INTERNATIONAL CRIMINAL LAW SERIES

MENS REA AT THE INTERNATIONAL CRIMINAL COURT

GEERT-JAN ALEXANDER KNOOPS

BRILL | NIJHOFF

Mens Rea at the International Criminal Court

By

Geert-Jan Alexander Knoops

BRILL
NIJHOFF

LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Names: Knoops, Geert-Jan Alexander, 1960- author.
Title: Mens rea at the international criminal court / by Geert-Jan Alexander Knoops.
Description: Leiden ; Boston : Brill, 2017. | Series: International criminal law series ; volume 10 | Includes bibliographical references and index.
Identifiers: LCCN 2016041109 (print) | LCCN 2016041444 (ebook) | ISBN 9789004307872 (hardback : alk. paper) | ISBN 9789004307889 (E-Book)
Subjects: LCSH: Criminal liability (International law) | Criminal intent. | International Criminal Court.
Classification: LCC KZ7078 .K59 2017 (print) | LCC KZ7078 (ebook) | DDC 345/.04--dc23
LC record available at https://lccn.loc.gov/2016041109

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 2213-2724
ISBN 978-90-04-30787-2 (hardback)
ISBN 978-90-04-30788-9 (e-book)

Copyright 2017 by Koninklijke Brill NV, Leiden, The Netherlands.
Koninklijke Brill NV incorporates the imprints Brill, Brill Hes & De Graaf, Brill Nijhoff, Brill Rodopi and Hotei Publishing.
All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.
Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA. Fees are subject to change.

This book is printed on acid-free paper and produced in a sustainable manner.

Printed by Printforce, the Netherlands

Foreword

For the courts and tribunals operating in the field of international criminal law, the issue of *mens rea* in the context of assessing individual criminal responsibility is a real challenge and one of the most complex issues. This book offers a comprehensive and in-depth consideration of the issue from a theoretical and practical perspective, with particular emphasis on the definitional elements at the International Criminal Court regarding specific crimes and various modes of liability. Professor Knoops, being a widely-respected scholar in the field of international criminal law and one of the most impressive advocates who appeared before me, provides a valuable addition to the present body of literature and I commend him for his commitment to furthering the discussion on the intricacies of international criminal law.

Judge O-Gon Kwon, ICTY
The Hague, March 2016

Preface

The concept of *mens rea* lies at the heart of all crimes. This book attests to this notion.

One of the most challenging issues of modern International Criminal Law is whether the concept of *mens rea* plays an important role when determining culpability for international crimes and how the International Criminal Court is assessing *mens rea*.

As Perkins and Boyce in their book "Criminal Law"[1] underline: "one of the great contribution of the common law is het conception that there is no crime without a mind at fault."[2] A physical act alone – without the existence of intent – cannot constitute a crime, be it a national or international crime. For instance, the launch of an surface to air missile during an armed conflict which hits a civilian aircraft might constitute a war crime; however if the operator acted in good faith and reasonably believed that the aircraft was an military aircraft of the adversary, the requisite criminal intent – even *dolus eventualis* meaning when one consciously accepts a risk that a certain consequence will occur – might be absent. Indeed, there are "two general components of every crime; one is physical, the other is mental; one is the actus reus, the other is the *mens rea*."[3]

One of the most challenging issues of modern International Criminal Law is the implementation of the concept of *mens rea* as a determination factor for the culpability for international crimes within the framework of the International Criminal Court.

Under the Statute of the International Criminal Court, known as the Rome Statute, the concept of *mens rea* features in a distinct and general provision, article 30,which sets forth two elements for *mens rea* to be proven: intent and knowledge. Yet, as also noticed by Perkins and Boyce, "the type of mind needed for criminal guilt is not the same for all offenses".[4] The same is true for international crimes. This book will delve into these various types of *mens rea*.

A rather underdeveloped subject matter remains the influx of neurosciences within International Criminal Law when it concerns the determination of the requisite *mens rea*. In 1982, Perkins already observed that:

---

1 Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* (3rd ed. Mineola: The Foundation Press, 1982).

2 *Ibid.*, 828.

3 *Ibid.*, 831.

4 *Ibid.*, 829.

此为试读,需要完整PDF请访问: www.ertongbook.com

> [a]s more is learned about human conduct in general, and about methods of regulating and controlling such conduct, many changes in the general administration of criminal justice may be expected.[5]

Within the ICC system, defences which coalesce with the state of mind of the defendant are limited to for example mental disease and intoxication. In this respect the ICC is yet to be confronted with the emerging area of neurosciences which development already emerges in criminal cases on a national level in various countries around the world. However, it is to be seen whether the emerging relevance of neurosciences to determine *mens rea* in domestic criminal cases, will feature within the ICL arena. The magnitude of the core crimes of the ICC might prevent this influx of neurosciences for legal-political reasons. Despite this expectation it is worthwhile to ascertain the potential implications of neurosciences for International Criminal Law. This is why this book also delves into this topic. The chapters dedicated in this book to this potential fusion of two different disciplines, may be seen as a first step.[6]

Amsterdam, February 2016

5 *Ibid.*, 828.

6 On this topic, see also Chapter 8 part 7 in Geert-Jan Alexander Knoops, *Defenses in Contemporary International Criminal Law 2nd ed.* (Leiden: Martinus Nijhoff Publishers).

Acknowledgements

I am indebted to my international criminal law mentors, M. Cherif Bassiouni and William A. Schabas. My colleagues at Knoops' lawyers in Amsterdam deserve gratitude for their support and trust. Ms. Evelyn Bell, researcher at Knoops' lawyers until late 2015, performed a masterly task in preparing the text at its various stages and Mr. Sylvain Clerc, researcher at our law firm as of late 2015, for finalizing this book. I am also indebted to my colleagues Ms. Eva Vogelvang, attorney-at-law at Knoops' lawyers and Ms. Karien van den Doel, criminologist and researcher at our firm. Ms. Bell, Ms. Vogelvang, Ms. Van den Doel and Mr. Clerc were instrumental in collecting the relevant jurisprudence and academic sources that shaped this publication in its present form. Without their considerable support and input this book could not have been published. I would also like to show gratitude to the Brill Publishing Company that gave me the opportunity to write another book for which I thank the staff of Brill, especially Bea Timmer.

I also thank my academic friends and colleagues from the University of Amsterdam (the Netherlands) at which I hold a chair as professor Politics of International Law by special appointment since April 2015. I would also like to pay tribute to Shandong University (Jinan, China), which I am affiliated with as a visiting professor of International Criminal Law since October 2013, for their inspiration and trust. This position at Shandong University could not have materialized without the academic support of my colleague and friend Tom Zwart, professor of Human Rights Law and director of the School of Human Rights research at Utrecht University. Finally, I owe gratitude to my legal partner and wife Carry, whose inspiration and support is of indispensable value to my work.

Amsterdam, 20 June 2016

Contents

此为试读,需要完整PDF请访问: www.ertongbook.com

CHAPTER 1

Introduction

1.1 Rationale of *Mens Rea* in International Criminal Law

Central to domestic criminal and international criminal law is the interpretation of the behavior of human beings. Even when keeping the distinction in international criminal law between principal and accessory criminal liability in mind, the criminality of all such individuals is contingent upon a certain mental stage, referred to as the mental element of *mens rea*. Absent such mental stage no criminal offence can be imputed to a human being. From this perspective, *mens rea* serves as a substantive protective mechanism to wrongful convictions. The *mens rea* requirement is reflected in the Latin maxim: *actus non facit reum nisi mens sit rea*, meaning that "an act does not make a person guilty of a crime, unless the person's mind be also guilty".

In early law systems, *mens rea* was not always required to establish criminal responsibility. As noted by the US jurist Henry Wigmore:

> The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer; the owner of an instrument which caused harm was responsible because he was the owner, though the instrument had been wielded by a thief; [...] one who merely attempted an evil was not liable because there was no evil result to attribute to him; a mere counselor or instigator of a wrong was not liable, because the evil was sufficiently avenged by taking the prime actor.[1]

The causing of injury was central to determining whether one could be held criminally responsible, regardless the blameworthiness of the "doer". The requirement of *mens rea* started to gain importance between the years 1200 and 1500, as the imposition of punishment and the compensation of victims became distinguished, or, as crime and tort became two distinguished concepts.[2]

1 Henry Wigmore, "Responsibility for Tortious Acts: Its History," *Harvard Law Review* 7, 6 (1894), cited in Eugene J. Chesney, "Concept of Mens Rea in the Criminal Law," *Journal of Criminal Law and Criminology* 29, 5 (1939): 628.

2 David J. Seipp, "The Distinction Between Crime and Tort in the Early Common Law," *Boston University Law Review* 76 (1996): 59; Paul H. Robinson, "Mens Rea," in *Encyclopedia of Crime*

© KONINKLIJKE BRILL NV, LEIDEN, 2017 | DOI 10.1163/9789004307889_002

Christian thoughts on *mens rea* influenced the development of this concept into common law systems. Firstly, the church conveyed the message that physical misconduct was the result of spiritual failure to a wide audience. Secondly, clerics were able to influence governmental policies, because they were among the few who could write and read and because of the church's own political power.[3] Thirdly, the church had its own courts for trying clergy, and, in the sixteenth and seventeenth century, started to apply the notions of *mens rea* in its courts.[4] Examples of determining a person's blameworthiness on the basis of his knowledge or mental state can be found in the Bible. For example, in Joshua 20 it can be read:

> Designate the cities of refuge, of which I spoke to you through Moses, that the manslayer who kills any person unintentionally, without premeditation, may flee there, and they shall become your refuge from the avenger of blood.[5]

Similar notions on *mens rea* are, however, also found in law systems without a history of Biblical dominance.[6] Around the sixteenth and early seventeenth century, the term *mens rea* started to appear in criminal law treatises.[7] At that time, *mens rea* was loosely defined. If a person intended to wound a person, but unintentionally killed his victim, he was deemed to have the requisite *mens rea* to hold him criminally responsible for murder.[8] In modern criminal law systems, a distinction is made between perpetrators who intended to kill and those who did not intend this consequence. The notion of *mens rea* revolves around the distinction between a crime and an innocent mistake. International criminal law practice still faces several important questions; how is such a distinction made? How does one determine an accused's *mens rea ex post facto*? What if the death of the victim was an unintended, yet reasonable

---

and Justice, ed. Joshua Dressler (University of Michigan, 2002), 995–1006. Available at SSRN: http://ssrn.com/abstract=661161.

3 Robinson, "Mens rea," 996.

4 *Ibid.*; Finbarr McAuley and Paul McCutcheon, *Criminal Liability: A Grammer* (Round Hall Ltd., 2000), 18–19.

5 Joshua 20: 2–3 (NASB).

6 Robinson, "Mens rea," 996.

7 Gerry Johnstone and Tony Ward, *Law and Crime. Key Approaches to Criminology* (London: SAGE Publications Ltd., 2010), 41.

8 *Ibid.*

foreseeable consequence of the perpetrator's intention to wound the victim? This book will address all these questions, while paying particular attention to the development of *mens rea* before the International Criminal Court.

1.2 Contemporary *Mens Rea* Controversies

Criminal intent – a term which is also interchangeably used with mental element – is one of the most controversial principles in international criminal law. In 2014, the controversial nature thereof was exemplified by the acquittal for both premeditated and *non*-premeditated murder of the South African para-athlete Oscar Pistorius who was charged with murdering his girlfriend Reeva Steenkamp. His defense pertained to having mistakenly shot his wife at night, assuming that an intruder had entered his premises.[9]

On 11 September 2014, the South African Judge Thokozile Masipa delivered her verdict and convicted Oscar Pistorius for culpable homicide. He was acquitted for the more serious murder charge, because, according to the judge, *dolus eventualis* could not be proven. According to this legal concept, a defendant may incur criminal responsibility on the basis of *dolus* for the foreseeable consequences of his actions and his or her willingness to accept these risks. Judge Masipa outlined the criteria related to criminal liability as outlined in the South African *S v Mtshiza*[10] case:

> [N]owadays criminal liability is not regarded as attaching to an act or a consequence unless it was attended by mens rea. Accordingly if A assaults B and in consequence B dies, A is not criminally responsible for his death unless:
>
> a) He foresaw the possibility of resultant death, he had persisted in his deed, reckless, whether death ensued or not
>
> b) He ought to have foreseen the reasonable possibility of resultant death.
>
> In a) the mens rea is the type of intent known as dolus eventualis and the crime is murder.
>
> In b) the mens rea is culpa and the crime culpable homicide.[11]

9 *The State v. Pistorius*, Case No.: CC113-2013, Judgment, 12 September 2014, p. 3284.

10 S v Mtshiza 1970 (3) SA 747A.

11 *Ibid.*, cited in *Pistorius*, Judgment, p. 3324.

Judge Masipa concluded that the evidence failed to prove that Pistorius had the requisite intent to kill:

> In the present case the accused is the only person who can say what his state of mind was at the time he fired the shots that killed the deceased. The accused has not admitted that he had the intention to shoot and kill the deceased or any other person for that matter. On the contrary, he stated that he had no intention to shoot and kill the deceased. The court is however entitled to look at the evidence as a whole and the circumstances of the case to determine the presence or absence of intention at the time of the incident.[12]

The judgment in this regard was heavily criticized by South African scholars as having no sound legal basis. Legal precedents in South Africa dictate that "[i]f you point a firearm at someone and shoot, then you intend to kill them".[13] As outlined by the legal scholar Pierre de Vos:

> In South African law it is not a valid defense to claim that you did not have the intention to kill X because you had in fact intended to kill Y and had killed X by mistake. Thus if Pistorius had intended to kill an intruder (and not Steenkamp), he would still be guilty of murder as long as the state had proven beyond reasonable doubt that he had intended to kill the person behind the door whom he might (or might not) have thought to be an intruder.[14]

Yet, this observation does negate the defense of mistake of fact, which erases the accused's *mens rea*.[15] The *Pistorius* case is but one of the many examples that illustrates the ambiguous nature of *mens rea*. The overturning of the *Pistorius* verdict by the South African Supreme Court of Appeal on the 3 December 2015 which was based largely on the interpretation of *dolus*

---

12 *Pistorius*, Judgment, p. 3326.

13 "Pistorius verdict has scholars and critics thumbing Latin dictionary," *South Chinese Morning Post*, 14 September 2014, accessed 21 October 2014, http://www.scmp.com/news/world/article/1591849/pistorius-verdict-has-scholars-and-critics-thumbing-latin-dictionary.

14 Pierre de Vos, "Pistorius and dolus eventualis: do the facts support the finding?," *Daily Maverick*, 11 September 2014, accessed 21 October 2014, http://www.dailymaverick.co.za/opinionista/2014-09-11-pistorius-and-dolus-eventualis-do-the-facts-support-the-finding/.

15 See Chapter 9.

eventualis further illustrates the complexity of the concept of *mens rea* in present day criminal law. The bench ruled that:

> the accused ought to have been found guilty of murder on the basis that he had fired the fatal shots with criminal intent in the form of *dolus eventualis*. As a result of the errors of law referred to, and on a proper appraisal of the facts, he ought to have been convicted not of culpable homicide on that count but of murder.[16]

Consequently, Pistorius was convicted of murder and was sentenced to six years imprisonment.

At the international criminal tribunals, the implications of the *actus reus* and *mens rea* – both legally and politically – can be considerable. An example is the acquittal of General Momčilo Perišić by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in 2013 for alleged war crimes and crimes against humanity.[17] From about 26 August 1993 until 24 November 1998, Perišić was the chief of the General Staff of the Yugoslav Army (VJ).

The fact that the acquittal relied on a majority ruling by the ICTY Appeals Chamber is self-explanatory. Importantly, the majority held that the military assistance as such facilitated by General Perišić to the war in Bosnia to Bosnian-Serb forces, did not constitute a war crime or crimes against humanity.[18] The Appeals Chamber held that the *actus reus* element of aiding and abetting was not proven beyond reasonable doubt.[19] In this case, the acquittal thus pertained to the interpretation of the *actus reus* condition which required that the aider and abettor's acts were "specifically directed" at committing the principal crimes, if the accused aider and abettor was remote from the actions of the principal perpetrators. The majority found that it could not be established beyond reasonable doubt that the acts carried out by Perišić were "specifically directed to assist, encourage or lend moral support to the perpetration of [the] certain specific crime[s]".[20]

Just a few months later, the Special Court for Sierra Leone Appeals Chamber distanced itself from this interpretation, holding that "specific direction" was

16 *Director of Public Prosecutions, Gauteng v. Pistorius,* Case No. 96/2015, Appeals Judgment, 3 December 2015, para. 55.

17 *Prosecutor v. Perišić,* Case No.: IT-04-81-A, Appeals Judgment, 28 February 2013.

18 *Ibid.*

19 *Ibid.*, para. 73.

20 *Ibid.*

not a requirement of the *actus reus* of aiding and abetting.[21] Almost a year after the ICTY Appeals Chamber ruling in the *Perišić* case, the ICTY Appeals Chamber explicitly rejected specific direction as part of the *actus reus* of aiding and abetting.[22] This view was repeated in the appeal judgment of the Appeals Chamber of the ICTY in the *Stanišić and Simatović* case.[23]

Although the *Perišić* case revolved around the *actus reus* of aiding and abetting war crimes, the element of "specific direction" also has a connotation with the mental element. Specific direction inheres both an objective element (were the acts aimed at facilitating war crimes) and a subjective element; without a certain "will" it is hard to image to "specifically direct".

Apart from dogmatic, societal and political dimensions of the application of *mens rea* in law practice, one may conclude that this principle operates in order to prevent individuals from wrongful convictions. This could be perhaps one of the most notable rationales of *mens rea*.

1.3 Composition of Research

This book commences in Chapter 2 with outlining the definitional aspects of *mens rea* at the *ad hoc* tribunals, as well as general notions of *mens rea* as applied before national courts. The *mens rea* requirements for the specific liability modes applied at the *ad hoc* tribunals will be examined. Chapter 3 will discuss definitional aspects of *mens rea* at the ICC, and in particular the *mens rea* requirements for the specific liability modes listed in article 25(3) ICCSt., as well as the general "intent" and "knowledge" requirements of article 30 ICCSt. Chapter 4, 5, 6 and 7 address the *mens rea* requirements for the crimes listed in the Rome Statute, respectively, genocide, war crimes, crimes against humanity and the crime of aggression. Since the case law of the ICC *vis-à-vis mens rea* is still at its infancy, a review of customary international law or the standards promulgated by the *ad hoc* tribunals – which is often based on an analysis of customary international law – will follow. Chapter 8 will go into *mens rea* requirements for political speeches. In some cases, certain speeches are said to be catalysts of international crimes. Therefore, it is of relevance to examine how the accused's intent could be construed. Finally, the book will end with a discussion of *mens rea* defenses in Chapter 9.

---

21 *Prosecutor v. Taylor*, Case No.: SCSL-03-01-A, Appeals Judgment, 26 September 2013.

22 *Prosecutor v. Šainović et al.*, Case No.: IT-05-87-A, Appeals Judgment, 23 January 2014.

23 *Prosecutor v. Stanišić and Simatović*, Case No.: IT-03-69-A, Appeals Judgment, 9 December 2015.

此为试读,需要完整PDF请访问: www.ertongbook.com