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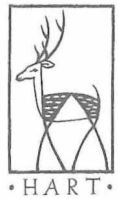
# ANNEX D

# The Concept of *Mens Rea* in International Criminal Law

## The Case for a Unified Approach

Mohamed Elewa Badar



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subjective elements provided for in Article 25(3) sub-paragraphs (d)(i) (aim of furthering the criminal activity of the group) and (d)(ii) (knowledge of the intention of the group) will stand up against any application of the 'extended form' of joint criminal enterprise (JCE III).[170]

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

Article 28 of the ICC Statute sets forth two different levels of culpability regarding military and civilians commanders. As for the military commanders, or persons effectively acting as military commanders, Article 28(a)(i) of the ICC Statute assigns both actual knowledge (knew) or constructive knowledge (should have known). The term 'should have known' which is akin to negligence – a type of legal fault not necessarily involving a mental state – differs from the language employed in Articles 7(3) and 6(3) of the ICTY and ICTR Statutes. There, the term 'had reason to know' is set out as a second alternative of knowledge which has to be proved on the part of the commander. It appears that the drafters of the ICTY and ICTR Statutes unlike those of the ICC Statute have carefully read the *travaux préparatoires* of Article 86 (then Article 76 – Failure to Act) of Protocol 1 to the 1949 Geneva Conventions. During the preparatory work of the first Additional Protocol many delegations expressed their concerns regarding the inclusion of the phrase 'should have known' in then Article 76.[171] Syria submitted an amendment suggesting the deletion of the phrase 'should have known'.[172] This was endorsed by the delegate from Argentina who drew the working group's attention to the fact that 'penal responsibility should be interpreted in a very clear sense' and that the phrase 'should have known', as it appears in the ICRC draft, 'introduced a lack of clarity with regard to the conduct of superiors'.[173] He concluded by saying that the phrase 'would be tantamount to reserving the responsibility for submitting proof, which would be incompatible with the presumption of innocence common to all Latin American legal systems'.[174]

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

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

[170] For critical analysis of the third category of JCE see Badar, ' "Just Convict Everyone!" ', ibid.

[171] The *travaux préparatoires* of the first Additional Protocol is reproduced in four volumes and one supplement in the work of Howard S Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions*, 4 vols (New York: Oceana Publications, 1981). The Supplement appears in 1985.

[172] Proposed Amendment to Art 76 by the Syrian Arab Republic, CDDH/1/74, 20 March 1974, Official Records, Vol III, 328, in Levie, ibid, 302.

[173] Mr Cerda (Argentina), CDDH/I/74 in Levie, ibid, 306.

[174] ibid.





> negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility.[175]

Israel supported the United States' proposal in principle, but suggested the insertion of the words 'or ought to have known' after 'knew' in subparagraph (b)(i) of Article 25 as set out in the Preparatory Committee's 1998 draft Statute.[176] In the view of the Israeli delegate, this would establish 'the principle that a superior not only had actual knowledge but also what he would term "constructive' " knowledge, in other words, being equally responsible for failing to appreciate facts which he or she was in a position to know'.[177]

Recent jurisprudence of the Yugoslavia and Rwanda Tribunals has stressed that 'criminal negligence is not a basis of liability in the context of criminal responsibility'.[178] These evolutionary developments in the law of command responsibility were endorsed by PTC I in *Lubanga*. In discussing the elements of war crime of using, conscripting or enlisting children, the Pre-Trial Chamber considered the jurisprudence of the two *ad hoc* Tribunals and concluded that the expression 'had reason to know' is stricter than the one of 'should have known' because the former 'does not criminalize the military superior's lack of due diligence to comply with their duty to be informed of their subordinates' activities'.[179] Rather the 'had reason to know' requirement 'can be met only if military superiors have, at the very minimum, specific information available to them to the need to start an investigation'.[180] Accordingly, 'a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him in notice of offences committed by subordinates'.[181] Thus, one might discern that neglect of a duty to acquire such knowledge, does not feature in the provision of Article 28(1) as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.[182]

In light of the aforementioned, and reading Article 28(a) together with Article 30(3), it appears that while the first alternative of knowledge assigned to the military commander would meet the knowledge standard, the second alternative (should have known) would not. In such a situation the proviso 'unless otherwise provided' will come into play and the second alternative of Article 28(a) 'should have known' would prevail.

[175] Proposal submitted by the United States (A/CONF.183/C.1/L.2) (emphasis added) reprinted in M Cherif Bassiouni, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (New York: Transnational Publishers, 2005) paras 67–68.

[176] UN Doc A/CONF 183/C.1/SR.1 (16 June 1998), Mr Nathan (Israel), reprinted in Bassiouni, *Summary Records*, ibid, 78, para 73.

[177] ibid.

[178] *Halilović* Trial Judgement, para 71; *Blaškić* Appeal Judgement, para 63; *Bagilishema* Appeal Judgment) paras 34–35.

[179] *Lubanga* Decision on the Confirmation of Charges, fn 439.

[180] ibid.

[181] ibid.

[182] *Blaškić* Appeal Judgement, para 62.

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

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

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

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

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

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

[183] David M Treiman, 'Recklessness and the Model Penal Code' (1981) 9 *American Journal of Criminal Law* 281, 351.

[184] ibid.

[185] ibid.

[186] Rome Statute, Art 32(1).

[187] ibid, Art 32(2).

[188] Otto Triffterer, 'Article 32 – Mistake of Fact or Mistake of Law' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (Oxford: Hart Publishing, 2008) 902 (italics in the original).