

the concept of *mens rea* in international criminal law

the case for a unified approach

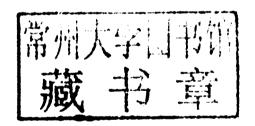
MOHAMED ELEWA BADAR

with a foreword by PROFESSOR WILLIAM SCHABAS and an epiloque by PROFESSOR ROGER CLARK

The Concept of *Mens Rea* in International Criminal Law

The Case for a Unified Approach

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FOREWORD

Actus non facit reum nisi mens sit rea is helpfully rendered, by 'Google Translate', as: 'An act does not make the person guilty unless the mind be also guilty.' I first heard of the idea several decades ago when an activist academic friend who was also quite a talented amateur lawyer advanced the concept in the magistrates' court as a basis for anti-war demonstrators charged with disturbing the peace to take the stand in their own defence in order to make political speeches. When the judge challenged them as to the relevance of their motivation, which was to oppose American involvement in Viet Nam, the clever answer was that the absence of a guilty mind was surely germane to the case as it was to all criminal justice matters. The argument never led to an acquittal, but some judges were left unsettled by the argument and let the testimony proceed.

Like most people trained in the law, the local magistrates knew that *mens rea* was a sacred principle in criminal law. Their understanding did not appear to go much further. They did not regularly deal with trials of serious crimes where distinctions between negligence, recklessness and full intent might be more likely to arise. A nuanced discussion of the mental element of crime rarely surfaced elsewhere than in landmark rulings of the Supreme Court and the Courts of Appeal. Inevitably, sophisticated explanations in the rulings of the highest courts were subsequently transformed into little more than slogans so that they could be used by lawyers and judges, and dutifully recited by students in bar school examinations.

After a lull of several decades, international criminal law began to revive in the early 1990s. When in 1993 the Secretary-General of the United Nations proposed a draft statute and accompanying commentary for what became the International Criminal Tribunal for the former Yugoslavia to the Security Council in 1993, nothing was said about the mental element of crime. Presumably it was assumed that judges would know how to deal with the matter. It soon became evident that the limited volume of existing case law did not offer much help.

The post-war trials at Nuremberg and Tokyo as well as isolated national cases like *Eichmann* formed the basis of initial understandings of general principles including the *mens rea* requirement. In reality, there was precious little to go on. The International Military Tribunal only came close to considering the concept when it dealt with the fitness to stand trial issues that arose with defendants Hess and von Krupp. Furthermore, some of the accused had suggested that they lacked criminal intent because they were only following orders, to which the judges replied that this excuse was formally excluded by the enabling statutes. When the accused suggested that they had behaved as vehicles for government policy, the

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judges famously responded that 'crimes against international law are committed by men, not by abstract entities'.

The attention to the matter remained relatively perfunctory, however, until in 1994 the General Assembly established an Ad Hoc Committee to study the draft statute of the future International Criminal Court. For the first time in international criminal law, there was considerable momentum for a codification of general principles. A point-form outline indicating the matters to be addressed included 'Mens rea' as one of its headings. This was followed by a list of terms: 'Intention (culpa, dolus/intentionally, knowingly, recklessly/dolus eventualis, gross negligence); General intention – specific intention? (motives)'. Most of the lawyers involved in these discussions would have been familiar with some of the vocabulary, but not all of it. This was a multi-cultural nomenclature, drawing upon notions used in different legal traditions. The more well-informed understood that dolus eventualis and gross negligence, for example, were not actually exact translations.

Great attention to the matter followed. In the course of several sessions of the Preparatory Committee, specialists searched for a text on which some consensus might be reached. Some genuinely desired that a common standard be set out, melding the approaches used at the national level. There were significant schools of thought regarding the general perspectives of the common law and the Romano-Germanic and Islamic traditions, but it became evident that even within a particular system, there were huge differences. The common law in Australia does not always view the issue of *mens rea* in the same way as it does in the United States, Ireland and India. And even within Australia and the United States, where criminal law falls largely within the jurisdiction of the constitutive federal units, there are variations.

This debate eventually led to a dedicated provision on the mental element in the Rome Statute. It begins with the words 'Unless otherwise provided', an exception whose scope will be debated by judges for decades to come. Article 30 of the Rome Statute goes on to state 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'. An explanation is offered for both 'intent' and 'knowledge'.

Of course, the Rome Statute's definitions of crimes, as well as the modes of liability, contribute further. The immutable definition of genocide, taken without significant alteration from the 1948 Convention, sets out a crime that must be perpetrated with 'intent to destroy'. The more lengthy provision on crimes against humanity requires acts to be perpetrated 'with knowledge' of a widespread or systematic attack on a civilian population. Some of the war crimes must be committed 'wilfully'. Further guidance may be drawn from a secondary instrument, the Elements of Crimes.

Alongside the International Criminal Court, whose case law is only beginning to explore the scope of the mental element, is an increasingly fertile discussion of dolus, specific intent, motive and related notions at the United Nations ad hoc

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tribunals and the various hybrid institutions. The debate is also taking place before national courts where international crimes figure increasingly on the docket.

Mohamed Elewa Badar has taken this complex landscape of *mens rea* at the international level and prepared a thorough, well-structured monograph. Dr Badar's rich grasp of international criminal law is uniquely informed by an extensive knowledge of comparative law. He masters several of the relevant languages, including Arabic and German, and in this respect alone he is the envy of academic commentators who are forced to work with simplistic translations. This book is destined to become an indispensable tool for lawyers and judges at the international tribunals.

William A Schabas Professor of international law Middlesex University

PREFACE

This book is the culmination of more than a decade's work and research, and consists of my analysis and observations on substantive criminal law issues with which I have been struggling during my work at the Egyptian judiciary, my work with the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia and throughout my participation in the judicial reform programme of the Islamic Republic of Afghanistan.

During my work at the Public Prosecution Office in Egypt I was frequently confronted with the illusive concept of mens rea. In April 1998, a fatal car accident was reported to the Office of the North Court of Alexandria, Egypt. The defendant who was driving a bulldozer had crashed into the victim's car causing some serious damages. The defendant realised that he would be in trouble if the traffic police arrived and asked about his driving licence. He tried to avoid arrest by fleeing the scene of the incident, but the victim (V) stepped in front of the bulldozer in an attempt to prevent him from escaping. The defendant continued driving and V took a few steps backwards but then grabbed onto the left-hand door of the bulldozer in a last attempt at stopping him. The defendant tried to push him away, but when that failed, continued driving regardless, until eventually V fell off the bulldozer and was killed by its back tyres. The defendant was arrested and when confronted with the evidence he admitted that he drove off in the bulldozer with the victim clinging onto it but denied having any intention to kill him. The case was assigned to me in my capacity as the public prosecutor for the Muharrambek district, Alexandria, In preparing the indictment, I found that the facts of the case did not fall under any of the provisions of the Egyptian Penal Code (EPC). I could not indict him under Article 234 of the EPC 'Whoever kills a person deliberately without premeditation [...]', as the evidence indicated that this was not a deliberate murder. On the other hand, as some of you will agree, this was not merely a case of reckless driving which resulted in the death of a pedestrian as stated in Article 238 'Whoever causes by mistake the death of another person, as a result of his neglect, imprudence, carelessness [...]'. The last resort was to indict him under Article 236 of the EPC 'Whoever wounds or beats someone on purpose ... without meaning to kill, but doing that had led to the death [...]' but it was difficult to prove that V was assaulted by the defendant while clinging onto the bulldozer.

I came to the conclusion that a written code was perhaps not the most satisfactory approach to the complex issue of *mens rea*; due to their rigid nature, such codes fail to cover all possible scenarios that may arise for consideration before prosecutors and judges. They require facts to be moulded to fit the parameters of their provisions and leave little room for unpredicted scenarios.

I continued seeking clarification as to the concept of *mens rea* while working in other positions. I also had the chance to familiarise myself with other legal systems and explore the intricate rules of the guilty mind from different perspectives.

During my post graduate studies, I had the chance to work as a legal intern at the Appeals Section of the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the former Yugoslavia (ICTY). It was a good opportunity to work with lawyers who represented both common and continental legal systems and this added to my comparative criminal law skills. I am grateful to Norman Farrell of the OTP for his guidance and most valuable supervision during my short term with the ICTY.

My participation in the judicial reform of the Islamic Republic of Afghanistan provided me with a great opportunity to sharpen my knowledge of the Islamic legal tradition. I was privileged to lecture more than 450 Afghan magistrates on comparative criminal law and to benefit from their expertise in return. I am most grateful to Professor Cherif Bassiouni of DePaul University, Chicago for allowing me such an opportunity.

Two short study visits to Beijing in 2008 and 2009 provided me with a basic knowledge of Chinese criminal law. I am greatly indebted to Ms Bi Yi of the China University of Political Science and Law for her assistance, especially for her preparatory work and translation of relevant parts of textbooks and commentaries on the Chinese Criminal Code.

In acquiring knowledge of the German legal system, particularly the concept of crime in German criminal law, I depended on the generous guidance of my colleague, Judge Dr Nora Karsten of the District Court of Hamburg.

In gathering materials, I was fortunate to have the opportunity to work with the consummately professional librarians at the National University of Ireland (NUI), Galway. The Special Collection section at NUI, Galway allowed me to access old and rare materials which assisted me in writing the evolution of the *mens rea* concept in common law jurisdictions.

While researching the theory of *mens rea* and writing this book, it was necessary to seek advice and guidance from a great number of people. I was constantly astounded by the generosity of the scholarly and legal community. I am grateful to Michael Bohlander, Ray Murphy, Otto Triffterer, William Schabas, Sharon Williams, Kai Ambos, Carsten Stahn, Roger Clark, Larissa van den Herik, Fabián Raimondo and Elies van Sliedregt.

At this point I would particularly like to acknowledge the generous research assistance of Polona Florijančič of Brunel Law School, who worked tirelessly editing and commenting on several chapters of the book. A number of others have also generously read chapters of this book and commented on them. I would like to thank Dr Noelle Higgins of the National University of Ireland, Galway for her assistance and comments. I am also grateful for the kind support of Katherine Mills of Brunel Law School who read through the entire monograph at very short notice. Their attention has greatly improved this work, and any remaining errors are entirely my own.

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Much of this research was done in Ireland in 2002 and 2007, and I would like to thank Dr Saber El Safty and John and Ann Cummins for their very kind support and encouragement. I would also like to thank Mohamed El Zeidy, Aly Mokhtar, Vivienne O'Connor, Lorraine Finn and all my colleagues and friends at Brunel Law School.

Much gratitude goes to the excellent editorial skills of Ms Melanie Hamill and Ms Anne Bevan, copy editor at Hart Publishing. Special thanks go to Mr Richard Hart, Mr Tom Adams, Ms Rachel Turner and Ms Emma Swinden as they have all been a pleasure to work with.

Last but not least, words cannot express my love and thanks to my wife, Patricia Gawenda, to my daughter, Mariam Elewa, to my in-laws Max and Ruth Gawenda, and to my sister Professor Lamia Salah Elewa.

Mohamed Elewa Badar

London, 10 December 2012

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