

PUBLIC
ANNEX F

M. E. Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing 2013)

Mens Rea in Common Law Jurisdictions

As far as *mens rea* is concerned, there are two important questions that need to be resolved. The first is whether the principal must be aware of the nature of his agent's innocence? According to *Tyler and Price*,²²¹ it appears unnecessary for a principal to believe or know that his agent is in some way innocent. Smith's thoughtful explanation of the principal's mental state vis-à-vis the nature of his agent's innocence merits lengthy quotation:

Where, as is usual, *P* [principal] acts to achieve a particular objective through the medium of *A*'s behaviour, it should make no difference that *P*, for example, mistakenly believes *A* to fully comprehend the nature of the situation. *P*'s misconception of the quality of his own liability as being secondary should not inhibit his conviction as a principal. This being so, *a fortiori*, *P*'s mistake or ignorance as to the nature of *A*'s 'innocence' should, similarly, not affect his liability as a principal. Therefore, if *P* believes he is using a 15-year-old lunatic to steal, whereas, in reality, the agent is a physically precocious 9-year-old, then *P*'s liability should remain unaffected.²²²

In cases where *A* did not intend the proscribed act which *P* had procured him to do, this does not affect the principal's criminal responsibility. In *R v Cogan and Leak*,²²³ *L* forced his wife to have sexual intercourse with *C*. Subsequently *C* was charged with rape, and *L* was charged with aiding, abetting, counselling and procuring *C* to commit rape. However, *C* was acquitted of rape on it appearing that he did not know that *L*'s wife was not consenting to the intercourse. *L* was convicted and appealed. The doctrine of innocent agency was applied and the Court of Appeal held that *L* could have been the one indicted as a principal offender:

In the language of the law the act of sexual intercourse without the wife's consent was the *actus reus*: it had been procured by *Leak* who had the appropriate *mens rea*, namely, his intention that *Cogan* should have sexual intercourse with her without her consent. In our judgment it is irrelevant that the man whom *Leak* had procured to do the physical act himself did not intend to have sexual intercourse with the wife without her consent. *Leak* was using him as a means to procure a criminal purpose.²²⁴

B Secondary Participation – Aiding, Abetting, Counselling or Procuring

Article 38 of Stephen's *Digest of the Criminal Law* defines 'principals in the second degree' as follows:

Whoever aids or abets the actual commission of a crime, either at the place where it is committed, or elsewhere, is a principal in the second degree in that crime. Mere presence on the occasion when a crime is committed does not make a person a principal in

²²¹ *Tyler and Price* (1883) 8 C & P 616, 172 ER 643.

²²² Smith, above (n 218) 97.

²²³ *R v Cogan and Leak* [1976] 1 QB 217 (CA).

²²⁴ *ibid.*

Accessorial Liability

the second degree, even if he neither makes any effort to prevent the offence or to cause the offender to be apprehended, but such presence may be evidence for the consideration of the jury of an active participation in the offence. When the existence of a particular intent forms part of the definition of an offence, a person charged with aiding or abetting the commission of the offence must be shown to have known of the existence of the intent on the part of the person so aided.²²⁵

The natural meaning of to 'aid' is to give help, support or assistance, whereas 'abet' means to incite, instigate or encourage. To 'counsel' means to advise, solicit or encourage. It has been observed that the difference between abetting and counselling is that the former connotes incitement at the time of the offence, whereas the latter connotes incitement at an earlier time.²²⁶ In the words of *Attorney-General's Reference (No 1 of 1975)* 'to procure means to produce by endeavour'.²²⁷ A person procures a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.²²⁸ In *R v Bryce*, however, it was advised to use the 'catch-all' phrase 'aid, abet, counsel or procure' so long as 'the shades of difference between them are far from clear'.²²⁹

'Aiding' may occur by supplying an instrument to the principal, keeping a lookout, doing preparatory acts and other forms of assistance.²³⁰ The principal does not have to be aware of the assistance given. As far as the element of causation is concerned, it is now settled in the criminal law of England that in order to incur liability of a secondary party, 'it is necessary to prove a causative link between the act of assistance alleged against the secondary party and the substantive crime committed by the perpetrator'.²³¹ That is not to say the prosecution must prove that the secondary party's assistance was a *conditio sine qua non* to the commission of the crime, meaning that without such assistance, the crime at issue would not have been committed.²³² However, in the case of procuring, one cannot procure an offence unless there is a *causal link* between what he does and the commission of the offence.²³³

English law also recognises aiding by omission albeit to a limited extent. There are two possible scenarios: (i) where there is a duty to intervene and the person

²²⁵ Stephen, above (n 215) 31.

²²⁶ Smith and Hogan, *Criminal Law*, 11th edn, above (n 162) 172–73.

²²⁷ *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773 (CA) (Lord Widgery CJ).

²²⁸ *ibid.*

²²⁹ *R v Bryce*, above (n 212) 602 (Potter LJ).

²³⁰ *Attorney-General v Able and Others* [1984] QB 795, by supplying a booklet explaining how to commit suicide, *D* aided and abetted suicide.

²³¹ *R v Bryce*, above (n 212) 611 (Potter LJ).

²³² In *Bryce*, the Court of Appeal ruled that, where *D* had transported the killer, *P*, to the scene of the crime, but the killing had not occurred until 13 hours later, there was no 'break in the chain of causation' which would absolve *D*'s liability. In dismissing the appeal, the Court of Appeal concluded: 'that it was not necessary for the prosecution to prove that the appellant's acts of assistance were performed at a time when *X* had formed the necessary intent for murder... all that is necessary in the secondary party is foresight of the real possibility that an offence will be committed by the person to whom the accessory's acts of assistance were directed'; *ibid.*, 593, 614, paras 80–81.

²³³ *Attorney-General's Reference (No 1 of 1975)*, above (n 227) 780.

fails to do so; and (ii) where the person has legal power to control the behaviour of the principal and fails to do so.²³⁴

i Mens Rea of Secondary Participation

The classic statement of the *mens rea* for a secondary party is stated by Lord Goddard CJ in *Johnson v Youden and Others*.²³⁵ '[b]efore a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence'.²³⁶ In *R v Bryce*, the Court of Appeal ruled that in order to incur criminal liability for a secondary party (D) to an offence committed by the principal (P), the following subjective elements must be demonstrated by the prosecution:

- i. intentional assistance by D in the sense of an intention to assist . . . P in acts which D knew were steps taken by P towards the commission of the crime;
- ii. D did the act deliberately realising that it was capable of assisting the offence;
- iii. D, at the time of doing the act, contemplated the commission of the offence by P, that is he foresaw it as a real or substantial risk or real possibility.²³⁷

Smith and Hogan summarised the *mens rea* of the secondary party as follows:

- (1) the secondary party must intend to assist or encourage the principal's act, or in the case of procuring, to bring the offence about; and
- (2) the secondary party must have knowledge as to the facts forming the essential elements of the principal's offence, (including any facts as to which the principal bears liability). This includes an awareness that the principal will act with *mens rea*.²³⁸

In England, some cases have required more than knowledge of the principal's intention. In *Gillick*,²³⁹ the House of Lords held that a doctor who prescribed the contraceptive pill to a girl under 16, knowing it would assist her boyfriend to commit the offence of sexual intercourse with a girl under 16, did not aid and abet a crime.²⁴⁰ Their Lordships found that although the doctor knew of the crime, his purpose was to protect the girl and not to assist the offence.²⁴¹

²³⁴ *Du Cros v Lambourne* [1907] 1 KB 40; *Rubie v Faulkner* [1940] 1 KB 571, 575; *Tuck v Robson* [1970] 1 All ER 1171; *JF Alford Transport Ltd* [1997] 2 Cr App R 326, quoted in Anderson et al. above (n 5) 12, fn 17.

²³⁵ *Johnson v Youden and Others* [1950] 1 KB 544.

²³⁶ *ibid*, 546 (Lord Goddard CJ).

²³⁷ *R v Bryce*, above (n 212) 593.

²³⁸ Smith and Hogan, *Criminal Law*, 11th edn, above (n 162) 179.

²³⁹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, [1986] AC 112, [1985] 3 WLR 830 (HL).

²⁴⁰ *ibid*.

²⁴¹ *ibid*.

ii The Degree of Knowledge Required

Neither mere suspicion nor broad knowledge of some criminal intention on the part of the principal is sufficient to hold him criminally liable as an accessory.²⁴² The minimum mental state for accessory liability is knowledge that the principal intends to commit a crime of the type actually committed.²⁴³ The aider and abetter must 'know the essential matters which constitute that offence'.²⁴⁴ He does not have to know, however, that the facts constitute an offence: for ignorance of the law is no defence.²⁴⁵

In *Maxwell v DPP for Northern Ireland*,²⁴⁶ 'B' who drove a car to the crime scene, was found liable as an accomplice to the offence of planting explosives because he contemplated that offence as one of the possible offences and intentionally lent his assistance. The Court of Criminal Appeal for Northern Ireland in the present case held that the guilt of an accessory springs, 'from the fact that he contemplates the commission of one (or more) of a number of crimes by the principal and he intentionally lends his assistance in order that such a crime will be committed'.²⁴⁷ The Court went on, asserting that '[t]he relevant crime must be within the contemplation of the accomplice, and only exceptionally would evidence be found to support the allegation that the accomplice had given the principal a completely blank cheque'.²⁴⁸

It is clear from the above-quoted judgment that the test is not so much *knowledge* as *contemplation*.²⁴⁹ An accessory 'cannot know things in advance; his assistance will have occurred before the commission of the crime by the principal; he may have foreseen the likelihood of certain events and conduct on the part of his

²⁴² *R v Bainbridge* [1960] 1 QB 129, 134 (Lord Parker CJ): 'there must not be merely suspicion but knowledge that a crime of the type in question was intended'. See also Smith and Hogan, *Criminal Law*, 11th edn, above (n 162) 181: 'Mere recklessness whether assistance be given is not sufficient'.

²⁴³ *R v Bryce* [2004] EWCA Crim 1231.

²⁴⁴ *Johnson v Youden and Others*, above (n 235) 546 (Lord Goddard CJ): 'Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute the offence'. These words were endorsed by the House of Lords in *Churchill v Walton* [1967] 2 AC 224, 236, and the same House of Lords in *Maxwell v DPP for Northern Ireland* [1978] 3 All ER 1140, 1144.

²⁴⁵ *Johnson v Youden and Others*, above (n 235) 546. The full passage of Lord Goddard reads as follows: 'Before a person can be convicted of aiding and abetting an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, "I knew of all those facts but I did not know that an offence was committed," would be allowing him to set up ignorance of the law as a defence.' Lord Goddard's opinion was endorsed by Lord Scarman in *Maxwell v DPP for Northern Ireland*, above (n 244) 26.

²⁴⁶ *Maxwell v DPP for Northern Ireland* [1978] 1 WLR 1350 (HL).

²⁴⁷ Sir Robert Lowry CJ [Court of Criminal Appeal for Northern Ireland] *Maxwell v DPP for Northern Ireland* quoted by Lord Scarman in *Maxwell v DPP for Northern Ireland*, above (n 246).

²⁴⁸ *ibid*, 1355.

²⁴⁹ Birch et al, *Blackstone's Criminal Practice*, above (n 121) 74.

Mens Rea in Common Law Jurisdictions

principal; yet he cannot have "knowledge" of something that has yet to occur'.²⁵⁰ This principle, as formulated by the Court of Appeal and endorsed by the House of Lords in the same case, has three important aspects:

- i. it directs attention to the state of mind of the accessory – not what he ought to have in contemplation, but what he did have (subjective standard);²⁵¹
- ii. it ensures that a man will not be convicted of aiding and abetting any offence his principal may commit, but only one which is within his contemplation;²⁵²
- iii. 'an accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made'.²⁵³

iii Intention to Assist

In order to incur criminal liability for a secondary party for acts committed by the principal, the prosecution must prove that the accessory intended to give encouragement to the principal.²⁵⁴ Non-accidental presence at the scene of the crime is not conclusive of aiding and abetting.²⁵⁵ It must be proved that D's presence had in fact given encouragement to the crime and that D intended to give encouragement.²⁵⁶ What has to be proved is encapsulated in a well-known passage stated by Hawkins J in *R v Coney*:

[to] constitute an aider and abettor some active steps must be taken by word, or action, with the *intent* to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non interference or he may encourage *intentionally* by expressions, or gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he *wilfully encouraged* and so aided and abetted. But it would be purely a question for the jury whether he did so or not.²⁵⁷

²⁵⁰ Smith and Hogan, *Criminal Law*, 11th edn, above (n 162) 183–84.

²⁵¹ *Maxwell v DPP for Northern Ireland*, above (n 246) 1363 (Lord Scarman).

²⁵² *ibid.*

²⁵³ *ibid.*

²⁵⁴ *R v Clarkson* [1971] 3 All ER 344, 347.

²⁵⁵ *ibid.*; *R v Coney* [1882] 8 QB 534.

²⁵⁶ *R v Clarkson*, above (n 254) 347.

²⁵⁷ *R v Coney*, above (n 255) 557–58 (emphasis added). This finding was endorsed by the Court of Appeal in *R v Clarkson*, above (n 254) 347.

Accessory Liability

Mere intention is not in itself sufficient; there must be an intention to encourage.²⁵⁸ In *National Coal Board v Gamble*,²⁵⁹ Devlin J put it more clearly:

[A]iding and abetting is a crime that requires proof of *mens rea*, that is to say, of *intention* to aid as well as of *knowledge* of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done.²⁶⁰

But when the existence of a particular intent forms part of the definition of an offence (eg, murder), the prosecution must prove that the accessory knew the existence of that intent on the part of the principal. The following example is illustrative. If P is indicted for inflicting on V an injury dangerous to life with intent to murder, A will be indicted for aiding and abetting P, if he is shown to have known that it was P's intent to murder V. It is not sufficient to show that A helped in what he did.²⁶¹

iv Motive or Desire is Irrelevant

In England, an accessory may incur criminal responsibility as an aider or abettor, even if he was indifferent to the result of the crime. In *National Coal Board*, the issue was further clarified by Devlin J:

If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that *mens rea* is a matter of intent only and does not depend on desire or motive.²⁶²

v Accessory Liability in Australia

In Australia, an accessory must act with a certain state of mind, both in relation to the assistance or encouragement given to the principal offender and to the facts amounting to the principal offence. Looking at New South Wales, which is said to be common law, and Western Australia and Queensland, which both have criminal statutes, we find that the leading case for all of these jurisdictions is *Giorgianni v The Queen*.²⁶³ In this case, the High Court of Australia ruled that an accessory must intentionally render assistance or encouragement to the principal offender

²⁵⁸ *R v Clarkson*, above (n 254) 348 (Megaw LJ).

²⁵⁹ *National Coal Board v Gamble* [1959] 1 QB 11.

²⁶⁰ *ibid.*, 20 (emphasis added).

²⁶¹ Stephen, above (n 215) 32.

²⁶² *National Coal Board v Gamble*, above (n 259) 23. *Contra* see the dissenting opinion of Slade J, 'the Prosecution must prove that the act or omission on which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence'; *ibid.*, 12.

²⁶³ *Giorgianni v The Queen* [1985] HCA 29.

Mens Rea in Common Law Jurisdictions

and must know of the affairs which constitute the 'essential matters' of the principal offence. In this case R – who drove a heavily laden coal truck with defective breaks – caused an accident which killed five people. His employer G was accused of procuring R to drive the truck in its defective condition. The trial judge concluded that G would be liable, if he knew at the time that the brakes were defective and could fail and if he knew that this could constitute driving in a manner dangerous to the public, or if he acted recklessly not caring whether these facts existed or not.²⁶⁴

The Court of Appeal held that the trial judge erred in directing the jury that reckless behaviour would suffice to establish the intent necessary to make G the procurer. Delivering the judgment Gibbs CJ stated that '[r]ecklessness, in the sense of not caring whether the facts exist or not, would be relevant only if it . . . was virtually equivalent to knowledge, in other words only if it amounted to wilful blindness'.²⁶⁵ He went on to state that:

No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender.²⁶⁶

In light of the above quoted judgment, it is obvious that the aider and abettor must have knowledge of all the essential facts constituting the principal offence and an intent to aid, abet, counsel or procure. Any lower threshold, ie, recklessness or negligence, would not be sufficient.

The Model Criminal Code and the Commonwealth Criminal Code adopt a broader basis for complicity than *Giorgianni*, including recklessness. According to section 11.2(3) for the person to be guilty, the person must have intended that:

- (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
- (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

However, the above-mentioned recklessness refers solely to the commission of the offence, while recklessness with respect to a risk or likelihood that conduct might provide aid, encouragement, counsel or otherwise promote the commission of that offence is not a basis for conviction. In this respect the Code reflects common law.²⁶⁷

According to *Giorgianni*, wilful blindness would suffice for the knowledge requirement. Subsequent decisions on the role and meaning of wilful blindness

²⁶⁴ *ibid*, para 3.

²⁶⁵ *ibid*, para 15.

²⁶⁶ *ibid*, para 17.

²⁶⁷ Australian Government, Attorney-General's Department, *Criminal Code Practitioner Guidelines* – (March 2002) 262, available at: www.ag.gov.au/www/agd/agd.nsf/Page/Publications_CriminalCodePractitionerGuidelines-March2002

Accessorial Liability

have however rejected this approach.²⁶⁸ In Western Australia, the interpretation of the knowledge threshold was established in *Ward*, where the Court of Criminal Appeal held that there must be actual knowledge of the facts amounting to the offence.²⁶⁹ In *Kirby*, the Court further stated that this meant that the principal's offence was within the secondary party's contemplation.²⁷⁰ This is in line with the Queensland decision in *Jervis*.²⁷¹ In Queensland, it was further established by the Court of Appeal in *Ancuta* that it was not necessary that a secondary party knew the precise details of the crime committed, but that it was sufficient if the secondary party contemplated the type and kind of crime committed.²⁷²

In *Stokes and Difford*²⁷³ the New South Wales Court of Criminal Appeal held that it is 'more appropriate to speak of the accessory's knowledge (or awareness) of the principal offender's intention to do an act . . . than it is to speak of the accessory's knowledge of the act done by the principal offender'.²⁷⁴ The Court therefore proposed that the accessory's knowledge of the principal offender's intention would be sufficient to establish his liability.

The threshold of knowledge of the principal's offence found in Australia is very different from the position in the United Kingdom; namely, that the accused need not know that any particular offence is to be committed by the principal offender, but must merely be aware of the probability that the principal offender will commit some offence within a range of offences contemplated as possible.

vi Accessory Liability in Canada

In Canada, accomplice liability is governed by section 21(b)(c) and sections 22 and 23 of the Criminal Code, which read as follows:

Section 21(1)

Everyone is a party to an offence who

...

- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

Section 22(1)

Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled. (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the

²⁶⁸ Simon Bronniti and Bernadette McSherry, *Principles of Criminal Law*, 2nd edn (Sydney: Lawbook Co, 2005) 361.

²⁶⁹ *Ward v Western Australia* (1997) 19 WAR 68 in Dobinson, above (n 11) 12.

²⁷⁰ Dobinson, above (n 11) 12.

²⁷¹ *ibid*.

²⁷² *Ancuta* (1990) 49 A Crim R 307.

²⁷³ *Stokes and Difford* (1990) 51 A Crim R 25.

²⁷⁴ *ibid*, 38 (emphasis in original).

Mens Rea in the Model Penal Code

- (6) Requirement of Purpose Satisfied if Purpose Is Conditional.
When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.
- (7) Requirement of Knowledge Satisfied by Knowledge of High Probability.
When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
- (8) Requirement of Wilfulness Satisfied by Acting Knowingly.
A requirement that an offence be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offence, unless a purpose to impose further requirements appears.
- (9) Culpability as to Illegality of Conduct.
Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offence or as to the existence, meaning or application of the law determining the elements of an offence is an element of such offence, unless the definition of the offence or the Code so provides.³⁰

A 'Purposely'³¹

Generally speaking, the word 'intent' or the adjective 'intentionally' in criminal law has traditionally not been limited to the narrow definition of purpose, aim or design, but instead has often been viewed as encompassing knowledge. In common law, a person is considered to intend the consequences of his conduct if: (i) it is his desire or conscious objective to cause that consequence; or (ii) he acts with knowledge that the consequence is virtually certain to occur as a result of his conduct.³²

Efforts have been made to differentiate between intent *stricto sensu* and knowledge.³³ On the one hand, this distinction appears to be insignificant for most purposes of liability, as often there is a good reason for imposing liability whether the

³⁰ Model Penal Code, § 2.02.

³¹ Under the Model Penal Code 'purposely' has the meaning specified in § 2.02 and equivalent terms such as 'with purpose', 'designed' or 'with design' have the same meaning, see § 1.13(1). § 1.13(2) provides that 'intentionally' or 'with intent' means 'purposely'. Most recent legislative revisions and proposals have adopted, though with varying terminology, the Model Penal Code's distinction between purpose and knowledge. The main respect in which these enactments and proposals differ from the Model Penal Code is in the use of the term 'intentionally' where the Code uses 'purposely'. The reason for using the term 'intentionally' is its familiarity in legal usage, although, the term is ambiguous. See *Model Penal Code and Commentaries*, above (n 13) § 2.02, Comment, 235, fn 11 and its accompanying text. The Model Penal Code, in abandoning 'intention' as a bad job and using 'purposely' instead, was regarded by Glanville Williams as 'an advantage and helpful device in the context of a newly-drafted code'; see Glanville Williams, *The Mental Element in Crime* (Jerusalem: The Magnes Press, 1965) 19.

³² Dressler, *Understanding Criminal Law*, above (n 19) 119; See also Glanville Williams, *Criminal Law: The General Part*, 2nd edn (London: Stevens & Sons, 1961) 34–36.

³³ Model Penal Code, § 2.02(a)(b).

Degrees of Culpability under the Model Penal Code

defendant desired or merely knew of the practical certainty of the results.³⁴ On the other hand, in certain narrow classes of crimes, heightened culpability has been thought to merit special attention. Thus, for example, the statutory and common law of homicide often distinguish, either in setting the 'degree' of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the 'specific purpose' of taking another's life.³⁵ In *Haupt v United States*, the Supreme Court held that in order to find the defendant guilty of treason, the government must demonstrate that the defendant acted with a 'purpose' to aid the enemy.³⁶ Another such example is the law of inchoate offences, such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocent behaviour.³⁷

i 'Purpose' with Regard to the Nature of the Conduct or Result

The term 'purposely' as employed in § 2.02(2)(a) of the Model Code has two different meanings, depending on whether the material element of the offence in question is related to a conduct or result, on the one hand, or to attendant circumstances, on the other.³⁸ With respect to conduct or result, a person acts 'purposely' if it is his 'conscious object to engage in conduct of that nature or to cause such a result'.³⁹ Hence, 'purposely' in the way it is defined is a fault element comparable to the first of the two alternative common law definitions of the word 'intentional'.⁴⁰ That is to say, the word 'purposely' as provided for in § 2.02(2)(a) (i) is equivalent to the common law 'actual intent'.⁴¹ So defined in the Model Penal Code, 'purposely' is also equivalent to ('*Absicht*') or *dolus directus* of the first degree in German criminal law. '*Absicht*' in the criminal law of Germany is

³⁴ *United States v United States Gypsum Co*, 438 US 422, 445 (1978); *Model Penal Code and Commentaries*, above (n 13) § 2.02, Comment, 233–34.

³⁵ LaFare and Scott, *Handbook on Criminal Law*, above (n 4) 196–97.

³⁶ *Haupt v United States*, 330 US 631, 641 (1947).

³⁷ *Model Penal Code and Commentaries*, above (n 13) § 2.02, Comment, 233–34.

³⁸ Model Penal Code, § 2.02(2)(a) defines the term 'purposely' as follows:

A person acts purposely with respect to material element of an offence when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

³⁹ Model Penal Code, § 2.02(2)(a)(i).

⁴⁰ Dressler, *Understanding Criminal Law*, above (n 19) 138–39. A second way of defining intention in common law is to expand its meaning to include not only conscious object or purpose, but foresight of consequence. The particular level of foresight varies according to the definition employed. In England, following the decision of the House of Lords in *R v Woollin* [1999] 1 AC 82 (HL), it appears that a result may be taken as intended, although it is not the actor's purpose to achieve it, when it is a 'virtually certain' consequence of his act.

⁴¹ The noun 'intention', according to Kenny, an eminent English scholar, is used to denote the state of mind of a person who not only foresees but also 'wills' the possible consequence. 'To intend is to have in mind a fixed purpose to reach a desired objective'. See JW Cecil Turner, *Kenny's Outline of Criminal Law*, 19th edn (London: Cambridge University Press, 1966) 36.

defined as a 'purpose bound will'.⁴² It is generally assumed that a defendant acts 'purposely' if he desires to bring about the result.⁴³

Accordingly, in a charge of murder committed 'purposely' the prosecution has to prove beyond reasonable doubt that the defendant consciously desired that result, no matter whether death is likely to occur from the defendant's conduct.⁴⁴ The Supreme Court, in *United States v Bailey et al*, ruled that a 'person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct'.⁴⁵

It follows that if intention is expressed in such limited terms – 'conscious object or purpose' – a defendant cannot be held responsible for 'purposely' causing the consequence which resulted from his conduct even though he foresees it as probable, so long as it was not his purpose to achieve such consequence. Hence, if a prisoner, in an effort to escape, blows up the prison wall with knowledge that guards are present, and in so doing, one of the prison guards dies in the explosion, in the eyes of the Model Penal Code, this prisoner would not be considered as 'purposely' having murdered the guard, no matter how clearly he may have foreseen the death of the guard.⁴⁶ Even if the prisoner was virtually certain of the consequence which might occur from his prohibited conduct, he still could not be criminalised as acting 'purposely' with respect to that consequence. In such cases, and according to § 2.02(2)(b) the defendant will be held guilty for knowingly causing such results.⁴⁷

ii 'Purpose' with Regard to the Attendant Circumstances

Under the Model Penal Code, 'purpose' as a culpable mental state has two alternative meanings, depending on whether it is related to a result or a circumstance element. According to § 2.02(2)(a)(ii), a person acts purposely with regard to attendant circumstances if 'he is aware of the existence of such circumstances or he believes or hopes that they exist'.⁴⁸ For example, if D poisoned V's food in

⁴² Volker Krey, *Deutsches Strafrecht: Allgemeiner Teil*, Teil II (German Criminal Law: The General Part) (Stuttgart: Kohlhammer, 2003) 109.

⁴³ For more details on intention or *Vorsatz* in German criminal law see, Mohamed Elewa Badar, 'Mens Rea – Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals' (2005) 5 *International Criminal Law Review* 203, 220–34.

⁴⁴ Model Penal Code, § 210.2(1)(a).

⁴⁵ *United States v Bailey et al*, above (n 3); US Lexis 69, 7 November 1979; argued 21 January 1980; decided, 632; See also *United States v United States Gypsum Co*, above (n 34).

⁴⁶ George Fletcher used this hypothetical situation in order to distinguish 'intention' from 'recklessness'. He asserted that 'in legal system across the Western world, the concept of "intention" is interpreted broadly to include these probable side-effects of intentional conduct'. He added 'this willingness to sweep in probable side-effects is what generates the problem of demarcation relative to recklessness. If the side-effects are not very probable-say, there are no guards visible at the time of the explosion-the killing might well be considered reckless rather than intentional'. See George P Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000) 443.

⁴⁷ See Model Penal Code, § 210.2(1). The Model Penal Code includes a form of recklessness that is sufficient mental state for murder.

⁴⁸ Model Penal Code, § 2.02(2)(a)(ii).

order to murder him, D has acted 'purposely' regarding the attendant circumstances that the quantity of the poison used is sufficient to cause V's death if: (i) he was aware it was sufficient; or (ii) he believed or hoped that it would be. The Code's assertion that 'purpose' with regard to circumstance is satisfied either by belief or by hope that the circumstance exists, remains subject to different interpretations. On the one hand, it has been understood that 'the Code provides that a person can act with "purpose" towards a circumstance without believing (or even recklessly suspecting, or negligently failing to suspect) that the circumstance exists'.⁴⁹ On the other hand, it is possible that this 'hope' provision was employed in order to lower the threshold of the culpability required as to the circumstance element. That is to say, in the above hypothetical example (murder by poisoning), the prosecution has to demonstrate that the defendant, when he acted, believed that there is a chance that the circumstance exists, and that belief was part of the defendant's reason for acting. In the words of Glanville Williams, 'hope is desire in circumstances of low probability, and it is sufficient for intention'.⁵⁰

B 'Knowingly'⁵¹

In the criminal law of the United States, knowledge arises as a *mens rea* issue in the following situations: (i) it is sometimes required by the definition of a particular crime; and (ii) it is sometimes considered as a determining factor in establishing a different required state of mind, such as intent, wilfulness, or malice.⁵² Generally, the prosecution must prove that the defendant had knowledge of facts which would make the conduct illegal, but ordinarily is not required to prove the defendant's awareness of the legal consequences of the conduct (eg, that the conduct was illegal).⁵³

Under the Model Penal Code, the distinction between acting 'purposely' and 'knowingly' is very narrow. Knowledge that certain circumstances or facts exist is a common element in both conceptions.⁵⁴ Both 'purposely' and 'knowingly' refer to the actor's subjective state of mind. Yet, the presumption that a person intends the natural or probable consequences of his acts is not the Code's culpability test.⁵⁵ According to § 210.2(1) of the Model Penal Code, 'purposeful' or 'knowing'

⁴⁹ Kenneth W Simons, 'Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"? Examining the Requisite Connection between Mens Rea and Actus Reus' (2002) 6 *Buffalo Criminal Law Review* 219, 239.

⁵⁰ Glanville Williams, *The Mental Element in Crime*, above (n 31) 19.

⁵¹ Model Penal Code, § 1.13 provided that: 'knowingly' has the meaning set out in § 2.02 and equivalent terms such as 'knowing' or 'with knowledge' have the same meaning.

⁵² *United States v Hilliard*, 31 F 3d 1509 (10th Cir 1994).

⁵³ *ibid*.

⁵⁴ See the Model Penal Code § 2.02(2)(a)(ii) and (b)(i). One scholar questioned 'would it not suffice to define "purpose" with respect to results, and then simply provide that when "purposely" applies to circumstance element, it means "knowledge"?', see Kenneth W Simons, 'Should the Model Penal Code's Mens Rea Provisions be Amended?', 1 *Ohio State Journal of Criminal Law* (2003-2004) 179, 182.

⁵⁵ *Model Penal Code and Commentaries*, above (n 13) § 210.2, Comment, 20–21.

General Conclusions and Recommendations

desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result.¹⁹ *Dolus directus* of the first degree is also defined as a 'purpose-bound will'.²⁰ It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.²¹

The Model Penal Code definition of the first culpability term (purposely), which is akin to *dolus directus* of the first degree, is significant in this regard.²² According to § 2.02 of the Model Penal Code

A person acts purposely with respect to a material element of an offence when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

B *Dolus directus* of the second degree

In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be an undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result.²³ Yet in cases of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volitional element is weak.²⁴ It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient.²⁵ In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.

¹⁹ Peter Cramer and Detlev Sternberg-Lieben, 'Vorsätzliches und Fahrlässiges Handeln' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch: Kommentar* 28th edn (München: Beck'sche Verlagsbuchhandlung, 2010) 260 (*Absicht . . . liegt nur dann vor, wenn der Handlungswille des Täters final gerade auf den vom Gesetz bezeichneten Handlungserfolg gerichtet war.*) See also Karl Lackner, *Strafgesetzbuch* (München: Beck'sche, 1991) 95; Claus Roxin, *Strafrecht: Allgemeiner Teil* (München: Beck'sche Verlagsbuchhandlung, 1997) 366.

²⁰ Volker Krey, *Deutsches Strafrecht: Allgemeiner Teil, Teil II* (German Criminal Law: The General Part) (Stuttgart: Kohlhammer, 2003) 109.

²¹ *ibid.* See also Mohamed Elewa Badar, 'Mens Rea – Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals' (2005) 5 *International Criminal Law Review* 203.

²² See ch 4 of this volume.

²³ Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (Berlin: Duncker & Humblot 1996) 298 *et seq.*

²⁴ Krey, above (n 20) 113; Jescheck and Weigend, *ibid.*, 299.

²⁵ BGHSt 18, 264.

Culpability terms should be confined to three culpable mental states

C *Dolus eventualis*

Dolus eventualis as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals.²⁶ The case law of these Tribunals made it clear that *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as extermination as a crime against humanity.²⁷ A recent decision by the ICC provides further clarification of the nature of this mental state which entails criminal liability for most of the crimes under the subject matter jurisdiction of the International Criminal Court. According to the *Lubanga* Pre-Trial Chamber, *dolus eventualis* encompasses,

situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.²⁸

Dolus eventualis must be distinguished from the common law notion of recklessness. The former requires not only that the perpetrator is aware of a risk, but that he *accepts* the possibility of its occurrence (volitive element). Unlike *dolus eventualis*, recklessness requires an affirmative aversion to the harmful side effect.²⁹ This position is supported by a recent judgment of the Yugoslavia Tribunal in which the *Orić* Trial Chamber agreed with the defence submission that intent does not include recklessness.³⁰

Dolus eventualis, as perceived by Fletcher, is defined as 'a particular subjective posture toward the result. The tests . . . vary; the possibilities include everything from being indifferent to the result, to "being reconciled" with the result as a possible cost of attaining one's goal'.³¹ However, the present author is of the opinion that in the sphere of international criminal law *dolus eventualis* must be interpreted as a foresight of the likelihood of the occurrence of the consequences and not mere indifference towards its occurrence. This element of acceptance brings *dolus eventualis* within the contour of intention in its broader sense and ruled out the common law recklessness as a culpable mental state under Article 30 of the ICC Statute.

²⁶ See chs 9 and 10 of this volume.

²⁷ See ch 9 of this volume.

²⁸ *Lubanga* Decision on the Confirmation of Charges, para 352 (ii).

²⁹ Fletcher, above (n 14) 446. This concept of recklessness seems similar to the Model Penal Code's, which requires conscious awareness of a substantial risk.

³⁰ *Orić* Trial Judgement, fn 1020. See the discussion in ch 9 of this volume.

³¹ Fletcher, above (n 14) 445, 445–46; See also Mihajlo M. Ćimović, 'Conceptions of Culpability in Contemporary American Law' (1965) 26 *Louisiana Law Review* 28, 48 (describing a Romanist law test according to which the perpetrator acted intentionally if he could have said to himself: It may be either so or different, it may happen either so or differently; anyhow I shall act). For a different opinion see Paul T. Smith, 'Recklessness in *Dolus Eventualis*' (1979) 96 *South African Law Journal* 81 (criticising South African law to the extent that it interprets *dolus eventualis* as indifference rather than foresight).

III 'Special intent', '*dolus specialis*', 'ulterior intent' or 'primary purpose' crimes require proof of *dolus directus* of the first degree on the part of the accused

The systematic analysis of the jurisprudence of the Yugoslavia and Rwanda Tribunals evidenced that various crimes within the subject matter jurisdiction of these Tribunals require proof of *dolus directus* of the first degree on the part of the accused. Any lower threshold of *mens rea*, such as *dolus directus* of the second degree or *dolus eventualis*, would not suffice to trigger the criminal responsibility of individuals for such crimes. The 'crime of acts or threats of violence, the primary purpose of which is to spread terror among civilian population' falls within the realm of 'specific intent crimes'. According to the Yugoslavia Tribunal, in order to sustain a conviction for this offence,

the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that was the result which he specifically intended. The crime of terror is a *specific-intent* crime.³²

The same applies *mutatis mutandis* to the crime of genocide. In the *Akayesu* case, the Rwanda Tribunal stated:

The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. [H]ence the Chamber is of the opinion that genocide constitutes the crime of crimes.³³

Both genocide and the crime of terror against the civilian population do not require the actual destruction of the group or the actual infliction of terror among the civilian population, respectively. Thus, the alleged perpetrator can incur criminal responsibility for such heinous crimes even if the result element (the destruction of the group in the case of genocide) did not materialise. Accordingly, it is recommended setting the bar high regarding the *mens rea* threshold for such categories of crime by requiring a proof of *dolus directus* of the first degree on the part of the accused.

³² *Galić* Appeal Judgement, para 136.

³³ *Kambanda* Trial Judgement, para 16. Since then various ICTR and ICTY Trial Chambers have referred to the intent required for genocide as 'special intent', a 'specific intent', 'specific genocidal intent' and they unanimously recognise that genocide is characterised by a *dolus specialis*.

IV Negligence or gross negligence does not satisfy the *mens rea* requirement for international crimes

'Negligence' is failure to conform to the standard of care to which it is the defendant's duty to conform.³⁴ In other words, negligence 'is failure to behave like a reasonable man, in circumstances where the law requires such a reasonable behaviour'.³⁵ Unlike intention and recklessness, negligence does not require a state of mind or *mens rea* to be proved.³⁶

The systematic analysis of the case law of the Rwanda Tribunal evidenced that negligence has been considered a sufficient fault element for heinous crimes within the subject matter jurisdiction of this Tribunal (for example, extermination as a crime against humanity). This is considered a backwards step regarding the developing law of *mens rea* which requires proof of a cognitive element of knowledge and a volitional element of intent. Even gross negligence is not sufficient to trigger the criminal responsibility of international crimes. It was observed that there can be no degrees of inadvertence (negligence) 'when that word is used to denote a state of mind, since it means that in the man's mind there has been a complete absence of a particular thought, a nullity; and of nullity there can be no degrees'.³⁷

Recent case law of the Yugoslavia Tribunal expressly stated that negligence and gross negligence do not satisfy the *mens rea* requirement for international crimes, simply because individual criminal responsibility for serious crimes over which the ICTY has jurisdiction requires intention.³⁸

V Actual knowledge and wilful blindness are blameworthy – constructive knowledge has no place in criminal law and should be abandoned

To date, there is no clearer judgment – national or international – regarding the distinction between the three degrees of knowledge than the one held by Devlin J, in *Taylor's Central Garages* (1951).³⁹

³⁴ Glanville Williams, *Text Book of Criminal Law* 2nd edn (London: Stevens & Sons, 1983) 88.

³⁵ *ibid.*

³⁶ See the very thoughtful explanation by Andrew Ashworth, *Principles of Criminal Law*, 4th edn (Oxford: Oxford University Press, 2003) 193–96.

³⁷ JW Cecil Turner (ed), *Kenny's Outline of Criminal Law*, 19th edn (London: Cambridge University Press, 1966) 39.

³⁸ *Orić* Trial Judgement, paras 279, 348. See the discussion in chs 9 and 10 of this volume.

³⁹ *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284 (KBD).