

How is the concept of ‘*Mens Rea*’ under Article 30 of the Rome Statute interpreted in International Criminal Law?

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Abstract:

This article examines the concept of mens rea under Article 30 of the Rome Statute and its application in the case-law of the ICTR and ICTY. Firstly, the article gives a brief history of the concept of mens rea and its evolution in the Rome Statute in International Criminal Law. Thereafter, it attempts to define the concept of mens rea, distinguishing the terms ‘intent’ and ‘knowledge’ and their understanding in the case law of the ICTY and ICTR. Finally, before concluding it looks into the application of mens rea and the simultaneous application of its various elements.

1. Introduction

All crimes are predicated on a certain mental state, known as the mental element of *mens rea*. A human being cannot be charged with a crime unless he or she has reached this mental state. *Mens rea*, according to this view, acts as a substantive safeguard against unjust convictions.¹

Mens rea comes from the work of Edward Coke, who prescribed that “an act does not make a person guilty unless [their] mind is also guilty.”² In the 12th century, *mens rea* was not a component of crime.³ Wrongdoers used to be punished whether their actions were intentional or not. As remarked by US Judge Henry Wigmore: “The doer of a deed was responsible whether he acted innocently or inadvertently.”⁴ The causation of harm was critical in establishing whether one may be held criminally accountable, irrespective of the “doer’s” blameworthiness.

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¹ G.J.A. Knoops, *Mens Rea at the International Criminal Court* (Brill 2017).

² S. Frese, “Mens Rea” (*Crime Museum* June 17, 2021) <[³ Ibid.](https://www.crimemuseum.org/crime-library/criminal-law/mensrea/#:~:text=The%20term%20mens%20rea%20comes,%5D%20mind%20is%20also%20guilty%E2%80%9D.>” accessed July 6, 2022.</p></div><div data-bbox=)

⁴ Knoops, supra note 1.

Moreover, *mens rea* was formulated in the 17th century, along with the Latin term '*actus reus non facit reum nisi mens sat rea*,' which translates as 'there can be no crime without a guilty mind.'⁵ The Latin maxim reflects the requirements of *mens rea* meaning that "an act does not make a person guilty of a crime, unless the person's mind is also guilty."⁶ This maxim addressed the issue that a crime can only be characterised as an activity performed with the intent to commit a crime.

In current criminal justice systems, a difference is drawn between criminals who planned to murder and those who did not. The concept of *mens rea* relies around the distinction between a crime and an unintentional error. This article will look at how *mens rea* is defined and applied according to Article 30 of the Statute of the International Criminal Court (Rome Statute) and 'the general requirement of *mens rea*' for the International Criminal Court's (ICC) jurisdictional purposes through the implementation of concept⁷ according to the judgments delivered in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Until 1998, the parameters of *mens rea* in international criminal law were mostly determined by case law.⁸ The particular purpose included in the 1948 Genocide Convention and the form of *mens rea* laid out by the 1988 UN Convention against Torture were exceptions.

However, this did not change until 1998. At the Rome Conference on the Establishment of the ICC, 120 States finally agreed on a very similar definition of *mens rea*, which is embodied in Article 30 of the Rome Statute. Following that, the jurisprudence of the international criminal tribunals in this sector will be examined.

A review of the case law of the ad hoc tribunals is necessary since the ICC, although being autonomous of these courts, might rely on the ICTY/ICTR case law in two methods:

"(i) when interpreting the primary sources of the ICC, the ICC Statute, the Elements of Crimes or the Rules of Procedure and Evidence and (ii) when the primary sources of the ICC, even after interpretation,

⁵ Sujata S., 'All You Need to Know about Mens Rea' (*iPleaders*, January 18, 2022) <<https://blog.ipleaders.in/all-you-need-to-know-about-mensrea/#:~:text=Mens%20Rea%20was%20first%20proposed,purpose%20to%20commit%20a%20crime>> accessed July 6, 2022.

⁶ Ibid.

⁷ Knoops, *supra* note 1.

⁸ Ibid.