

The Mental Element

IN INTERNATIONAL CRIMINAL LAW



K. JANJAC & D. ANDONI (EDS.)

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INTERNATIONAL CRIMINAL LAW SERIES



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1. INTRODUCTION

“*Actus non facit reum nisi mens sit rea.*”¹

The Latin maxim, which in its many variations is still applicable to modern national criminal justice systems as well as international criminal law, points out that “an act is not criminal in the absence of guilty mind” and distinguishes between the elements of crime; *actus reus* and *mens rea*.² There can be no criminal responsibility without a subjective relationship that could be defined as intent or negligence (*mens rea*) of the individual in question towards his actions (*actus reus*). Regulation of the mental element in the general part of the Rome Statute³ represents a major step forwards in the development of international criminal law, since so far none of the statutes of international courts contained general rules on this matter. Classical concepts of the general part of substantive criminal law were dealt with fragmentally in the context of each individual crime.

This book examines Article 30 of the Rome Statute which contains the default rule on guilt and defines intent as a basic form of it, which requires for the imposition of criminal responsibility both its cognitive and volitional component as it has been developed under the jurisprudence of the *ad hoc* Tribunals.⁴ Furthermore, it presents exceptions to the default rule (the “unless otherwise provided” clause) requiring either a more severe or a milder form of guilt for a specific conduct. It also addresses the question as to whether the definitions of these exceptions in the Elements of Crimes⁵ are in accordance with the principle of legality or whether they represent an expansion of criminal responsibility. The book finally deals with the issue of mistake of fact and mistake of law, mental diseases and defects as well as the institute *actio libera and causa*.

¹ »The act is not culpable unless the mind is guilty.«

² Herring, J. *Criminal Law: Text, Cases and Materials*, Oxford University Press (2012), p. 70

³ Rome Statute of the International Criminal Court, adopted at the Rome conference on 17th July 1998, entered into force on 1st July 2002 [hereinafter Rome Statute]

⁴ The Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgment, July 29, 2004, para. 41; The Prosecutor v. Naser Orić, Case No. IT-03-68-T, Trial Judgment, June 30, 2006, para. 279

⁵ Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record, adopted by the Assembly of States Parties on September 9, 2002

2. GUILT IN INTERNATIONAL CRIMINAL LAW

Statutes of the *ad hoc* tribunals of the United Nations for Yugoslavia⁶ and Rwanda⁷ have not developed a general rule on guilt (neither had the Statute of the International Military Tribunal in Nuremberg⁸ before, nor the Statute of the Special Court for Sierra Leone⁹), but have instead defined a required form of guilt for every crime separately. Thus, the question of how to interpret the content of an “international criminal guilt” arose. The International Criminal Tribunal for former Yugoslavia has been reluctant to take over concepts and their meanings from various national systems, because the terms in different legal systems are related to specific legal contexts and existing domestic case law that gives them special meaning.¹⁰ They would not necessarily be the most appropriate terms and concepts for use in international criminal law. Therefore, they used case law of international courts, international documents, the general meaning of wording and the aim of incriminations, comparative analysis and the deduction of some of the common rules of all systems.¹¹ The Rome Statute of the International Criminal Court, unlike the statutes of preceding courts, regulates guilt in its third part among the General Principles of Criminal Law in Article 30, entitled “Mental element”. It determines the required mental element for all crimes (and not separately or fragmentally as before), which is closer to the common law conception of *mens rea* as described in the former chapter.

⁶ International Criminal Tribunal for the Former Yugoslavia (ICTY), established on 25th May 1993, when the UN Security Council passed resolution 827.

⁷ International Criminal Tribunal for Rwanda (ICTR), established on 8th November 1994, when the UN Security Council passed resolution 955.

⁸ International Military Tribunal, the legal basis for the trials was established by the London Charter on 8th August 1945, trials were held in Nuremberg between 20th November 1945 and 1st October 1946.

⁹ The Special Court for Sierra Leone, established jointly by the Government of Sierra Leone and the United Nations on 16th January 2002.

¹⁰ The Prosecutor v. Delalić, Judgement of the International Criminal Tribunal for the former Yugoslavia, Case no. IT-96-21-T, November 16, 1998, para. 431–435

¹¹ Cassese, A. *International Criminal law*, Oxford University Press (2003), p. 159–162

3. INTRODUCTORY COMMENTS ON GUILT IN THE ROME STATUTE

The general view of The Preparatory Committee on the Establishment of an International Criminal Court was that since there could be no criminal responsibility unless *mens rea* was proved, an explicit provision setting out all the elements involved should be included in the Statute.¹² A clear understanding of the general legal framework is of great importance not only for the Court but for the States Parties and the accused so as to provide guidance, predictability and certainty and to promote consistent jurisprudence on fundamental questions, including the issue of moral culpability or *mens rea*.¹³ Despite the aim of the Preparatory Committee not all elements were included in a single article.

Before analyzing it in detail, the mental element has to be placed in the three-part structure of crimes under international criminal law.¹⁴ The first step is to check whether the perpetrator committed the material elements of the crime (in other words *actus reus*). These include conduct, consequences and other circumstances that are covered by the definition of the crime. We deal with the mental element (*mens rea*), which requires that the material elements be committed with intent and knowledge, in the second step. At this point the exact determination of material elements as conduct, consequences or circumstances is crucial, because each of these characters may be related to a different mental element. The relevant mental element cannot be determined until each material element of a crime is properly characterized.¹⁵ On the third step on the way to criminal responsibility we are checking for grounds for excluding criminal responsibility.¹⁶

¹² Report of the Preparatory Committee on the Establishment of an International Criminal Court, (Proceedings of the Preparatory Committee During March-April and August 1996), U.N. GAOR 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) Vol. I, para. 199

¹³ Piragoff, D.K., Robinson, D. Article 30, Mental Element in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (Munich: C.H.Beck, 2008), margin Nos 1-28, 849-61, p. 850

¹⁴ Werle, G. *Principles of International Criminal Law*, T.M.C Asser Press, p. 95-96

¹⁵ Finnin, S. *Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*. *International and Comparative Quarterly*, 61, pp 325-359, p. 338

¹⁶ Supra note 14

According to Article 30, 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. Therefore (as a general rule) the Rome Statute only incriminates intent and not negligence. Other forms of guilt, such as various forms of negligence and *dolus eventualis*¹⁷ should not fall within the scope of this general rule, as it could lead to misinterpretation of this article in a way that this form of guilt is sufficient for criminal liability of individuals as a general rule.¹⁸ However, we can find them in specific definitions of crimes and in other general principles of criminal law in the Statute.¹⁹ This is pointed out in the first paragraph of Article 30 which begins with the words “unless otherwise provided”. The second and third paragraphs define intent and knowledge. They describe the meaning of these concepts and the required level of culpability (*mens rea*). For example, for a person to act with intent in relation to conduct this person must also mean to engage in this conduct, his carelessness towards the conduct would not suffice. According to the third paragraph, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events; mere suspicion does not suffice.

¹⁷ Rome Statute, Chapter 6.2.3 (*dolus eventualis* within the scope of the default rule)

¹⁸ Supra note 13

¹⁹ For example, in definitions of crimes: “wilful” or “wilfully” in Article 8/2a, treacherously in Article 8/2b (xi) and Article 8/2e (ix); in other general principles of criminal law: “knew or, owing to the circumstances at the time, should have known” in Article 28/1a (i); see more on other forms of guilt in the Rome Statute in Chapter 10.

4. MATERIAL ELEMENTS

Prior to the adoption of the Rome Statute a discussion was held on whether to use the term “physical elements” or the term “material elements” for non-mental elements. One could say that these are synonyms, but nonetheless there is a distinction between the term “physical”, which assumes a certain physicality (such as bodily injury or destruction of property), and the term “material”, which includes psychological (as breaking the victim’s will) and even legal detriments (discrimination by apartheid, wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial) in addition to physicality.²⁰ Yet, there is no definition in the Rome Statute of the *actus reus* or the material elements of the crime, which leaves room for any kind of interpretation.²¹ In a broader definition of material elements (according to Eser), the perpetrator’s intent must cover all the positive elements of the definition of the crime in addition to the absence of grounds for excluding criminal responsibility.²² The only elements that are not necessarily covered with intent, according to this interpretation, are elements of a procedural nature, such as the jurisdiction of the International Criminal Court. This interpretation is relevant in situations in which the perpetrator is mistaken as to the grounds for excluding criminal responsibility.

Assuming that intent must include both the positive elements of the crime (conduct, circumstances and consequences) as well as the absence of grounds for excluding criminal responsibility, the perpetrator’s mistake that he,²³ for example, found himself in a situation of self-defence, would exclude intent and hence his criminal responsibility.²⁴ The final version in the Statute contains the expression “material elements” and the prevailing interpretation of it in the narrow sense is that it comprises of conduct, consequences of this conduct and circumstances (excluding the absence of grounds for excluding criminal responsibility).²⁵ “Conduct” usually means an active act or omission, or a combination of both. The “consequence” or

²⁰ Eser, A. *Mental Elements- Mistake of Fact and Mistake of Law*, in Cassese, A. et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, (2002) 889, p. 908

²¹ Gadirov, E., Clark, R. *Article 9 – Elements of Crimes*, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, (Otto Triffterer, ed., 2nd edn., 2008) at 513

²² *Supra* note 20, p. 908–910

²³ The feminine gender includes the masculine gender and vice versa.

²⁴ See more on this topic in the chapter on Mistake of Fact and Mistake of Law.

²⁵ *Supra* note 20, p. 909

the outcome (also: result, harm) is what follows from the act or omission. "Circumstances" refer to the nature of the prohibited conduct or the consequences, or to the whole situation.²⁶ Some legal systems, especially in the common law have a distinct category of element called "causation". It represents a link between conduct and consequence. However, there is no specific reference to causation in the Rome Statute. It must probably be subsumed in some way in either conduct or consequences.²⁷

²⁶ Supra note 21, p. 513

²⁷ Ibid

5. THE MENTAL ELEMENT IN ARTICLE 30 OF THE ROME STATUTE

5.1. THE COMPLEXITY OF ARTICLE 30

First of all, a few basic concepts that apply must be pointed out, even though they are not explicitly mentioned in the Statute itself. First such concept is the exclusion of strict liability.²⁸ The content of Article 30 requires that the crime be subjectively attributed to the perpetrator, even if the definitions of crimes under Articles 6 and 8 do not require a certain form of guilt. Therefore, Article 30, with its requirement of intent and knowledge, acts as a general and supplementary rule of criminal responsibility according to the Statute.²⁹ This is not only true for the perpetration of the crimes of Articles 6 to 8 of the Rome Statute, but applies also to the various forms of perpetration or participation of Article 25/3 on individual criminal responsibility. This is because Article 25/3, when it does not require a special state of mind at all, does not distinguish between perpetration and participation and therefore presupposes intention and knowledge according to the general rule of Article 30.³⁰ However, the general rule in Article 30 is not absolute. As will be described in greater detail below, the clause “unless otherwise provided” allows for different regulations of the mental element, in an extremity even for its complete suspension. Nevertheless, a step back to strict liability is not probable. Furthermore, it is important that the mental element is established by evidence in each individual case and that it is not presumed.

So, the essential question is: what lies in the terminology of Article 30 of the Rome Statute? According to Eser, the mere title of the article “Mental element” is erroneous and should bear the title “intent”, because it only deals with this form of guilt. The word “intent” represents a volitional component and the word “knowledge” a cognitive component of intent. For example, mistake of law, mistake of fact and command responsibility, which are also types of psychological (mental) phenomenon, are discussed in separate articles.³¹

²⁸ Than, de C., Shorts, E. *International Criminal Law and Human Rights*, Sweet ad Maxwell (2003), p. 3

²⁹ Supra note 20, p. 902–903

³⁰ Ibid

³¹ Rome Statute. Articles 32 and 28/1a (i)

At first glance, it seems that Article 30 is relatively clear. The first paragraph states that 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. Subsequently the second and third paragraphs define intent and knowledge separately. If however, Article 30 is read more accurately, we can see that intent and knowledge do not refer to the same material elements, leading to considerable confusion, since the use of the word “and” could be interpreted in a way that intent and knowledge must always exist simultaneously.³²

According to Article 30, intent relates to conduct (Article 30/2a) and its consequences or awareness that they will occur in the ordinary course of events (Article 30/2b). Knowledge on the other hand relates to the awareness that a circumstance exists or a consequence will occur in the ordinary course of events (Article 30/3). Before the adoption of the Statute a debate took place on whether to use these two terms in a disjunctive (“or”) or conjunctive formulation (“and”).³³

The decision was made in favour of the conjunctive formulation and it was substantiated with the theory that the perpetrator cannot act with intent, if he does not have knowledge of the relevant circumstances. However, if this is true, it becomes quite redundant to even mention knowledge, because according to this theory it is already a component of intent. In any case, the conjunctive formulation is much more appropriate than the disjunctive formulation, according to which the provision could be understood in the way that merely proof of the intention of conduct (without knowledge of the relevant circumstances) or just knowledge of the circumstances and consequences of the crime (without intent) could suffice for criminal responsibility for international crimes.

As mentioned before, intent under the second paragraph of Article 30 relates to the conduct and the consequences of this conduct. A crucial distinction between these two material elements must be made. The relation towards conduct must include the willingness of the perpetrator (the perpetrator must want to commit the act - the volitional component), while it is sufficient in certain cases in the relation towards the consequences, that the perpetrator is aware that they will occur in the ordinary course of events (the cognitive component suffices).

³² See Table 1 below.

³³ Clark, R.S. *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Criminal Law Forum, 291, p. 302