Mens rea – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*

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“There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness. Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principal of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.”

Joel Bishop, A Treatise on Criminal Law, 1865.

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Introduction

Even though international criminal law is an autonomous area of law and its terms are to be construed accordingly, the proper interpretation and appropriate application of international criminal law often requires a comparative analysis of national legal systems. The two ad hoc Tribunals have consistently referenced national approaches to a variety of legal issues to support their findings on issues of both substantive and procedural international criminal law. Among these issues was the identification of the mens rea required for triggering the criminal responsibility for serious violations of international humanitarian law. It is a general principle of law that the establishment of criminal culpability requires an analysis of both actus reus, the material element of a crime, and mens rea, the mental element of a crime. The jurisprudence of the Tribunals mirrors the difficulty of identifying the various forms and shades of mens rea in international criminal law. One reason for this is the lack of a general definition of the issue in either the Nuremberg and Tokyo Charters, or the Statutes of the two ad hoc Tribunals. As a result of the general uncertainty regarding the definition of various categories of mens rea and the absence of a customary rule regarding these issues, the drafters of the Rome Statute decided to include a special provision on the subject. However, it is doubtful

1 In examining the issue of whether a standard of mens rea that is lower than ‘direct intent’ may apply in relation to “ordering” under Article 7(1) of the ICTY Statute the Appeals Chamber of the Yugoslav Tribunal deems it useful to consider the approaches of national jurisdiction, see Prosecutor v. Tihomir Blaškic (Case No. IT-95-14-A), Judgment, 29 July 2004, paras. 34–42; In order to facilitate a better understanding of the concept of complicity the Yugoslav Tribunal refers to four national legal systems namely; the former Yugoslavia, France, Germany, and England, see Prosecutor v. Milomir Stakić, Decision on Rule 98 bis Motion for Judgment of Acquittal, 31 October 2002, paras. 54–59; In determining that duress is not a defence to a charge of crimes against humanity and war crimes, the Yugoslav Tribunal considered in some detail the authorities in customary international law, the post World War II military tribunals, general principles of law recognised by civilised nations, and the position in a variety of civil law and common law systems, see Prosecutor v. Erdemović, (Case No. IT-96-22-A), Judgment, 7 October 1997, paras. 40–61.

2 While the terminology utilised varies, these two elements have been described as “universal and persistent in mature systems of law”. See Prosecutor v. Delalić et al., (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 424 (also known as Čelebići), quoting Morissette v. United States (1952) 342 U.S. 246.


5 Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (17 July, 1998), entered into force 1 July 2002, Art. 30 provides as follows: