Aspects of Implementing the Culpability Principle both under International and National Criminal Law
Francisco Francisco, María Inmaculada

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2003

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):
Summary

The subject to be explored in this thesis is the implementation of international substantive criminal law in national legal systems. More precisely, it analyses the influence of substantive criminal law as regulated in the national legal systems of states when they implement the obligations deriving from ratified international legal texts³⁶ that provide legal definitions of crimes. In this context, the English, Spanish and Dutch criminal legal systems have been selected as case studies in order to analyse the role of both the culpability principle and the subjective preconditions for establishing criminal liability as established in these criminal legal systems pursuant to the implementation of the obligations deriving from their ratification of international legal texts dealing with (substantive) criminal law matters. To this end, the following international legal texts have been scrutinised: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 and the Council Directive 91/308/EEC of 1991 on prevention of the use of the financial system for the purpose of money laundering. All three regulate the offence of money laundering.

In relation to this topic, the main question addressed in this thesis reads as follows: what is the role of both the culpability principle and the subjective preconditions for establishing criminal liability under national law when individual states (in this case the UK, Spain and the Netherlands) implement the obligations deriving from ratified international legal texts that provide legal definitions of crimes (in this case the crime of money laundering as regulated by the United Nations Drugs Convention of 1988, the Council of Europe Convention of 1990 and the Council Directive of 1991)?

³⁶ In this thesis the term 'international legal texts' is used to refer to the two conventions and to the European Union directive which have been scrutinised. As it is known, conventions and directives are, from a legal perspective, two different sources of international law. See Chapter 2 for a more detailed explanation.
In order to answer this question, a number of related aspects are considered in this study. The first aspect refers to the way in which international criminal law is implemented in national legal systems. More precisely, the way in which international criminal law is implemented in the UK, Spain and the Netherlands. The purpose is to establish whether the UK, Spain and the Netherlands follow a monistic approach or a dualistic approach when implementing international criminal law.

The second aspect considers the establishment of criminal liability in both international and national legal systems, i.e. the modus operandi of the subjective preconditions for establishing criminal liability and the culpability principle in international criminal law and in the English, Spanish and Dutch criminal laws. With regard to the culpability principle, we have addressed the question of whether this principle presents the following features in international law as well as in the national laws of the three aforementioned countries:

(i) the rejection of presumptions of culpability that reverse the burden of proof and disregard, therefore, the presumption of innocence, and
(ii) the recognition of subjective liability, thereby excluding objective liability. If the requirement of subjective liability is interpreted in the strictest – i.e. psychological – sense, the result is that only physical persons can be held criminally liable. This requirement excludes the acceptance of the criminal liability of legal persons, which do not possess any psyche at all. In this context, we have analysed whether the culpability principle can be qualified as protolegal in both international and national laws.

Finally, both aspects have been studied in relation to the regulation of money laundering in the English, Spanish and Dutch criminal legal systems, pursuant to the implementation of the United Nations Drugs Convention of 1988, the Council of Europe Convention of 1990 and the Council Directive of 1991. In other words, we have scrutinised how these Conventions and Directive were implemented in the respective national legal systems, and if they exerted by the culpability principle in establishing criminal liability.

- Monism versus dualism
With regard to the implementation of international criminal legal systems, it has been established that the UK follows a monistic approach when implementing not only international treaties but as a whole, including domestic enabling legislation. This state that international law is implemented in the domestic enabling legislation required to implement international conventions.

In contrast to the UK, the Spanish legal system, although has been published in treaties ratified by Spain, has been implemented, in important exception to this rule. The Spanish legal system has not implemented the international conventions and, consequently, the implementation of the culpability principle in the national criminal law is not mandatory. This does require enabling legislation – namely a special Act to enable the application of these conventions.

Like the Spanish legal system, the Dutch legal system has implemented the monistic approach as well. The implementation of the conventions and principles of international law is, in the same way, regulated by domestic enabling legislation, which, once published, is required to enable the application of these conventions and principles.


370 See Chapter 1.
371 Regarding the culpability principle, attention has to be paid to the meaning of the adjective protolegal in the context of this thesis. Protolegal means that the culpability principle can be called príncipio primario. The principle is valid and binding in the legal orders irrespective as to whether any positive legal instrument (law, jurisprudence, treaty provisions, decisions of supranational organisations) does indeed recognise the principle or aspects of it. See Chapter 1 for a more detailed explanation.

372 See Chapter 3.
373 See Chapter 4.
implemented in the mentioned national legal systems as well as the influence exerted by the culpability principle and the subjective preconditions for establishing criminal liability at both the international and national levels following implementation of the aforementioned Conventions and Directive.

- Monism versus dualism
With regard to the implementation of international criminal law in the UK, it has been established that the UK adheres to the dualistic approach when implementing not only international criminal law but also international law as a whole, including international legislation on Human Rights. One may thus state that international criminal law is not self-executing in the UK and domestic enabling legislation – namely an Act of Parliament – is therefore required to implement international legislation.372

In contrast to the UK, the Spanish legal system follows in principle a monistic approach when implementing international law. It can therefore be stated that domestic enabling legislation is not required to implement the provisions of treaties ratified by Spain, which will directly apply when these treaties have been published in the Spanish Official Bulletin. Nevertheless, there is an important exception to this as far as international criminal law is concerned. The Spanish legal system follows indeed the dualistic approach in relation to the implementation of international criminal law and, therefore, international criminal law is not self-executing in Spanish law. As a result, domestic legislation – namely an Organic Law promulgated by Parliament373 – is required to enable the application of international criminal law into the Spanish legal system.

Like the Spanish legal system, the Dutch legal system is largely based on the monistic approach when implementing international law and, therefore, international law is, at least in principle, self-executing in Dutch law. Nevertheless, the Dutch legal system adheres to the dualistic approach when implemen-
ting international criminal law. Consequently, international criminal law is not self-executing in the Netherlands and domestic enabling legislation is required to implement international criminal law in Dutch law.\(^{321}\)

In this context, a state’s adherence to the legality and territoriality principles in criminal law matters is the legal justification for following the dualistic approach when implementing international criminal law in its national legal system.

As a result, one may state that the UK, Spain and the Netherlands are similar with regard to the implementation of international criminal law into their national legal systems because all three follow a dualistic approach. Consequently, these legal orders require domestic enabling legislation as *conditio sine qua non* to implement the provisions of international treaties dealing with criminal law matters, both substantive and procedural.\(^{375}\)

### Establishing criminal liability

The analysis of criminal liability in this study begins with an outline of the historical development of criminal liability in international criminal law as well as in English criminal law, Spanish criminal law and Dutch criminal law. That historical development accounts for the concept of criminal liability as it is currently regulated in international law as well as in the three aforementioned countries.\(^{376}\)

With regard to the subjective preconditions for establishing criminal liability, this study analyses the *mens rea* precondition as it is regulated in the international criminal legal system as well as in the national criminal legal systems of England, Spain and the Netherlands.\(^{377}\) As is commonly known, *mens rea* is the psychological state of mind of the defendant at the moment he commits the offence.

Besides, this study seeks to establish criminal liability both under international law and Dutch law, leaving a second subjective precondition for criminally liability, namely the accused’s knowledge of another conduct on the facts.\(^{378}\)

From a comparative legal order and the three subjective preconditions in cases of strict liability, in contrast to English law, these legal orders have elaborated another kind of liability, namely the 'culpability' principle.

In so far as the culpability principle of affairs this principle is permitted not only as in the English legal systems, but also in English international criminal legal systems, there are more.

In the international context of culpability leading to the recognition of innocence and they that contravene the provisions, treaties have clearly to the recognition of protection. The Court of Human Rights are permitted if the...
Besides, this study scrutinises the other subjective precondition required to establish criminal liability in the Spanish and Dutch legal systems. In Spanish law and Dutch law, legal scholars and jurisprudence have indeed formulated a second subjective precondition needed for establishing the defendant’s criminally liability, namely the culpability, which denotes that the defendant is to blame for his conduct. In the Spanish and Dutch legal systems, the elements of the culpability precondition are the imputability of the accused, the accused’s knowledge of the unlawfulness of the conduct and the fact that another conduct on the part of the accused may be required.378

From a comparative perspective one can state that, in the international legal order and the three national legal systems discussed, the mens rea is the subjective precondition required for establishing criminal liability, except in cases of strict liability in English law. In the Spanish and Dutch legal systems, in contrast to English law and international law, legal scholars and jurisprudence have elaborated a second subjective precondition to establish criminal liability, namely the culpability.379

In so far as the culpability principle, one can ascertain that in the current state of affairs this principle is recognised in the international criminal legal system as well as in the English, Spanish and Dutch criminal legal systems. Nevertheless, if one goes deeper into the legal status of the culpability principle in the international criminal legal system and in the aforementioned national criminal legal systems, there are differences and similarities that need to be mentioned. In the international criminal legal system one does not encounter presumptions of culpability leading to a reversal of the burden of proof, which thereby contravene the presumption of innocence. Generally speaking, international treaties have clearly established that a defendant is not required to prove his innocence and they therefore reject the reversal of the burden of proof that leads to the recognition of presumptions of culpability. In this scenario, the European Court of Human Rights has stated that rebuttable presumptions of culpability are permitted if they operate within reasonable limits. Furthermore, the
subjective criminal responsibility is recognised in international law since the
\textit{mens rea} of the defendant is required in order to establish his criminal responsi-

In principle, the English criminal legal system rejects irrebuttable presumptions of culpability. Nevertheless, in practice, the way in which some offences and defences are regulated implies the recognition of almost irrebuttable presumptions of culpability. Moreover, the English criminal legal system acknowledges offences of strict liability which implies that the \textit{mens rea} of the defendant is presumed, thereby shifting the burden of proof and breaching the presumption of innocence. English strict liability is indeed an exception to the feature of the culpability principle that recognises subjective liability. Furthermore, in English criminal law, offences qualified by the result can be encountered, thereby favouring the recognition of the objective liability. In this context, English criminal law recognises not only the criminal liability of physical persons, but also the criminal liability of legal persons. Despite the fact that the culpability principle is recognised in the English law, it cannot be qualified as protolegal.\textsuperscript{380}

In the Spanish legal system we do not encounter presumptions of culpability that lead to reversals of the burden of proof and that, consequently, violate the presumption of innocence. However, it must be noted that the way in which a few offences are still regulated denotes the recognition of rebuttable presumptions of culpability. Moreover, subjective criminal liability is recognised in Spanish criminal law. The \textit{mens rea} of the defendant plays indeed a very important role as a \textit{conditio sine qua non} for establishing the defendant's criminal liability. Consequently, Spanish law does not acknowledge strict liability. Moreover, the vestiges of objective liability have been in principle eliminated from the Spanish legal system and thereby the typical offences qualified by the

result have been excluded. Spanish criminal law, however, not in principle, that the culpability principle is protolegal to a degree."\textsuperscript{382}

In Dutch criminal law, the presumption of irrebuttable culpability leading to the presumption of innocence has been declared unconstitutional. With regard to the doctrine of the \textit{culpa}, this constitutes a formal exception to this because it is only possible with regard to misdemeanor. However, the defendant's \textit{culpa} is not, in principle, that if the mental element of an offence, this element is in principle faithful to the \textit{culpa}. This constitutes a formal exception to this because it is only possible with regard to misdemeanor. Moreover, Dutch criminal law still contains a few offences qualified by the result have been excluded. Spanish criminal law, however, not in principle, that the culpability principle is protolegal to a degree."\textsuperscript{382}

\textsuperscript{380} See Chapter 2.
\textsuperscript{381} See Chapter 3.
\textsuperscript{382} See Chapter 4.
\textsuperscript{383} See Chapter 5.
result have been excluded from the Criminal Code. However, a few offences still have to be interpreted as offences qualified by the result. Furthermore, Spanish criminal law recognises the criminal liability of physical persons but not, in principle, that of legal persons. The culpability principle is therefore protolegal to a degree that lies between moderate and maximum, closer to moderate. 362

In Dutch criminal law one does not usually encounter presumptions of culpability leading to reversals of the burden of proof, which thereby violate the presumption of innocence. Indeed, the *mens rea* of the defendant cannot be presumed in the Dutch legal system. Nevertheless, it cannot be denied that the doctrine of the material fact relating to misdemeanours supposes an exception to this because it presumes the defendant’s *mens rea*. To avoid the culpability principle being violated, the Dutch Supreme Court, has stated that, with regard to misdemeanours, the *mens rea* of the defendant is presumed, however, the defendant will not be convicted if he can prove ‘absence of all culpa’. This constitutes the recognition of a rebuttable presumption of culpability. Moreover, Dutch criminal law does not, in principle, recognise strict liability although there are offences with a tacit *mens rea* in the Dutch criminal legal system. With regard to these offences, the Dutch Supreme Court has stipulated that if the mental element is not explicitly established in the legal definition of an offence, this element shall be deduced from the legal definition of this offence as it was expressly established. This means that the Dutch criminal law is in principle faithful to the feature of subjective liability that composes the culpability principle. In addition, one has to take into account that Dutch criminal law still contains elements of objective liability through the recognition of offences qualified by the result. Moreover, the criminal liability of both physical persons and legal persons is recognised in the Dutch criminal legal system. In this context, the culpability principle is qualified as protolegal to a moderate degree. 363

362 See Chapter 4.
363 See Chapter 5.
ASPECTS OF IMPLEMENTING THE CULPABILITY PRINCIPLE BOTH UNDER INTERNATIONAL AND NATIONAL CRIMINAL LAW

From a comparative perspective, one may state that presumptions of culpability leading to a reversal of the burden of proof and contravening the presumption of innocence are not encountered in the international legal system. This is certainly akin to the Spanish and Dutch criminal legal systems. Strict liability is not encountered in the international criminal legal system, unlike English criminal legal system. In the international criminal legal system, the mens rea of the defendant is indeed required in order to establish his criminal responsibility, which is similar to both Spanish and Dutch criminal legal systems. In a similar way to English criminal law and Dutch criminal law, international law recognises the criminal responsibility of legal persons. However, there is a clear contrast between English, Dutch and international criminal laws and Spanish criminal law on this matter, which does not acknowledge the criminal responsibility of legal persons.

With regard to the protolegality of the culpability principle as regulated in international law and in the English, Spanish and Dutch criminal legal systems, one may ascertain that Dutch criminal law and Spanish criminal law are most similar. Moreover, they are also similar to international law. This is in contrast to English criminal law, in which the culpability principle is not qualified as protolegal.364

- The regulation of the offence of money laundering
Following the dualistic approach, the UK implemented the 1988 United Nations Drugs Convention by the 1990 CJA and, as a result, money laundering related to drug trafficking is regulated as an offence. In accordance with the United Nations Drugs Convention of 1988, ‘knowledge’ is the mens rea required to establish the offence of money laundering related to drug trafficking in English criminal law. However, English law goes further than the Convention by including ‘having reasonable grounds to suspect’ as enough mens rea for money laundering. Strict liability has also been incorporated into the regulation of money laundering.

Furthermore, the Council of Europe Convention of 1990 has not been explicitly implemented, yet in the 1993 CJA the offence of money laundering related to any serious offence is regulated as an offence. The 1993 CJA establishes the mens rea required to regulate the offence of money laundering related to any serious offence. In contrast to English law, although the Punitive Offences Against Public Health Act 1970 did not recognise strict liability, it did not recognise strict liability for money laundering in England.

Some of the provisions in English criminal law related to this Directive have been included in the Money Laundering Act 1995.

The United Nations Drugs Convention was not explicitly implemented by the UK, however, some of the provisions were incorporated into the Criminal Code. This Directive when regulating money laundering, 'negligence' (i.e. showing 'carelessness') was included as mens rea. The Directive of 1991 has not been implemented by English law, although the United Nations Convention against the Financing of Terrorism has been. Namely in the Law Enforcement Code, this Directive has not been implemented.
resumptions of culpability evening the presumption normal legal system. This is normal systems. Strict liability system, unlike English legal system, the mens rea in his criminal responsibil-\nlegal systems. In a legal law, international law. However, there is a clear criminal laws and Spanish knowledge the criminal principle as regulated in criminal legal systems, Spanish criminal law are most normal law. This is in contrast principle is not qualified as

The United Nations Drugs Convention of 1988 was implemented in the Spanish legal system in 1992. As a result, money laundering related to drug trafficking in English law requires the mens rea required to drug trafficking in English law requires the mens rea required to drug trafficking in English law. 'Knowledge' and 'gross negligence' (i.e. should have reasonably known) are recognised in Spanish law as the mens rea required for the offence of money laundering related to drug trafficking. In addition, Spain ratified the Council of Europe Convention of 1990 in 1998. Nevertheless, the provisions of the Convention relating to the offence of money laundering related to another serious offence were already included in the Criminal Code of 1995. Furthermore, the mens rea required for money laundering related to any serious offence is either 'knowledge' or 'gross negligence' (i.e. should have reasonably known). Moreover, the Council Directive of 1991 has not been explicitly implemented in the field of criminal law, although the Spanish legislator could have been influenced by the Directive when regulating the offence of money laundering in the Criminal Code. This Directive has been transformed in the field of administrative law, namely in the Law 19/93. As a result of the implementation of this Directive

385 See Chapter 3.
in Spanish law, failure to comply with Law 19/93 constitutes an administrative infraction.\textsuperscript{365}

In 1993 the Netherlands ratified the United Nations Drugs Convention of 1988. However, it has not been implemented in Dutch criminal law with regard to considering money laundering related to drug trafficking as a separate offence. Furthermore, the Council of Europe Convention of 1990 was ratified by the Netherlands in 1993 and implemented in the Dutch Criminal Code in 2002. ‘Knowledge’ or ‘should have reasonably assumed’ is the mens rea required for the offence of money laundering related to any other serious offence in the Dutch criminal legal system. The Council Directive of 1991 has been implemented into administrative law, particularly in the Disclosure of Unusual Transactions (Financial Services) Act and in the Identification (Financial Services) Act. Moreover, non-compliance with these Acts constitutes an economic offence under Article 1 of the Economic Offences Act, which is the only effect of this Directive in Dutch substantive criminal law.\textsuperscript{367}

In a nutshell, one can state that money laundering related to drug trafficking is not considered as a separate offence in the Dutch criminal legal system, unlike the Spanish criminal legal system and the English criminal legal system. Nevertheless, the three legal systems are similar in their treatment of money laundering related to another serious offence as a separate offence. Regarding the mens rea required to commit the offence of money laundering as regulated in these three legal systems, one can say that ‘knowledge’ is established in the three of them. Moreover, ‘should have reasonably known’, ‘should have reasonably assumed’ and ‘having reasonable grounds to suspect’ have been established as enough mens rea to commit money laundering in Spain, the Netherlands and England respectively. ‘Suspicious’ as enough mens rea for the offence of money laundering has also been set up in the English criminal legal system.\textsuperscript{368}

\textsuperscript{365} See Chapter 4.
\textsuperscript{366} See Chapter 5.
\textsuperscript{367} See Chapter 6.
\textsuperscript{368} See Chapter 7.
\textbf{SUMMARY IN ENGLISH}

\textbf{- Conclusions}

An answer to the main question formulated at the beginning of this study has been provided in the conclusions of this thesis. Moreover, general guidelines for implementing treaties dealing with matters of substantive criminal law, namely treaties that provide legal definitions of crimes, have been also proposed in these conclusions.\footnote{See Chapter 7.}

With regard to the main question, it may be stated that both the culpability principle and the subjective precondition for establishing criminal liability, as regulated by national legal systems, play a very important role when a state implements the obligations deriving from a ratified international legal text that provides a legal definition of an offence.

This answer can be justified in legal terms by both the fact that the national legal systems follow a dualistic approach when implementing international criminal law and by the criminal law itself. In principle, every state has the exclusive power to establish the criminal law to be applied within its borders and, thus, every state has the right to exercise the \textit{ius puniendi} within its territory. This relates to the fact that states follow the territoriality principle in criminal law matters and, consequently, follow a dualistic approach when implementing international criminal law into their national law.

Moreover, one has to state that the way in which both the culpability principle and the subjective preconditions for establishing criminal liability are interpreted in the international legal system is also of vital importance. However, once a treaty is implemented, what matters is the way in which the culpability principle is interpreted in the national legal systems, i.e. whether or not this principle is characterised as protolegal in these national legal systems.

With regard to the general guidelines for the ratification and implementation of international treaties dealing with substantive criminal law, i.e. treaties providing legal definitions of offences, it can be stated that:

Firstly, states must closely study the text of a treaty prior to ratification. Attention should be paid to the treaty’s consequences for national law.
ASPECTS OF IMPLEMENTING THE CULPABILITY PRINCIPLE BOTH UNDER INTERNATIONAL AND NATIONAL CRIMINAL LAW

Secondly, once a state has ratified a treaty that provides a legal definition of an offence, this state must comply with the obligations that derive from such ratification. In principle, the offence as legally defined in the treaty must be clearly identifiable in the national law of signatory states.

Thirdly, at the international level, the mens rea stipulated in a treaty regulating an offence is a minimum requirement that states must meet when they implement the treaty. However, this does not imply that the actus reus and the mens rea of the offence must not be unequivocally recognized in its definition at the domestic level. The actus reus and the mens rea of the offence should also be clearly stipulated in the text of the treaty.

In addition, it is necessary to further guarantee the degree of protolegality of the culpability principle, for example by eliminating the vestiges of objective liability. Moreover, it is necessary to guarantee the protolegality of the culpability principle in those legal systems where it is not already guaranteed, as is the case in the English legal system.

Fourthly, since treaties dealing with criminal law matters are not 'legally operative' until the signatory states implement them in national law, it is proposed that states be required to implement treaties dealing with criminal matters by a specified date, as is the case with certain European Union legislation, e.g. directives. Consequently, treaties dealing with criminal law matters will be 'legally operative' within a reasonable and short period of time.

Deze studie richt zich op het materiële strafrecht in nationale rechtsystemen. Wanneer de betreffende internationale of nationale rechtsvorming een bepaald strafrechtelijke begrip vaststelt, moet dat begrip in de nationale rechtsvorming worden erkend. Dit betekent in het concreet dat de nationale rechtsvorming het strafrechtelijk begrip moet erkennen en dat het strafrechtelijk begrip moet worden toepassen in de geest van het internationaal verdrag.

In deze studie wordt een dergelijke analysis van internationaal strafrecht als onderwerp. Het gaat hierbij om de rol die het strafrecht moet spelen op het gebied van de strafrechtelijke moeilijkheden. Deze studie richt zich daarnaast op de twee onderzocht richtlijnen van het internationaal strafrecht.