Mistake of law: excusing perpetrators of international crimes
van Verseveld, A.

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CHAPTER 1 INTRODUCTION

1.1 TORTURE AT ABU GHRAIB

The disclosure of pictures of American soldiers abusing prisoners in the Abu Ghraib prison in Iraq caused a worldwide wave of shock and disbelief.2 The pictures showed a wide range of scenes of abuse: naked Iraqi prisoners in stress positions, lying in a pile on top of each other, with a hood over their head standing on a box with electric wires attached to their hands, driven into a corner under attack of a prison guard dog, its teeth right in the face of the terrified prisoner. In some of the pictures, next to the abused prisoners, American soldiers can be seen, posing for the camera, smiling, giving the thumbs up. The most notorious of these is probably the picture of Pfc. Lynndie R. England holding one end of something that looks like a dog leash, a prisoner lying on the floor at the other end of it.3

The next shock and feeling of disbelief probably came when some of the soldiers, back in America and being prosecuted for these crimes, said that they were just doing their jobs, following orders, not knowing to have done anything wrongful, that they had acted under mistake of law. How is it best to respond to any defence of mistake of law in such serious cases? Is this a palatable defence? Considering allegations of such a grave nature the irrebuttable presumption that everyone knows the law seems more than justified.

If it is completely irrelevant that these soldiers were mistaken about the wrongfulness of their behaviour, their defence can be denied at the outset. But is a mistake truly irrelevant to the determination of culpability? Does the fundamental principle of nulla poena sine culpa not require that we respond to these pleas? Assessing first of all the credibility of it: were or might these soldiers have been truly mistaken? And, secondly, if we assume they were, the question arises whether they should have known better? Should the ultimate question be whether or not they are to blame for their wrongful conduct, which would also entail a determination of culpability with regard to their mistakes?

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The purpose of this study is to investigate the scope and content of the defence of mistake of law in international criminal law. Can a mistake of law exculpate the perpetrator of an international crime? And if so, what would be the circumstances under which the defence would apply? And if so, are those circumstances covered by the current international codification of mistake of law?

1.2 Outlining the issue
Acting under mistake of law means that one is unaware of the wrongfulness of his conduct. The postulate "every man is presumed to know the law", has long been the basis for the rule *ignorantia legis neminem excusat*, ignorance of the law does not excuse. However, for over half a century this postulate has been questioned because of its harsh outcomes in respect of a blameless defendant. As a result, the presumption is now widely recognized as no longer being irrebuttable. Many legal systems have found ways to respond to the issue of mistake of law, for example by providing for a defence of mistake of law or interpreting certain crime definitions as to require knowledge of the law. A successful defence of mistake of law is generally limited to those defendants who made a reasonable mistake or could not avoid the mistake.

It could be argued that international crimes are of such a grave nature that the presumption that everyone knows the law should be irrebuttable. The more serious the alleged crime, the less reasonable or unavoidable the mistake. On the other hand, the fact that not all norms of international criminal law, including justifications, have fully crystallized and the fact that perpetrators are likely to be less familiar with international crimes than with domestic crimes, may warrant non-exclusion of the defence of mistake of law a priori.

The Statute of the International Criminal Court (ICC Statute) specifically provides, for the first time in the history of the codification of international criminal law, for the defence of mistake of law. This codification has been a starting point for this research.

1.3 The occasion
The codification of mistake of law in the ICC Statute marks an important step in the development of international criminal law (ICL). As soon as we take a closer look at the

4 An important exception is the UK, see § 2.2.2.2 infra.
relevant provisions, however, the problem of the “unlike parents” of ICL, public international law and criminal law, becomes apparent. The Court may be expected to interpret the Statute as a treaty, while from a criminal law perspective a recourse to general principles or reasoning from the rationale of a provision seems warranted. And ICL does not only have these "unlike parents", but on top of that, the criminal law "parent" appears to have a "split personality", containing aspects of common law and civil law. Often ICL tries to reconcile its two personalities. This implies that ICL can not be studied as a *sui generis* system of law; understanding and interpreting its provisions requires a comparative law perspective. However, as will become apparent from the current study, the domestic approaches are on occasion irreconcilable. Here, ICL must either develop an approach *sui generis* or must choose the domestic approach that it perceives best in the interests of justice.  

Common law and civil law apply a different 'structure of offences'. The structure of an offence forms the basis of attribution, which includes the issue of defences, and thus the issue of mistake of law. The 'structure of offences' may be an issue on which common law and civil law appear irreconcilable. The current study aims, through its investigation into the scope of mistake of law, to contribute to the development of a more systematic approach to the structure of international offences.

### 1.4 Methodology and limitations

A starting point for this research has been the provision on mistake of law in the ICC Statute and the legal literature that has commented upon it. In order to be able to understand and interpret this provision, a comparative law study of mistake of law is required. I have compared the approach to mistake of law in the common law systems of the United States of America (USA) and the United Kingdom (UK) and the civil law systems of Germany and France. I have consulted legislative sources, case law and legal literature. A case law study of ‘international’ trials aimed at construing theoretical

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6 I am aware of the danger this term holds for it can refer to various, not always compatible interests: justice for the victims or the affected community, justice for the defendant, justice of (general or specific) prevention.


8 In this study I did not include the Dutch approach to mistake of law. Although recognized as an excuse, mistake of law has remained uncodified in the Netherlands. The scope of this unwritten excuse is comparable to the German provision on mistake of law. My choice for including the German approach is based on the fact that Germany has a richer tradition of legal doctrine than the Netherlands.
foundations underlying decision regarding pleas of mistake of law and to discern practical examples of situations in which the defence may be applicable. A study of the elements of international crimes as defined by the ICC Statute and the Elements of Crimes has offered more insight into areas where mistake of law could be relevant. There has been consultation with several military lawyers to validate whether the examples I chose to discuss are realistic scenarios in practice.

The comparative law study and the case law study are limited. I justify the choices made on the basis of the aim of this study, which has not been to determine the customary law status of mistake of law, but to determine, mainly on the basis of a theoretical account, what the scope of mistake of law under international law should be and whether this scope is covered by the current international provision.

1.5 Definitions
In this study, international crimes refers to war crimes, crimes against humanity and genocide, as defined in the Statute of the International Criminal Court. These crimes are crimes of intent and not crimes of negligence; they concern intentional and knowledge-based behaviour.9

In this study, mistake of law does not encompass mistakes concerning issues of procedural criminal law (mistake of formal law) but rather mistakes about the substantive wrongfulness of the act, i.e. a mistake about the underlying norm protected by the specific criminal law (mistake of substantive law). Someone may be totally ignorant of the underlying norm, he may be mistaken about the scope of the norm or about an element of the crime definition or the mistake may concern a ground of justification (putative justification); these are all relevant instances of mistake of law. In relation to international crimes, a mistake about the prohibition as such is, given the grave nature of these crimes, highly unlikely. The most relevant mistakes of law will therefore be mistakes about normative (as opposed to factual) elements of the crime definition and mistakes about justifications. A special place in international criminal law is reserved for mistakes about the justification of superior orders. Many international crimes are committed in the context of a military organization. A mistake about the lawfulness of a superior order

constitutes a mistake of law. The battlefield reality arguably requires a differentiated approach toward mistaken subordinates. The putative justification of superior orders is therefore treated separately from other examples of such putative justification.

A common referred to distinction is that between mistakes of law and mistakes of fact.\(^{10}\) According to this distinction mistake of fact is generally a good defence and mistake of law is (generally) not. The mistake of a hunter who shoots someone’s dog mistaking it for a wolf, is a mistake of fact. If the hunter however believes his hunting permit also allows him to shoot someone’s dog, he acts under a mistake of law. In most legal systems, the fact that mistake of fact excludes criminal responsibility is far more acceptable than mistake of law excluding criminal responsibility. This is mainly so because a mistake of fact is more likely to negate the required intent. The distinction between mistake of fact and mistake of law, however, is not always as obvious as in the example of the mistaken hunter.\(^{11}\) Mistakes about purely descriptive elements are mistakes of fact. A mistake concerning a legal or normative element, however, may variably qualify as a mistake of fact or as a mistake of law.\(^ {12}\) Basing the relevance of a mistake on a disputable distinction is arbitrary. Further, the distinction is most of the time besides the point. The paramount issues concern which mistakes are irrelevant, which mistakes will exculpate per se, and which mistakes will only exculpate when reasonable or unavoidable.\(^ {13}\) These issues can not be answered by applying the distinction between mistake of fact and mistake of law, even if such distinction was unproblematic. The answer as to whether (un)reasonable mistake exculpates can be found by determining whether the mistake negates the required intent. If a mistake negates the required intent, any mistake, reasonable or unreasonable, will exculpate. If the mistake concerns an element extrinsic to the required intent, a reasonableness standard may be applied.\(^ {14}\) Both mistakes of fact and of law can be relevant and irrelevant to the required intent. The determination as to whether or not a certain element belongs to the required intent is unfortunately by no means an easier task than determining whether an element is an element of fact or law.

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10 See e.g., art. 32 ICC Statute.
14 See Chapters 2 and 3 infra.
Since all international crimes are crimes of intent, whether the object of the mistake is part of this intent or not is determinative of whether only reasonable or unavoidable mistake exculpates.

Hence, the distinction between mistake of fact and mistake of law is not helpful in determining the relevance of a mistake (although mistake of fact generally negates the required intent and mistake of law generally does not). In this research I use this distinction, nevertheless, to indicate whether a certain case, issue or example belongs to the topic of this research, mistake of law. Mistake of law, as indicated, involves ignorance or mistake as to the wrongful nature of the conduct.

1.6 Structure of the thesis
As stated, a starting point for this research has been the provision on mistake of law in the ICC Statute. As will become evident from the discussion in Chapter 4 about the texts of articles 32 and 33, and the various comments thereto, although codification of such an important part of the general part of international criminal law is to be welcomed, the ICC articles are not as comprehensive and sound as they at first sight may seem. The articles, being the result of treaty-negotiations, necessarily have the character of a compromise. The codification of the defence is by all appearances influenced by national understandings of the defence and by previous (inter)national prosecutions of international crimes. Research into national and international regulations and case law is necessary in order to understand the scope and the meaning of the ICC provisions.

The comparative law study of Chapter 2, comparing the common law systems of the USA and the UK and the civil law systems of Germany and France, aims at demonstrating the implications of these distinctive systems for the defence of mistake of law. This Chapter reveals a distinctive approach in the common law systems and the civil law systems in their structure of offences. The common law concept of offences can be characterised as a twofold structure: offences (which consist of mens rea and actus reus) and defences. The Germanic civil law structure of offences is threefold: the crime definition (mens rea and actus reus), the wrongfulness of the act (absence of justification) and the culpability of the perpetrator (absence of excuse).

Further theorising about the issue in Chapter 3 it will become evident that which structure of offences is followed has implications for the prospects of solving the complex issue of mistake of law. Reasoning from the conclusions of Chapter 3, Chapter 4 brings to light the problematic implications of the current codification of mistake of law; the question arises whether the ICC provision at all addresses the issue of mistake of law. Chapter 5 reveals that the case law concerning pleas of mistake of law and superior orders is a poor instrument to construe theoretical foundations underlying rejections or recognitions of the defence of mistake of law. In Chapter 6 I will test the theoretical analyses of Chapters 3 and 4 by investigating the scope of the current provision on mistake of law in relation to the elements of international crimes as defined by the ICC Statute and by sketching some scenarios which are unduly not covered by the current international provision on mistake of law. In the final Chapter 7 I will return to the issue with which I have opened this study: the Abu Ghraib prison torturers’ plea of mistake of law.