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ANNEX D
The Concept of Mens Rea in International Criminal Law

The Case for a Unified Approach

Mohamed Elewa Badar
The purpose of the doctrine of law, based on legal systems, has been to
establish the work of the tribunals, including the mens rea, as well as its
importance in the jurisprudence of genocide. The 1948 Convention
devoted to the prevention of the crime of genocide, as defined
in Article 30 of the Convention on the Prevention and Punishment of
the Crime of Genocide, published in light of the study of
the various legal systems, as well as the participation of law in
the international criminal court.
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subjective elements provided for in Article 25(3) sub-paragraphs (d)(i) (aim of furthering the criminal activity of the group) and (d)(ii) (knowledge of the intention of the group) will stand up against any application of the ‘extended form’ of joint criminal enterprise (JCE III).\(^{170}\)

D Article 30 vis-à-vis Superior Responsibility – Article 28

Article 28 of the ICC Statute sets forth two different levels of culpability regarding military and civilians commanders. As for the military commanders, or persons effectively acting as military commanders, Article 28(a)(i) of the ICC Statute assigns both actual knowledge (knew) or constructive knowledge (should have known). The term ‘should have known’ which is akin to negligence – a type of legal fault not necessarily involving a mental state – differs from the language employed in Articles 7(3) and 6(3) of the ICTY and ICTR Statutes. There, the term ‘had reason to know’ is set out as a second alternative of knowledge which has to be proved on the part of the commander. It appears that the drafters of the ICTY and ICTR Statutes unlike those of the ICC Statute have carefully read the travaux préparatoires of Article 86 (then Article 76 – Failure to Act) of Protocol I to the 1949 Geneva Conventions. During the preparatory work of the first Additional Protocol many delegations expressed their concerns regarding the inclusion of the phrase ‘should have known’ in then Article 76.\(^{171}\) Syria submitted an amendment suggesting the deletion of the phrase ‘should have known’.\(^{172}\) This was endorsed by the delegate from Argentina who drew the working group’s attention to the fact that ‘penal responsibility should be interpreted in a very clear sense’ and that the phrase ‘should have known’, as it appears in the ICRC draft, ‘introduced a lack of clarity with regard to the conduct of superiors’.\(^{173}\) He concluded by saying that the phrase ‘would be tantamount to reserving the responsibility for submitting proof, which would be incompatible with the presumption of innocence common to all Latin American legal systems’.\(^{174}\)

At the Rome Conference, and as far as the requisite mens rea for command responsibility was concerned, the United States submitted a proposal in which it distinguished between the levels of culpability required for military commanders and civilian superiors:

An important feature in military command responsibility and one that was unique in a criminal context was the existence of negligence as a criterion of know or should have known that the forces under his control were going to commit a criminal act... The

\(^{170}\) For critical analysis of the third category of JCE see Badar, “Just Convict Everyone!”, ibid.


\(^{173}\) Mr Cerda (Argentina), CDH/1/74 in Levine, ibid, 306.

\(^{174}\) ibid.
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Paragraph 2 of Article 28 assigns a recklessness standard (consciously disregard information) with regard to the civilian superiors. This language is akin to the Model Penal Code § 2.02(2)(c). It is observed that the requirement that the actor consciously disregard the risk is the most significant part of the definition of recklessness under the Model Penal Code. It is this concept which differentiates a reckless actor from a negligent one.183 The negligent actor is a person who fails to perceive a risk that he ought to perceive. The reckless actor is a person who perceives or is conscious of the risk but disregards it.184 Hence, in many offences where the law provides that recklessness is the minimum level of culpability, negligence will not suffice. Accordingly, 'the distinction between “conscious disregard” and “failure to perceive” will often signify the difference between conviction and acquittal'.185

E Article 30 vis-à-vis Mistake of Law and Mistake of Fact

Article 32 of the Rome Statute is the first provision ever in the sphere of international criminal law which expressly recognises mistakes either of fact or law as grounds of excluding criminal responsibility. It is worth noting that the Nuremberg and Tokyo Charters, as well as the Statutes of the two ad hoc Tribunals, lack a general provision on the subject.

Paragraph 1 of Article 32 recognises the well-established principle ignorantia facti excusat. It provides that ‘a mistake of fact shall be ground for excluding criminal responsibility only if it negates the mental element required by the crime’.186 While the first sentence of the second paragraph of Article 32 reiterates the Latin maxim ignorantia juris non excusa, the second sentence of the same paragraph assures ‘a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element’.187 In his commentary on Article 32, Triffterer had this to say:

The difference between mistake of fact and mistake of law is that in principle in the latter case the perpetrator is not mistaken about the existence of a (purely) material element of fact; therefore, mistakes about legal aspects of a crime in general do not touch the material elements or material prerequisites for justification or excuse.188

On closer inspection, one might consider Article 32(1) to be superfluous as long as the default rule of Article 30(1) of the ICC Statute stands as a safeguard for excluding the criminal responsibility in situations where the material elements of

184 ibid.
185 ibid.
186 Rome Statute, Art 32(1).
187 ibid, Art 32(2).