to be assessed by a judge in order to achieve a fair conclusion.<sup>67</sup> Yet, as Wittgenstein would point out, already

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<sup>60</sup> *Ibid.*, p. 52, para. 109.

<sup>61</sup> Ludwig Wittgenstein, *Philosophical Grammar*, Rush Rhees (ed.), Blackwell, Oxford, 1974, p. 115, para. 72.

<sup>62</sup> Cf. Thomas S. Kuhn, *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago, 2012, p. 10.

<sup>63</sup> Baker and Hacker, 2005, p. 288, see *supra* note 50.

<sup>64</sup> Ludwig Wittgenstein, *Culture and Value*, Georg H. von Wright (ed.), Blackwell, Oxford, 1998, p. 71.

<sup>65</sup> Baker and Hacker, 2005, p. 288, see *supra* note 50.

<sup>66</sup> *Ibid.*

<sup>67</sup> See Section 17.2. above.

at this moment “[t]he decisive movement in the conjuring trick has been made, and it was the very one that we thought quite innocent”.<sup>68</sup> That is, we focus on the process of proving intentions and we find it innocent to characterise the process as ‘inference’, leaving it until later to investigate what this process precisely consists of. But here we already were wrong, since we have a definite idea of what inference is and “that’s just what commits us to a particular [erroneous] way of looking at the matter”.<sup>69</sup> In particular, to call the process ‘inference’ already presupposes that circumstances, from which the conclusion ought to be inferred, including the perpetrator’s behaviour, are something essentially different from perpetrator’s intentions. That even if we directly observe such behaviour, we cannot be said to also observe the perpetrator’s intentions themselves. That judges have only mediate access to the content of one’s intentions (and must therefore rely on their deductive skills), whereas the perpetrator, under normal conditions, *knows* them and, consequently, can *confess* them. In sum, to say that one’s intentions can be inferred from one’s acts amounts to accepting the whole Cartesian dichotomy between the mental ‘inner’ world and the physical ‘outer’ one.

But why should we call the process of determining and proving one’s intention an ‘inference’? The point is not to deny that in *some* cases the process of determining one’s intentions indeed involves deduction and, accordingly, can be duly called an inference.<sup>70</sup> The point is to say that in most cases, the relation between behavioural expression and what it is an expression of (intention, pain, joy, anger, and so on) is not external and, thus, leaves no space for inference. As Hacker pointed out: one’s inner world is generally not “related to its outward manifestations as an unobservable entity to its causal effects. The relation is internal or grammatical”.<sup>71</sup> To know that a person has a particular intention by observing that person’s behaviour is not a derivative, defective way of finding out. It is

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<sup>68</sup> Wittgenstein, 2009, p. 109, para. 308, see *supra* note 47.

<sup>69</sup> *Ibid.*

<sup>70</sup> For example, one can be found guilty of genocide even if one killed only a single person, provided that the crime took place “in the context of a manifest pattern of similar conduct directed against that group” from which the genocidal intent may be inferred. See ICC, Elements of Crimes, 11 June 2010, Article 6(a) ([www.legal-tools.org/doc/3c0e2d/](http://www.legal-tools.org/doc/3c0e2d/)).

<sup>71</sup> Hacker, 1990, p. 243, see *supra* note 38.

what could be called 'seeing' that another has an intention or even 'knowing directly' that another has an intention and also what this intention is.<sup>72</sup>

This will become clearer if we consider the following two examples. If I see a person shooting another in the head, it would be ridiculous to say that what I do is deduce or otherwise infer from that person's behaviour that they have the intention to kill another. In such a case, I simply see one person killing another, that is, I see the person *manifesting* and *executing* their intention to kill another. I do not infer anything, unless 'knowing by the senses' would always mean 'knowing by inference'. This is however not what the words 'see', 'hear', and so on signify in ordinary or legal language. If I see someone having non-consensual sexual intercourse with another person, I do not say that I 'infer' from the totality of the perpetrator's bodily movements that what the perpetrator is actually doing is raping another person. This would be absurd. But why should it be less absurd to claim that I can *merely* infer from the perpetrator's bodily behaviour (and perhaps other circumstances) that what the perpetrator is actually intending is to rape? Is it not so that "[my] intention lie[s] *also* in what I did"?<sup>73</sup> Indeed, to say that only the perpetrator honestly knows what they are intending, whereas other people (including the victim of the rape) may only find it out by inference, would sound like a cruel joke. As Wittgenstein noted:

In addition to the so-called sadness of his facial features, do I also notice his sad state of mind? Or do I deduce it from his face? Do I say: 'His features and his behaviour were sad, so he too was probably sad'?<sup>74</sup>

### 17.6. The Grammar of Intention

Wittgenstein's remarks on intending are primarily contained in §§ 629–660 of *Philosophical Investigations*. However, considerations relating to the alleged privacy of one's inner world, including the question whether and how this world can be accessed from the outer perspective, also appear earlier in the book, namely in connection with the so-called 'private language argument' (§§ 243–315).<sup>75</sup> As usual, Wittgenstein's investigation

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<sup>72</sup> *Ibid.*

<sup>73</sup> Wittgenstein, 2009, p. 173, para. 644, see *supra* note 47.

<sup>74</sup> Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology: Volume I*, Elisabeth M. Anscombe and Georg H. von Wright (eds.), Blackwell, Oxford, 1998, p. 97, para. 767.

<sup>75</sup> Hacker, 1990, p. 15, see *supra* note 38.

opens with a question: might there be a language in which a person could express his inner experiences (feelings, moods, and so on) for his own use? That is, might there be a language that “another person cannot understand”, because it refers to “what only the speaker can know – to his immediate private sensations”?<sup>76</sup> Wittgenstein, faithful to his methods, does not attempt to answer the question in a straightforward manner. Instead, he starts the inquiry by pointing to some aspects that make the question misleading. He denies, in particular, that inner experiences or activities, such as pains, moods, thinking, wishing, intending, and so on, could properly be said to be ‘private’ in the sense that *only* a person, who lived an experience or engaged in a particular mental activity, can be considered to know what these experiences or activities were:

In what sense are my sensations private? – Well, only I can know whether I am really in pain; another person can only surmise it. – In one way this is false, and in another nonsense. If we are using the word ‘know’ as it is normally used (and how else are we to use it?), then other people very often know if I’m in pain. – Yes, but all the same, not with the certainty with which I know it myself! – It can’t be said of me at all (except perhaps as a joke) that I know I’m in pain. What is it supposed to mean – except perhaps that I am in pain?

Other people cannot be said to learn of my sensations only from my behaviour – for I cannot be said to learn of them. I have them.

This much is true: it makes sense to say about other people that they doubt whether I am in pain; but not to say it about myself.<sup>77</sup>

‘Only you can know if you had that intention.’ One might tell someone this when explaining the meaning of the word ‘intention’ to him. For then it means: that is how we use it. (And here ‘know’ means that the expression of uncertainty is senseless.)<sup>78</sup>

Wittgenstein’s grammatical inquiry thus aims at the meaning of basic propositions that we regularly use when referring to our sensations

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<sup>76</sup> Wittgenstein, 2009, p. 95, para. 243, see *supra* note 47.

<sup>77</sup> *Ibid.*, pp. 95–96, para. 246.

<sup>78</sup> *Ibid.*, p. 96, para. 247.



or intentions. He argued that if we look at these propositions more closely, we realise that in one way they are false, and in another nonsense. First, they are false, because if we use the word 'know' as it is normally used, then other people very often know if I'm in pain or if I have or had a particular intention. For instance, I try to lift a dumbbell, but it is very heavy and I drop it on my foot. I think that everybody would say in this case that I am in pain. Moreover, everyone would be absolutely sure about their words. Everyone who can be said to *know* that a heavy dumbbell fell on my foot can also be said to *know* that I am or was in pain; and to know simply means that "everything speaks in favour [of such a conclusion], nothing against it".<sup>79</sup> If someone would say, for example, "Why do you feel sorry for him? You cannot really know whether he was in pain, you can only surmise it!", it would be considered nonsense or a joke, but not an expression of a legitimate opinion about the 'private' character of our sensations.

In the same vein, if I grasp the dumbbell and move it in a direction away from my foot, in this case too everyone can be said to know that my intention was, first, to move the dumbbell in a direction away from my foot and, second, to get rid of the dumbbell from my foot *by* moving it away.<sup>80</sup> Even if I do not provide any explanation for my behaviour, the maximum possible level of certainty is achieved: everything speaks in favour of such a conclusion and nothing against it. If someone would say, "Ok, I moved the dumbbell in a direction away from my foot, but I did not intend to get rid of the dumbbell from my foot", we would not believe him.

In addition, saying that only I can know whether I had a particular intention or that other people cannot know whether I had this intention "with the certainty with which I know it myself" is nonsense. As Wittgenstein pointed out, it cannot be said of me at all (except perhaps as a joke) that I know I am in pain or that I know I have such an intention. For what is it supposed to mean except that I *am* in pain or that I *have* a particular intention? Indeed, any expression of the form "I know that" keeps its sig-

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<sup>79</sup> Ludwig Wittgenstein, *On Certainty*, Elisabeth M. Anscombe and Georg H. von Wright (eds.), Harper & Row, New York, 1972, p. 2, para. 4.

<sup>80</sup> Cf. Hacker, 2000, p. 242, see *supra* note 4: "An agent *Vs* intentionally if he *Vs* knowing that he is so doing, and does so either because he wants to [...] or has a [...] reason for doing it. An agent may *V* with the intention of *Xing*. In this case the *Ving* may be unintentional or intentional".

nificance only if it is also possible not to know it. Yet can one have an intention or pain without knowing it? The answer must be negative (except, perhaps, for the specific context of psychoanalysis). Imagine, for instance, a judge justifying their verdict on genocide by saying, “Of course you had a genocidal intent, you just did not know it”. Rather, they would say, “Of course you had a genocidal intent, you just deny it”. The sentence “perhaps I have this intention, but I don’t know it” is senseless. On the other hand, it would be perfectly intelligible if a judge says, “Of course, you have or had this intention, I know it”. So contrary to our initial presupposition, what makes sense is that I can know what someone else intends, but not what I myself intend.<sup>81</sup>

Thus, according to Wittgenstein, saying that “only you can know if you had that intention” does not mean that someone else cannot know what I intend, only surmise it. The sentence “only you can know if you had that intention” is not an empirical statement informing us about certain facts. It is a grammatical statement explaining the meaning of the word ‘intention’.<sup>82</sup> Hence, saying that “only you can know if you had that intention” does not entail any information about the “nature” of our intentions (such as about their private character) or about ourselves (for example, that we each have a privileged epistemic access to our intentions); only that we use the word intention precisely in *this* way. To ‘know’ means here that it makes sense to say about other people that they doubt whether something is my intention, but not to say it about myself.<sup>83</sup> It means that as regards me and my intentions the expression of uncertainty

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<sup>81</sup> Wittgenstein, 2009, p. 233, para. 315, see *supra* note 47: “It is correct to say ‘I know what you are thinking’, and wrong to say ‘I know what I am thinking’. (A whole cloud of philosophy condenses into a drop of grammar.)”.

<sup>82</sup> In this regard, “[t]he sentence ‘Sensations are private’ is comparable to ‘One plays patience by oneself’”, see Wittgenstein, 2009, p. 96, para. 248, *supra* note 47.

<sup>83</sup> “Do not say ‘one cannot’, but say instead: ‘it doesn’t exist in this game’.”, see Wittgenstein, 1998, p. 23, para. 134, see *supra* note 47. See also Ludwig Wittgenstein, *The Blue and Brown Books*, Blackwell, Charlottesville, 1998, p. 30: “‘Surely I must know what I wish’. Now compare this answer to the one which most of us would give to the question: ‘Do you know the ABC?’ Has the emphatic assertion that you know it a sense analogous to that of the former assertion? Both assertions in a way brush aside the question. But the former doesn’t wish to say ‘Surely I know such a simple thing as this’ but rather: ‘The question which you asked me makes no sense’. [...] ‘Of course I know’ could here be replaced by ‘Of course, there is no doubt’ and this interpreted to mean ‘It makes, in this case, no sense of talk of a doubt’. In this way the answer ‘Of course I know what I wish’ can be interpreted to be a grammatical statement”.

is senseless, yet “not in the sense that one cannot be uncertain about what he intends, but in the sense that one cannot have an intention and be uncertain what it is”.<sup>84</sup> The sentence “I don’t know what I intend” does not mean that I have a certain intention, but have not yet discerned it. Rather, it signifies that I have no definite intention.<sup>85</sup>

The central issue in §§ 629-660 of the *Philosophical Investigations*, dealing specifically with the concept of intention, is the theme of recollecting what one was going to do or say.<sup>86</sup> Indeed, this is a characteristic feature of humankind: after reaching a certain age, we are ordinarily able to remember not only what we did, but also what we intended to do, regardless of whether or not we actually did it.<sup>87</sup> In criminal law, for instance, an accused may confess: “I remember that my intention was to kill the victim”. Or they can say: “I remember that my intention was not to kill the victim, only to wound her”. In either case, no one would doubt that an accused *can* remember what their intention was. Of course, we can doubt one’s sincerity or suspect the person of lying. Yet lying is already knowing or, at least, believing that things are thus and saying something else which one knows to be false.<sup>88</sup>

Accordingly, Wittgenstein’s investigations into recollecting what one was going to do or say strike at the very heart of the problem of what intentions are. If one can remember what one’s intention is, then intention is precisely what one remembers. Hence, if one would be able to describe what one’s remembering consists of (and there is *prima facie* no reason to assume the contrary), then the investigation may come to its end for at this moment we would already know what one’s intentions are.

It is sometimes argued, for example, that to remember my having a particular intention is tantamount to remembering an activity I was engaged in.<sup>89</sup> Seen from this perspective, the expression “I intended to”

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<sup>84</sup> Hacker, 2000, p. 258, see *supra* note 4.

<sup>85</sup> *Ibid.*

<sup>86</sup> “You were interrupted a while ago; do you still know what you were going to say?”, see Wittgenstein, 2009, p. 172, para. 633, *supra* note 47.

<sup>87</sup> Sometimes, we can also remember our intention, but not our physical or verbal acts whereby the intention was executed. See Wittgenstein, 2009, p. 174, para. 648, see *supra* note 47: “I no longer remember the words I used, but I remember my intention precisely; I wanted my words to calm him down”.

<sup>88</sup> Hacker, 1990, p. 67, see *supra* note 38.

<sup>89</sup> Cf. Hacker, 2000, p. 251, see *supra* note 4.

would be, as a matter of fact, akin to the expression “I planned to”, and “having the intention” to do something could be likened to “having a plan”. This is, however, misleading. As Wittgenstein explains, to say “‘I intend’ does not mean ‘What I am at, is intending’, or ‘I am engaged in intending’ (as one says, I am engaged in reading the newspaper)”.<sup>90</sup> While it makes perfect sense to say, for instance, “I am engaged in reading (the newspaper)”, “I am engaged in planning (a journey, an assault)”, or “I am engaged in thinking (of killing a person)”, the grammar of the expressions “I am engaged in” and “intend” are mutually incompatible. By the same token, we can encourage or order someone to carry out a certain (mental) activity, for example, to imagine a thing or action, to consider it, to think about it, or to plan it. On the other hand, it is grammatically impossible to order someone to intend something, just like it is impossible to order someone to mean something or believe that something is the case. “Is *this* the difference”, Wittgenstein asked, “that the first are voluntary, the second involuntary mental movements? I may rather say that the verbs of the second group *do not stand for actions*”.<sup>91</sup>

Similarly, to recollect one’s own intention is not, according to Wittgenstein, to have the memory of an experience.<sup>92</sup> When we say a sentence such as “For a moment I was going to” it seems as though we had a particular feeling, an inner experience, which was the intention, and we remember it.<sup>93</sup> But what, as a matter of fact, did this experience consist of? If one tries to remember it *quite precisely*, Wittgenstein argued, “[t]hen the ‘inner experience’ of intending seems to vanish again. Instead, one remembers [only] thoughts, feelings, movements and also connections with earlier situations”.<sup>94</sup> However, these thoughts, feelings, or connections surrounding our intentions cannot be assimilated to intentions themselves:

You remember various details. But not even all of them together show this intention. It is as if a snapshot of a scene had been taken, but only a few scattered details of it were to be seen; [...] the rest is dark. And now it is as if I knew quite

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<sup>90</sup> Wittgenstein, 1998, p. 111, para. 598, see *supra* note 74.

<sup>91</sup> Wittgenstein, 1998, p. 10, para. 51 (emphasis added), see *supra* note 47.

<sup>92</sup> “‘I had the intention of...’ does not express the memory of an experience. (Any more than ‘I was on the point of...’).”, see *ibid.*, p. 9, para. 44, *supra* note 47.

<sup>93</sup> Wittgenstein, 2009, p. 174, para. 645, see *supra* note 47.

<sup>94</sup> *Ibid.*

certainly what the whole picture represented. As if I could read the darkness.<sup>95</sup>

Lastly, philosophers, like international lawyers, tend to assimilate one's intentions with one's mental state or state of mind. To find out what intention is would therefore amount to discovering the content of one's mental state.<sup>96</sup> After all, if having an intention is not an action that I engage in, it must be a state, that is, a mental state, in which I am. In Wittgenstein's view, however, none of these options can be recognised as correct. Intention, he argued, is neither an emotion, a mood, a mental state, nor a state of consciousness. "It does not have genuine duration."<sup>97</sup> That is, we do not refer to our intentions (but also to our beliefs, understanding, and so on) in terms of time. When one has a particular intention, for instance, to unlawfully deport a group of people to another country, the intention is not interrupted by a break in consciousness or a shift in attention.<sup>98</sup> If an accused says, for example, "I had the intention of deporting those people", we would not ask him "When did you have that intention? The whole time during the deportation, or intermittently?". The questions would be senseless. One may certainly be interrupted in thinking about the deportation or the planning of the deportation,<sup>99</sup> but one would hardly say that they intended a deportation "uninterruptedly" for a certain period of time. For what would that mean? An interruption of intention, Wittgenstein suggests, is a period of lack of intention, just like an interruption of belief is a period of unbelief (not the withdrawal of attention from what one believes or intends as, for example, when one sleeps).<sup>100</sup> As Hacker noted:

One can intermittently be in a certain mental state, but to intend something intermittently is not to be interrupted in one's intending (as one's state of concentration may be interrupted

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<sup>95</sup> *Ibid.*, p. 172, para. 635.

<sup>96</sup> See Section 17.2. above.

<sup>97</sup> Wittgenstein, 1998, para. 45, p. 9, see *supra* note 47.

<sup>98</sup> Cf. Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology: Volume II*, Georg H. von Wright and Heikki Nyman (eds.), Blackwell, Oxford, 1998, pp. 9–10, para. 45.

<sup>99</sup> Cf. Wittgenstein, 1998, p. 9, para. 50, see *supra* note 47.

<sup>100</sup> Wittgenstein, 1998, pp. 9–10, para. 45, see *supra* note 98.

by a series of telephone calls), but to have an intention, abandon it, resume it, etc., i.e. to vacillate.<sup>101</sup>

### 17.7. Conclusion

Wittgenstein's philosophy of psychology might appear overly negativist. As though he denies the existence of everything: of mind, feelings, mental states or activities, even of intentions. This is, however, only a cursory and misleading view of what Wittgenstein's philosophy signifies. In fact, Wittgenstein does not reject any of these concepts.<sup>102</sup> When he claims that one does not know whether one is in pain or has a particular intention, he does not mean that we are not aware of our pains or intentions. Rather, he draws attention to the fact that knowing about one's having a pain or intention is not the same as knowing about one's having a car. That in the context of referring to our intentions, the verb 'to know', as is normally used (that is, as used for physical objects), is redundant, for to say "I know that I have such an intention" means nothing else than saying "I have such an intention". Similarly, when Wittgenstein denies that we have privileged access to our intentions, because we have them, he does not attempt to remove the expression "to have intentions" from our vocabulary, nor is he willing to doubt that other people *sometimes* do not know what our intentions are. Instead, he attempts to emphasise that to have an intention is not the same as having a physical object;<sup>103</sup> that the grammatical connection between the words 'to have' and 'intentions' must not be mistaken for a metaphysical or empirical one;<sup>104</sup> and, consequently, that the fact that we talk about intentions as though we have them does not entail any metaphysical truth about intentions and/or about our relationship to them. In short, what Wittgenstein attempts to do is reject a particular grammar which, as he wrote, "tends to force itself on us",<sup>105</sup> that is, the

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<sup>101</sup> Hacker, 2000, pp. 252–3, see *supra* note 4. See also Wittgenstein, 1998, p. 9, para. 47, see *supra* note 47.

<sup>102</sup> "And now it looks as if we had denied mental processes. And naturally we don't want to deny them." See Wittgenstein, 2009, p. 110, para. 308, *supra* note 47.

<sup>103</sup> For example, a beetle in a box of which only I can honestly know what kind of beetle it is, for only I can open the box and look inside. Cf. Wittgenstein, 2009, p. 106, para. 293, see *supra* note 47.

<sup>104</sup> Hacker, 1999, p. 27, see *supra* note 19.

<sup>105</sup> Wittgenstein, 2009, pp. 108–9, para. 304, see *supra* note 47.



grammar of “object and name”,<sup>106</sup> according to which the function of a word is primarily to name an object.<sup>107</sup>

Our mistake, Wittgenstein argued, is “to look for an explanation where we ought to regard the facts as ‘proto-phenomena’. That is, where we ought to say: *this is the language-game that is being played*”.<sup>108</sup> Accordingly, we can say that intentions ‘are’, but this does mean that they ‘exist’ as things or objects, be it ethereal things or mental objects. We may say we ‘have’ intention, but that does not entail any form of possession over ‘our’ intention, nor does it mean that only a person, whose intention it is, can truly say what this intention is (as, for instance, only the owner of a strongbox can truly say what the content of their strongbox is). We can also say we ‘know’ what our intention is, but it only means that expressing doubts is in this regard senseless. We may say “I don’t know what I intend”, yet it does not mean that we have a certain intention, but have not yet discerned it. It means that we have no definite intention.

Intentions, Wittgenstein insisted, are embedded “in human customs and institutions”.<sup>109</sup> These also include our (natural) language. We could not have an intention, for instance, to play chess if the technique of the game of chess did not exist.<sup>110</sup> And we could not have the ‘intention’ to do anything, that is, we could not use the concept of intention at all, if the technique of the use of the word ‘intention’, which stands for the concept, did not exist. Having said that, Wittgenstein did not mean that we could not intend to do anything *before* we mastered the relevant technique. A child obviously can intend (for example, an intention to drink from the breast), even if they cannot speak at all.<sup>111</sup> It only means that we cannot use the concept of ‘intention’ without having mastered the rules governing the use of the word ‘intention’ (or other substitutable words and expressions):

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<sup>106</sup> *Ibid.*, p. 107, para. 293.

<sup>107</sup> Cf. Hacker, 1990, pp. 254–5 see *supra* note 38.

<sup>108</sup> “The point is not to explain a language-game by means of our experiences, but to take account of a language-game.”, see Wittgenstein, 2009, p. 175, paras. 654–5, see *supra* note 47.

<sup>109</sup> *Ibid.*, p. 115, para. 337.

<sup>110</sup> *Ibid.*

<sup>111</sup> Cf. *ibid.*, p. 174, para. 647: “What is the natural expression of an intention? – Look at a cat when it stalks a bird; or a beast when it wants to escape”.

How [does anyone learn] to understand the order ‘Throw!’; and how, the expression of intention ‘Now I am going to throw’? Well – the grown-ups may perform before the child, may pronounce the word and straightway throw – but now the child must imitate that. [...] And how does it learn to use the expression ‘I was just about to throw’? And how does one know that it was then really in the state of mind that I call ‘being about to throw’? After such-and-such language games have been taught it, then on such-and-such occasions it uses the words that the grown-ups spoke in such cases, or it uses a more primitive form of expression, which contains the essential relations to what it has previously learnt, and the grown-ups substitute the regular form of expression for the more primitive one.<sup>112</sup>

In sum, the content of the *concept* of intention has no, so to speak, ontological independence *vis-à-vis* our language; just like the content of *our intentions*, for instance, an intention to play chess, is not independent from what it is possible to play or, more generally, to do. We learned the concept in learning language<sup>113</sup> and are able to correctly use the concept only when we have mastered the use of language in which the concept is expressed.

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<sup>112</sup> Wittgenstein, 1998, pp. 33–34, para. 163, see *supra* note 74.

<sup>113</sup> Wittgenstein, 2009, p. 125, para. 384, see *supra* note 47.

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