Mistake of law: excusing perpetrators of international crimes

van Verseveld, A.

Publication date
2011

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
TABLE OF CONTENTS

TABLE OF CONTENTS i

ACKNOWLEDGEMENTS v

CHAPTER 1 INTRODUCTION 1
  1.1 Torture at Abu Ghraib 1
  1.2 Outlining the issue 2
  1.3 The occasion 2
  1.4 Methodology and limitations 3
  1.5 Definitions 4
  1.6 Structure of the thesis 6

CHAPTER 2 THE THEORY OF MISTAKE OF LAW IN NATIONAL CRIMINAL LAW SYSTEMS 8
  2.1 Introduction 8
  2.2 Mistake of law in the common law systems of the USA and the UK 9
    2.2.1 Introduction - ignorantia legis non excusat 9
    2.2.2 The exceptions to the rule 9
    2.2.2.1 American law 9
    2.2.2.2 English law 18
    2.2.3 Conclusion – an ad hoc approach 26
  2.3 Mistake of law in the civil law systems of Germany and France 27
    2.3.1 Introduction 27
    2.3.2 Germany - Mistake of law is an excuse 27
      2.3.2.1 Das Recht 28
      2.3.2.2 The landmark decision 28
      2.3.2.3 The codification 35
      2.3.2.4 The German Border Guard Cases 44
        2.3.2.4.1 The German Border Guard Cases – The Principle of Legality 47
        2.3.2.4.2 The German Border Guard Cases – Mistake of Law 48
      2.3.2.5 Conclusion 51
    2.3.3 France – Mistake of law is a ground for excluding criminal responsibility 52
      2.3.3.1 The provision 54
      2.3.3.2 Avoidable mistake 56
      2.3.3.3 Conclusion 58
  2.4 Superior orders 59
    2.4.1 USA and UK 59
    2.4.2 Germany and France 62
    2.4.3 Conclusion 64
  2.5 Conclusion – Comparative analysis 64

CHAPTER 3 COMPARING THE NATIONAL APPROACHES – THEORISING ABOUT THE ISSUE 66
  3.1 Introduction – twofold and threefold structures 66
  3.2 Relevant distinctions 67
    3.2.1 Justification and excuse 67
    3.2.2 Wrongdoing and attribution 71
3.2.3 Defeasible and comprehensive rules 72
3.2.4 Conduct rules and decision rules 73
3.2.5 Analysis 74
3.3 Other issues 75
3.3.1 Criminal intent 75
3.3.2 Putative justifications 76
3.3.3 An element of ‘unlawfulness’ in the crime definition 78
3.3.4 The principle of legality 79
3.4 Conclusion 81

CHAPTER 4 THE THEORY OF MISTAKE OF LAW IN INTERNATIONAL CRIMINAL LAW 84
4.1 Introduction 84
4.2 Article 32(2) – Mistake of Law 85
  4.2.1 Article 32 Mistake 85
  4.2.2 Negate the mental element 87
4.3 Article 33 – Superior Orders 95
  4.3.1 Introduction 95
  4.3.2 The provision 96
  4.3.3 Criticism – Departure from customary international law 97
  4.3.4 Criticism – Manifest illegality 100
  4.3.5 Conclusion – Superior orders a separate defence? 102
4.4 Concluding analysis 103

CHAPTER 5 APPLYING THE THEORY OF MISTAKE OF LAW – AN ANALYSIS OF
(International) National Case Law 106
5.1 Introduction 106
5.2 The case law 107
  5.2.1 Pre-WWII case law 108
  5.2.2 WWII case law 110
  5.2.2.1 United States 110
  5.2.2.2 United Kingdom 114
  5.2.2.3 Other countries 117
  5.2.3 Trials related to other armed conflicts after WWII 126
  5.2.4 Recent decisions 131
  5.2.4.1 International Criminal Tribunal for the Former Yugoslavia (ICTY) 131
  5.2.4.2 Special Court for Sierra Leone (SCSL) 132
  5.2.4.3 International Criminal Court (ICC) 135
5.3 Conclusion 135

CHAPTER 6 APPLYING THE THEORY OF MISTAKE OF LAW – AN ANALYSIS OF
ELEMErS OF CRIMES AND A SURVEY OF DILEMMAS ON THE BATTLEFIELD 139
6.1 Introduction 139
Part I - Subjective requirements of criminal responsibility 140
6.2 Elements of Crimes 141
  6.2.1 Elements of crimes against humanity 143
  6.2.1.1 Specific elements: Deportation, Torture and Persecution 144
  6.2.2 Elements of war crimes 146
  6.2.2.1 Specific elements: Improper use of a flag, insignia or uniform 148
  6.2.3 Conclusion Part I 151
Part II – Dilemmas on the battlefield 152