MENS REA AND DEFENCES

Jo Stigen, 12 February 2009

MENS REA

- Punishment is an expression of condemnation
- Based on the free will of persons; we punish a person who has chosen to do the wrong
  - This presupposes some purpose and some knowledge
- Is legal and moral guilt the same?
- What do we mean by volative and cognitive with regard to mens rea?
- What are the different degrees of mens rea?
- Which mens rea is required in ICL?
- How does ICL differ from ordinary criminal law
  - Different actors – not necessarily the direct perpetrator
  - Military and civilian leaders
  - Participants in a joint criminal enterprise (e.g. a concentration camp)
- What are the sources of law?

THE VARIOUS FORMS OF MENS REA

Intent

- Volative
- Cognitive
- With regard to
  - Circumstances
• Conduct
• Consequences

• U.S. MPC: “purpose” and “knowledge”

• Some English jurisprudence
  o Steane (1947)
  o Moloney (1985)
  o Nedrick (1986)
  o Wollin (1999)

• ICTY/ICTR
  o Tadic
  o Kordic
  o Celebici
  o Kayishema
  o Stakic

• Irrelevance of motive

Knowledge
  o Superior
  o Participant in JCE
  o Aider and abetter

• Mauthausen

• Celebici

• Akayesu

• Kvocka

Recklessness

• Fore some perpetrators
  o Military leaders

• Conscious or unconscious neglect
• Military vs. civilian leader

• Proving intent or knowledge

DEFENSES

• Punishment only makes sense when the act is unwanted and the actor is blameworthy
  
  o Even when the \textit{actus reus} is committed with the required \textit{mens rea}, circumstances may exist which make the act justified or excusable
  
  o After a complete assessment
  
  o Recognized by all criminal justice systems – we punish acts that are

• All these circumstances cannot be described in each crime definition

• Instead: general defenses
  
  o More pedagogical
  
  o Reflects principles that apply beyond the scope of each crime

  o Justifications

  o Defenses
    
    • Differences:
      
      - Justification; no criminal responsibility for aider and abettor
      
      - Justification; cannot be met with self-defense
      
      - Excuse; possible civil liability

      - But for the perpetrator; same result

• Defenses in international criminal law
  
  o Pragmatic and moral and reasons for the reluctance
    
    • The gravity
    
    • Need to establish guilt
    
    • Protect potential victims
Also: more reluctance when the enemies are the accused…

The cases have also been well selected

But principles are principles…?

Compare IMT and IMTFE vs. ICTY and ICTR vs. ICC

- Difference between *state-centred* international law and international *criminal* law
  - Respondeat superior
  - Act of state

- Defenses most likely to succeed with war crimes
  - Insanity
  - Intoxication
  - Self-defense
  - Duress
  - Superior orders

**Sources:**

- Nuremberg, Tokyo, ICTY and ICTR: few regulations
- Most important; Nuremberg: “superior orders no defense”
- Official capacity – no defense
- Otherwise: Judged by each tribunal from case to case on the basis of “general principles”
- ICC: articles 27, 31 and 33.
- Article 31(3): other defenses
- ICC statute roughly reflects customary international law

**SUPERIOR ORDERS**

- No defense has been invoked more often
• In its pure form: The accused was given an order, and orders must be obeyed

• Arguments
  o Orders should be obeyed – why
    ▪ Otherwise chaos
    ▪ Respect for humanitarian law
    ▪ But only lawful orders should be obeyed
  o Difficult situations for subordinates
    ▪ Difficult law
    ▪ Should not think twice?
    ▪ Must be protected
    ▪ Otherwise will not obey
    ▪ But only when acts in good faith

• If taken to the extreme: Only the one person at the top…

• What about risk of reprisals?
  o Instead duress

• Rarely been regarded as valid defense, and when successful:
  o The subordinate did not understand and should not have understood that the order was unlawful; or
  o Combined with other defense: duress

Historical development:

• Around 1900 – superior alone was considered responsible (English and US Military Handbooks)

• Nuremberg article 8 – turned it upside down
"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

I. G. Farben:

"Thus the I.M.T. recognised that while an order emanating from a superior officer of from the government is not, on itself, a justification for the violation of an international law (although it may be considered in mitigation), nevertheless, such an order is a complete defence where it is given under such circumstances as to afford the one receiving it no other moral choice than to comply therewith."

"… they then were crimes under International Common Law. International Common Law must be superior to and, where it conflicts with, take precedence over National Law or directives issued by any national governmental authority. A directive to violate International Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive."

“The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognised as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case."

- Among the academics two schools developed:
  - Categorical rejection
  - Defense if 1) did not know that illegal, and 2) not manifestly illegal

- Latter inspired by the famous Llandovery Castle in Leipzig 1922. The accused had used a torpedo against a hospital ship that transported sick and wounded back home to Canada. Ordered by the captain of the Submarine. Clear signs that it was a hospital ship.

"It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law."

- “including the accused” has been commented, but…

- In Nuremberg no such exception, but these accused were high ranked…

- However, in the “12 subsequent Nuremberg trials”…
High Commands:

“[A] distinction has must be drawn as to the nature of the criminal order itself. […] it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors […] are in conformity with International Law. […] They were soldiers – not lawyers. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. […] He cannot be held responsible for a mere error in judgment as to disputable legal questions.”

“At any rate, it appears that the illegality of such use [of prisoners of war in constructing fortifications] was by no means clear [and] in view of the uncertainty of International Law […] orders providing for such use from superior orders, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face but a matter which a field commander had the right to assume were properly determined by the legal authorities upon higher levels.”

As curiosity: Reich Propaganda Minister Goebbles wrote in an article published in 1944:

"It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are evident to all morality and every international usage of warfare.”

- In the ICTY and ICTR statutes the categorical rule from the Nuremberg Charter is used.

- ICC article 33:

”1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful;
(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”

- Three cumulative criteria:
  - a legal obligation to obey
    - some pressure not enough,
    - though necessity
  - must not have understood that unlawful
    - the core of the Nuremberg principle: a soldier shall not obey orders that he knows to be unlawful
what did he know?
- military education...

- not manifestly unlawful
  - really a presumption of knowledge?
  - difficult to prove knowledge...

- some commentators have argued that ICC art. 33 is a step backwards
- but Nuremberg Charter was meant for higher officers
- must realize the dilemma of the soldier
- the worst crimes will be manifestly unlawful
- genocide and crimes against humanity always manifestly unlawful
- Can always be considered as a mitigating circumstance

DURESS

- Difference between “duress” and “defense”
- Most criminal systems have a general rule that duress might be a defense
- This is therefore considered customary international law
- The problem occurs when innocent life has been taken
- Here there is a division between common law and civil law
- In many common law systems: innocent life – categorically rejected
- Always mitigating circumstance

Einsatzgruppen:

"Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to put a lethal lever."

- This is a liberal view – interestingly an American tribunal…
- In Eichmann – the possibility raised, but
“performed the order of extermination [of jewes] at all times con amore …”

- In some Italian cases after the WWII accused convicted because they had acted under the following threat:

“If you refuse I shall have you shot, and I shall also have the three partisans shot!”

- The judges in these cases stressed that refusing to kill the innocent people would not have saved their lives.

- Also some German jurisprudence after WWII

- These cases represented civil law

Erdemovic (Appeals Chamber):

- The accused held that the victims would have been killed anyway – and then he would have been killed too

- The majority decided the question from what commentators have described as a normative point of view:

- It is not in the interests of the world community to allow this defense

- The superior can then threat the subordinates and make them kill innocent people

“It must be our concern to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them.”

- The majority rejected what they called an utilitarian view – the lesser evil…

- One life can never be weighed against another

The minority argued:

- Only heroes can live up to this

- A higher standard than most people can live up to

- Can the accused really be blamed?

Cassese:
“11. I also respectfully disagree with the conclusions of the majority of the Appeals Chamber concerning duress, as set out in the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah and on the following grounds:

(i) after finding that no specific international rule has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the general rule on duress should apply - subject, of course, to the necessary requirements. In logic, if no exception to a general rule be proved, then the general rule prevails. Likewise in law, if one looks for a special rule governing a specific aspect of a matter and concludes that no such rule has taken shape, the only inference to be drawn is that the specific aspect is regulated by the rule governing the general matter;

(ii) instead of this simple conclusion, the majority of the Appeals Chamber has embarked upon a detailed investigation of "practical policy considerations" and has concluded by upholding "policy considerations" substantially based on English law. I submit that this examination is extraneous to the task of our Tribunal. This International Tribunal is called upon to apply international law, in particular our Statute and principles and rules of international humanitarian law and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. In addition, it should refrain from relying exclusively on notions, policy considerations or the philosophical underpinnings of common law countries, while disregarding those of civil-law countries or other systems of law. What is even more important, a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle nullum crimen sine lege. On the strength of international principles and rules my conclusions on duress differ widely from those of the majority of the Appeals Chamber. I shall set out below the legal reasons which I believe support my dissent.

**ICC ARTICLE 31(1) (d)**

- Cassese “wins” in the Rome Statute
  - Threat of death or bodily harm
  - Imminent or continuing
  - Necessarily – no lesser evil possible
  - Reasonable
- “greater harm” not intended (Norway: evil avoided must be “clearly greater”…)
SELF-DEFENSE

- perhaps the most obvious defense – against the one who represents the threat
- deeply planted in our consciousness
- typical in an armed conflict – a soldier’s duty to defend himself and others
- little jurisprudence – no general provision before ICC

ICC article 31(1) (c):

- read
- also property

*Kordic – ICTY (Trial Chamber), 2001:*

“[self-defense] forms a part of the general principles of criminal law which the International Tribunal must take into account in deciding cases before it.”

“(t)he principle of self-defence enshrined in this provision reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law”.

The ICC provision on self-defense

“reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law”.

- Thus, ICC article must be considered as customary international law

- Five criteria:
  - “unlawful use of force”
  - “himself … or another person” – life or physical integrity
  - “to defend”
  - “imminent”
  - “reasonable”

- The fact that the whole unit was in a defensive operation is not decisive

- mistake of fact can be relevant – ICC article 32(1)
INSANITY

- Rome Statute article 31(1) (a)
  - Mental disease or defect
  - Destroys capacity
  - Appreciate unlawfulness
  - Control conduct
  - Conform to the law

- Does perhaps not make sense to say that this person has the required *mens rea*

INTOXICATION

- The controversial: What about voluntary intoxication?
- Rome Statute article 31(1) (b)

MISTAKE OF FACT

- Also a part of the mens rea discussion
- Compare the requirements of intent and knowledge

MISTAKE OF LAW

- *Error iuris simper nocet*