Mistake of law: excusing perpetrators of international crimes

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CHAPTER 3 COMPARING THE NATIONAL APPROACHES – THEORISING ABOUT THE ISSUE

3.1 INTRODUCTION – TWOFOLD AND THREEFOLD STRUCTURES

Chapter 2 showed two ways to conceptualise criminal offences. The Anglo-American systems and France use a twofold structure; the civil law system of Germany developed a threefold structure. The twofold system to analyse the internal structure of criminal offences distinguishes between the *actus reus* and the *mens rea* of offences, the inner or subjective side and the objective factual side. The threefold scheme of analysis consists of the following requirements: a criminal act must fulfil the elements of a crime definition, it must be wrongful (absence of justification) and the actor must be culpable (absence of excuse). Under a twofold system the issue of mistake of law is dealt with in terms of the required mental element. The threefold system has separated the issue of mistake of law from the mental element by requiring *Unrechtsbewusstsein* as a necessary element of culpability.

The system of offences to be applied has consequences, procedural and doctrinal, some of which we also already encountered in Chapter 2. The current Chapter further analyses the differences between these two approaches and, more importantly, the consequences of those differences. This requires more in depth discussion of the distinction between *justification* and *excuse*, wrongdoing and attribution, defeasible and comprehensive rules, conduct rules and decision rules. Other issues under discussion, which also bring to light important consequences of applying one system instead of the other, are: 1) criminal intent, 2) putative justifications, 3) the meaning of an element of unlawfulness or wrongfulness in the crime definition and 4) the principle of legality.

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3.2 RELEVANT DISTINCTIONS

3.2.1 Justification and excuse
As discussed in Chapter 2, most civil law systems, based on the Germanic tradition, distinguish between justification and excuse, a distinction long ignored in most common law systems.\(^{325}\) The distinction is part of the threefold assessment of criminal responsibility. The first question is whether the proven facts fall within the definition of the alleged criminal offence. The second question is whether this behaviour, falling within the crime definition, is also wrongful. This question investigates the applicability of a justification. The third question is whether the defendant is culpable, in other words whether the defendant is blameworthy for committing the wrongful act.\(^{326}\) The wrongfulness and culpability are presumed when all the elements of the crime definition are fulfilled. This presumption is however rebuttable, on the basis of a claim of justification or excuse respectively.\(^{327}\)

In most common law systems, where justifications and excuses fall under the common denominator of ‘defences’, any successful plea of such a defence must lead to the conclusion that no unlawful act has been committed.\(^{328}\) Fletcher calls this “flat legal reasoning”. “All elements are of equal significance. If any element, be it affirmative or negative, is absent, the defendant is not guilty.”\(^{329}\) And here the first important consequence of the distinction between justification and excuse becomes evident. A justification will indeed negate the wrongdoing, but "the question of excusing [only] arises after it is established that the norm is violated".\(^{330}\) I agree with Fletcher when he argues that “the distinction between justification and excuse is of fundamental theoretical and practical value”.\(^{331}\) The theoretical value lies in the fact that recognizing excuses, as distinct from justifications, acknowledges the fundamental principle of criminal law *nulla poena sine culpa*, no punishment without guilt.\(^{332}\) Another related theoretical and, at the same time, practical value is that the distinction allows for a judgment more closely

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326 See also Ibid., p. 101-102.
327 See § 2.3.2.5 supra.
328 See § 2.2 supra.
reflecting reality.\textsuperscript{333} In the case of an exculpatory excuse you do not reach the (in the eyes of the victim or general public sometimes painful) conclusion that no wrongful act has been committed, instead it is determined that the defendant is not to blame for his behaviour, however wrongful.\textsuperscript{334} If an excuse is raised, but rejected, the judgement becomes more precise in its reproach toward the defendant.\textsuperscript{335} Under a twofold system, that does not recognise the distinction between justification and excuse, any mistake of law will negate the required intent. If the mistake was avoidable or unreasonable, the defendant can only be convicted for committing the crime negligently, but only if the criminal code provides for such a crime of negligence.\textsuperscript{336} Under the threefold structure, however, an avoidable mistake of law does not impede the finding of intent; the defendant can be convicted on the basis of intent. When the court finds that the defendant acted with the necessary intent and the defendant raises the issue of mistake of law, which the court decides was avoidable, the conviction and the reproach toward the defendant is based on the fact that he intentionally committed the prohibited act, while he could have behaved differently.

Perhaps the reluctance in twofold systems to accept mistake of law as a defence also stems for the consequences just described. Accepting a defence, justification or excuse, leads to the conclusion that no criminal act took place. In that case, the (mistaken) impression could rise that the individual's interpretation of the law is decisive; i.e. that the defendant decides what is the law. If he, however unreasonably, believes the act to be lawful, his intent is negated and he has committed no wrongful act.

The importance of the distinction between justification and excuse becomes evident from criticism of the judgement of the Appeals Chamber of the ICTY in \textit{Erdemović}.\textsuperscript{337} It has convincingly been argued that had the majority recognized the defence of duress as an excuse, there would have been no issue on the legitimacy of duress as a complete defence in principle, even in case of the killing of innocents.\textsuperscript{338} The distinction between

\textsuperscript{335} See § 2.3.2.2 (discussing Bundesgerichtshof, 18-03-1952 (1952), GSSt 2/ 51 (Lexetius.com/1952,1)) and § 2.3.2.5 supra.
\textsuperscript{337} Prosecutor v. Erdemović (1997), ICTY Appeals Chamber, Case No. IT-96-22-A, Judgement, 7 October 1997.
justification and excuse turns out to be of overriding importance in assessing the responsibility of a person who under duress killed innocent persons. The distinction enables the maintenance of the position that killing innocents can never be justified, and at the same time acknowledges that under certain circumstances the perpetrator can not be blamed for his wrongful conduct. It is, under any circumstance, unreasonable to ask of someone to sacrifice his own life. Cassese, in his dissenting opinion in Erdemović, argued that an argument for exculpation can also be based on the fact that, had the defendant refused to shoot the victims, they would surely have been killed by someone else. As Van der Wilt states: "Here the human instinct of self-preservation merged with the rational calculation that the sacrifice of one's own life would be senseless anyway."

Dinstein, agreeing with the abolition of the defence in a case of the killing of innocents in English law, argues that duress can not even be an excuse in these cases, because one person's life can not be valued more than another person's life. It seems that this reasoning does not account for the rationale of the defence, more specifically, of the excuse of duress. Indeed, a justification entails a balancing of interests; and this balancing of interests can never be applied so as to evaluate whose life is more valuable. One rather than another, let alone a group of other persons. It could even be argued, as Ambos has, that "the commission of the atrocious crimes 'within the jurisdiction of the Court' can never be justified on the basis of a balancing of interests". However, the rationale of excuses is not one of balancing interests. Using excuses the system expresses "compassion for and understanding of the actor's human weakness". The rationale of excuses is that the law cannot expect heroism; it can not fairly be expected of the


defendant to withstand a threat that would be "irresistible for a reasonable person in similar circumstances". The issue, in case of an excuse, is "that the individual culpability or blameworthiness, in the sense of a normative understanding of guilt, is lacking".

Cryer notes that the ICC Statute provides for duress as a complete defence, which also applies to offences that involve the killing of innocents. However, Ambos discusses how article 31(1)(d) is a mixture of necessity as a justification and duress as an excuse. He distinguishes the separate components which indicate that the defence provided for is a justification (the objective elements) or an excuse (the subjective elements). Van Sliedregt describes that same mixture but seems to favour a reading of article 31(1)(d) to cover the excuse of duress.

It could be argued that because of this conflation neither defence has in fact been provided for in the Statute. The conflation is particularly illogical because the defences differ in rationale, being equal to the different rationale of justification and excuse. The provision requires the act to have been justified and the defendant to be excused. In a threefold structure this is illogical: if the act is justified, the issue of culpability becomes irrelevant.

The distinction between justification and excuse in a threefold system has advantages. The issue of intent as defined by the crime definition is treated separately from the issues of justification and excuse. This prevents the blurring of the different protected interests and rationales of the separate elements of the offence. It is a well thought-out doctrinal distinction – it lays out a map for interpreting different defences;

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the rationale of either justification or excuse determines the conditions for each
defence.\textsuperscript{351}

Many of the following distinctions (between wrongdoing and attribution, between defeasible and comprehensive rules, between conduct and decision rules) can be compared to the distinction between justification and excuse, which is therefore perhaps usefully called the 'basic distinction'.

3.2.2 Wrongdoing and attribution
Another way to describe the basic distinction is to refer to the distinction which the threefold system makes between wrongdoing and attribution.\textsuperscript{352} The elements of the crime definition and justifications concern issues of wrongdoing. They determine the wrongfulness of the act. A separate issue is the attribution of this wrongful act to the particular defendant. Excuses determine the capacity of the defendant to have attributed to him the wrongful act. Attribution is about the individual culpability of the defendant, about his blameworthiness. Excuses concern mental states which negate the defendant’s individual culpability, they remove the possibility of blaming the defendant for his wrongful act. One should clearly distinguish between this subjective element of criminal responsibility and the mental state required by every crime definition. In a threefold structure, excuses do not negate this mental element in the crime definition.\textsuperscript{353} The fact that someone acts under duress, or under a mistake of law, does not exclude a finding that the defendant acted intentionally.

The distinction is also relevant to the assessment of the liability of accomplices; the determination of the wrongfulness of the act applies to all participants; excuses only exculpate the individual defendant that has successfully invoked it.


'wrongdoing' refers to the crime definition and absence of justifications. As we will see below, in order to comprehend the issue of putative justification, it is also important to distinguish between these two concepts (crime definition and justifications).

\textsuperscript{353} If this mental element is 'intent'; excuses (and justifications) do negate the mental element of 'negligence'. As indicated before (§ 1.5, § 2.2.2., footnote 29 and § 3.3.1 supra), here, only the theory in relation to crimes of intent will be discussed, since international crimes are generally crimes of intent. See e.g Ambos, K., Other Grounds for Excluding Criminal Responsibility, in A. Cassese, P. Gaeta and J.R.W.D. James (ed.), The Rome statute of the International Criminal Court: A commentary: Oxford University Press, 2002) I, pp. 1003-1048, p. 1031 footnote 156 and accompanying text and Ambos, K., Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung (Berlin: Duncker & Humblot, 2004), p. 807-808 and 816.
3.2.3 Defeasible and comprehensive rules
Fletcher distinguishes between defeasible and comprehensive rules of criminal liability.\(^{354}\) Defeasible rules are rules of confession and avoidance. The issue of mens rea and actus reus is separated from the issue of defences. Defences are separate arguments the defendant brings forward to “circumvent the implications” of his criminal act.\(^{355}\) Comprehensive rules on the other hand, do not use the concept of defences. Under comprehensive rules of liability an actor is only liable if he fulfilled the crime definition with the required mens rea, there are no justifications for his behaviour and he can not be excused.\(^{356}\)

Fletcher describes how the general trend in both common law and civil law systems has been from defeasible to comprehensive rules of liability.\(^{357}\) He explains this trend by referring to “an increasing appreciation of an obvious postulate: The criminal law should punish only the guilty”, “those who could fairly be morally blamed for wrongdoing”.\(^{358}\) This concept of guilt refers to more than only the descriptive mens rea or mental element required by the definition of the offence (i.e. intention or knowledge). “For this new view of the criminal law to take hold, the notion of “guilt” had to become synonymous with the broader moral meaning of “culpability” or “blameworthiness” for wrongdoing.”\(^{359}\) As discussed in the previous chapter, however, in the common law systems and in France, the transition is far from complete. These systems are still based on a twofold structure distinguishing between actus reus and mens rea on the one hand and defences on the other. The fact that these systems sometimes put the burden of proof concerning issues of excuses on the defendant confirms the suspicion that the transition to a comprehensive system is far from complete. In systems that are based on comprehensive rules, excuses are part of the rule establishing the culpability of the defendant, which means that they fall within the presumption of innocence. This implies that all doubts concerning issues of guilt must be resolved in favour of the defendant.

\(^{355}\) Ibid., p. 97.
\(^{356}\) Ibid., p. 97.
\(^{357}\) As Van der Wilt pointed out to me, however, this trend took place on different grounds: in Germany the trend was based on the development of a principle of individual culpability (see Ch. 2) and the US the basis can be found in the principle of presumption of innocence.
3.2.4 Conduct rules and decision rules

The final theoretical distinction that bears discussion in relation to the basic distinction is the one between conduct rules and decision rules.\textsuperscript{360} Crime definitions, justifications and excuses are decision rules; they are the tools for judges and juries to decide a criminal case. The norms underlying the crime definition and justifications are conduct rules. They dictate how to act under certain circumstances. If the factual circumstances are of a specific nature, the same conduct rules apply to everyone. The crime definition refers to conduct that is prohibited. Justifications form general exceptions to these prohibitions. For example, everyone who is under unlawful attack by another person may defend himself and, even under certain circumstances, take the attacker's life, although the basic rule is that taking another person’s life is prohibited. These rules are conduct rules, which means that the actor is required to shape his conduct accordingly. This requires that the actor is aware of the relevant circumstances. If the defendant failed to act according to the conduct rules, a judicial authority may decide nevertheless that the defendant should not be held accountable. According to decisions rules, the judges or jurors decide on the culpability, the blameworthiness, of the defendant.\textsuperscript{361} The defendant is not required to have an opinion about these issues, the normative assessment of his behaviour is especially assigned to the judicial authority. Moreover, if a defendant is conscious of the presence of an excuse, for example the defendant knows that he is making a mistake of law, this knowledge is logically inconsistent with the excuse.\textsuperscript{362} The defendant can no longer properly claim the excuse, because it is exactly a lack of awareness in this respect that prevents the actor from behaving differently. The excuse of mistake of law particularly encompasses the situation where the actor, because of lack of consciousness in this respect is prevented from behaving differently. Or, to put it differently, the rationale of excuses is different. Conduct rules (the underlying norms of the crime definition and justifications) require the defendant to balance interests and will lead him to the right conduct. Excuses (which are decision rules) are meant as a tool for the judicial authority to prevent blameless persons, who nevertheless did not follow the conduct rules, from being held accountable. It is the compelling nature of excuses that makes the commission


\textsuperscript{362} As seen earlier, however, according to Roxin the fact that someone has doubts about the lawfulness of his intended acts does not mean that he is per se precluded from invoking mistake of law (see § 2.3.2.3., 1 supra). The point made here is that the defendant will not be excused if he thought to himself: I can commit the act because I will be excused because I made a mistake of law. Justifications on the other hand indeed require awareness of the justifying circumstances.
of the wrongful act excusable. It is not the fact that you made a mistake as to the applicability of an excuse to your situation that will excuse you; such mistakes are irrelevant.\textsuperscript{363} A mistake as to the existence of the threat, however, may indeed exculpate. This will be a mistake of fact, extrinsic to the required intent.

Understanding mistake of law and its function as an excuse, and thus understanding the improbability of a mistake of law negating the mental element, requires that one distinguishes between conduct rules and decision rules and between wrongdoing and culpability. The definition of offences generally do not require a criminal intent, knowledge of unlawfulness is no definitional requirement. As Fletcher holds, “[n]orms are designed to guide and influence conduct. The norm itself cannot include a condition about what should happen in the event that the norm was violated involuntarily or by mistake. […] The norm only includes those elements about which the actor should make a decision in seeking to conform his conduct to the law.”\textsuperscript{364}

3.2.5 Analysis
To conclude, what is the relevance of the above discussed distinctions? First of all, it shows a criminal act consists of different elements, both an act requirement and a culpability requirement. The act requirement includes a mental element in relation to the material elements. A defendant can however fulfil the act requirement without being culpable, because issues of culpability do not negate the wrongfulness of the act.\textsuperscript{365} Moreover, the issue of excuses only arises after it has been established that a norm has been violated.\textsuperscript{366}

Secondly, justifications contain conduct rules. They require awareness of the underlying norm. Crime definitions and justifications have underlying norms; the norm underlying a crime definition contains a prohibition, the violation of which may be justified by the norm underlying a justification. Like crime definitions, the underlying norms of justifications have an objective and a subjective side. The norms underlying justifications, including their objective and subjective side, are different than the norms

\textsuperscript{363} See also Ambos, K., Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung (Berlin: Duncker & Humblot, 2004), p. 820-821 (holding that in this respect (excluding mistake of law as to the applicability of an excuse) article 32(2) first sentence corresponds to national approaches).


\textsuperscript{365} Ibid. p. 734.

\textsuperscript{366} Ibid. p. 735.
underlying crime definitions. Some common law sources seem to overlook this distinction.367

Thirdly, the distinction between the crime definition on the one hand and justifications and excuses on the other is relevant for the burden of proof. All elements of the crime definition require proof. Elements of justification and excuse need to be brought forward and substantiated by the defendant; the absence of which again requires proof beyond reasonable doubt.368

Finally, the distinction between justification and excuse is relevant to the determination of the individual responsibility of participants in the crime. Justifications negate the wrongfulness of the conduct; none of the perpetrators or participants is responsible, since there is no wrongful act. Excuses on the other hand are personal; if one perpetrator is excused, his excuse does not negate the culpability of the other participants.

3.3 OTHER ISSUES

3.3.1 Criminal intent
If a mistake of law is related to the required mental element, than ‘intent’ is always negated by the mistake and ‘negligence’ is only negated if the mistake was reasonable or unavoidable. So, if the perpetrator can not be convicted for having acted intentionally because he made an unreasonable mistake, he can still be convicted for the negligent version of the crime. That is, if there is such a negligent variant of the crime.369 In international criminal law, as article 30 of the ICC Statute provides, the default mental element is that of intent and knowledge. There are generally no international crimes of negligence, with the exception of command responsibility under article 28 of the ICC Statute.370 One of the theoretical issues to be studied in the next chapter is whether the mental element required for international crimes includes a criminal intent.

367 See e.g. Robinson, P.H., Criminal Law Defenses (St. Paul, Minnesota: West Publishing Co., 1984), §184(a), p. 398 en §184(e), p. 412 (the (subjective) requirements of justification are linked to the subjective requirements of the crime definition).


The comparative law study contained in Chapter 2 indicates that in domestic law systems criminal intent is generally not required.\(^{371}\) An intent to break the law is not an element of wrongdoing. If it were, in every case proof of such an intent would be required, and all mistakes would bar a finding of wrongdoing. It is therefore only in very exceptional situations that the legislature provides for such a criminal intent requirement.\(^{372}\) Since these are exceptional provisions, in a system that only grants exculpatory effect to a mistake of law that negates the required intent, the scope of this defence is therefore limited to the minimum. The twofold systems are bound to such a negate-mental-element-requirement, because they lack the theoretical advantages of a threefold system that is based on wissen as a requirement for criminal responsibility outside the required mental element. This is one of the distinctive features of the threefold system that proves its benefits over the twofold approach. The wissen as a separate requirement of culpability in fact confirms or even justifies the general rule that no criminal intent needs to be proven.\(^{373}\) An avoidable mistake about the wrongfulness of the intentionally committed act will not relieve the actor of liability; proof of criminal intent would be superfluous. One could also say that recognizing unavoidable mistake of law as an excuse is not at variance with the general rule that no criminal intent is required. The issue of criminal conduct, of wrongdoing, is separated from the issue of the culpability of the defendant and this allows for a more precise reproach: if the crime is one of intent, the reproach toward the defendant is that he intentionally committed the prohibited act. The issue of his blameworthiness does not negate this finding of wrongdoing. It contains a separate reproach, namely that he acted in a culpable way when he could have behaved differently.

3.3.2 Putative justifications
Ambos also demonstrates the relevance of the distinction between wrongfulness and culpability by discussing the situation where the defendant made a mistake about the factual elements of a justification, a situation of so-called ‘putative justification’.\(^{374}\) An

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\(^{371}\) For the lack of such a requirement in Anglo-American law see also Sliedregt, E.v., The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (The Hague: TMC Asser Press, 2003), p. 232. (she calls this neutral intention and refers to §2.02(9) MPC).

\(^{372}\) The ICC Statute arguably only provides in one provision for a criminal intent requirement, see § 6.2.2.1 infra.

\(^{373}\) See also, on the application of this rule in Dutch threefold system, Hullu, J.d., Materieel Strafrecht (Deventer: Kluwer, 2006), p. 345.

example of putative justification is when the defendant seriously injures someone in the mistaken belief that he acts in self-defence against an unlawful attack. He thinks for example that the person is approaching him with a knife, but in fact this person is holding a harmless shiny object. As Ambos holds, the key to the right solution lies in the distinction between wrongfulness and culpability. The defendant’s act can not objectively be justified, because he was in fact not under attack. His act remains wrongful. His reasonable belief in the presence of a fact giving right to self-defence, however, excludes his culpability. Ambos suggests that because putative justification lies somewhere between real justification and real excuse, the most convincing solution is to treat putative justification as lack of intent. All depends of course on your definition of intent. Ambos argues that a putatively justified actor, like an actor who lacks intent, lacks “the subjective element of wrongfulness (comprising both the existence of the elements of the offence and the lacking of all elements of the justification).” As noted earlier, however, the subjective elements of wrongfulness consist of both the subjective element of the crime definition and the subjective element of the justification, and these elements may differ, at least as to their object. Triffterer suggests, in relation to Article 32 IIC Statute, to treat a mistake of fact as to a ground for justification as if it were a mistake of fact, although this mistake does not negate the mental element required by the crime definition.

This brings to light the relevant distinction, namely the distinction between mistakes that negate the required intent and mistakes that do not. Both putative justifications and mistakes of law generally do not negate the required intent. This means that, in order to exculpate the defendant, these mistakes (of fact and law) must have been reasonable. Mistakes of fact as to a ground of justification should not be treated as negating the required intent, because they do not negate the wrongdoing.


376 Ambos, K., ‘Towards a Universal System of Crime: Comments on George Fletcher’s Grammar of Criminal Law’, 28(6) Cardozo Law Review (2007), pp. 2647-2673, p. 2662. At another place Ambos describes how he favours this approach because under the ICC provisions (artt. 30 and 32) it is the only way to take account of putative justifications; this mistake of fact does not negate the required intent, as formulated by art. 30, but it is a relevant mistake nevertheless. Ambos, K., Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatizierung (Berlin: Duncker & Humblot, 2004), p. 809-810.

Ambos’ example of putative justification concerns a mistake about the factual elements of a justification. There is also a mistake of law version of putative justification, which was encountered in Chapter 2.\textsuperscript{378} In such a case the defendant mistakenly assumes that a certain ground for justification exists in the legal order, where in fact this justification is not recognized, or the defendant is mistaken in the legal scope of an existing ground for justification.\textsuperscript{379} For example, the defendant believes that retaliation is a recognized ground for justification or the defendant thinks he can use deadly force to protect property, while in fact the legal system allows the use of lethal force only in case of warding off an attack upon persons. This situation is different from the putative justification based on a mistake of fact. The latter, like the required intent, relates to elements of wrongdoing. As seen earlier, knowledge of unlawfulness is not an element of wrongdoing, but an element of culpability. Putative justification based on mistake of law, is an excuse par excellence.

\textbf{3.3.3 An element of ‘unlawfulness’ in the crime definition}

Some crime definitions contain an element of ‘unlawfulness’. The definitions of several international crimes in the ICC Statute, for example, contain elements like ‘unlawful’ or ‘in violation of fundamental rules of international law’.\textsuperscript{380} Does this mean that this element is part of the required intent?

The element of ‘unlawfulness’ in the crime definition can have different meanings. It is not necessarily the position that the fact that unlawfulness is part of the crime definition automatically means a particular mental state is required in relation to this element.\textsuperscript{381} When the legislature has provided for a definitional element of unlawfulness it is meant to limit the scope of the prohibition.\textsuperscript{382} In such cases the prohibited conduct may be very common and, usually, lawful. The unlawfulness of the act is the exception and is therefore mentioned in the crime definition.\textsuperscript{383} As part of the crime definition, this element requires specific proof.

\textsuperscript{378} This is a so called ‘indirect mistake of law’ (\textit{Grenzirrtum} or \textit{Bestandsirrtum}), see § 2.3.2.3, 2) supra.
\textsuperscript{380} See e.g. art. 8(2)(a)(vii) (unlawful deportation) and article 7(1)(e) (imprisonment in violation of fundamental rules of international law).
\textsuperscript{381} The Dutch scholarly debates on this issue is illuminating; hence, the numerous references to Dutch authors in this paragraph.
In some very exceptional cases the required intent covers this element of unlawfulness; here the norm is only, and specifically, violated if the perpetrator acted with the intent to violate the law. In all other cases, knowledge of violating the law is not part of the norm itself; it is irrelevant to the proof that the act was wrongful. The problem is how to establish whether the element of unlawfulness is covered by the required. One can search for the purpose of the legislator, or more generally for the rationale of the prohibition.\footnote{Kelk, C., Studieboek Materieel Strafrecht (Deventer: Kluwer, 2005), p. 199.} If unlawfulness is part of the crime definition this element is linked to the rationale, the \textit{Typizität}, of the offence.\footnote{Ibid. p. 129-130.} One solution to this problem appears in Chapter 2. Roxin demonstrated that the required intent will be negated when the social significance of a normative element can not be understood without legal knowledge. When, however, the normative element is equal to, or constitutes, the wrongfulness of the act concerned, a mistake as to this element will not negate the required intent, but will constitute a mistake of law. If such a mistake negated the required intent, this would lead to the undesired result that the (mistaken) belief of the defendant would determine the wrongfulness of the act.\footnote{Roxin, C., Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre (Munchen: C.H. Beck, 2006), p. 489, Rn. 105.}

As noted earlier, criminal intent is generally not required. This means that the element of unlawfulness is almost always a so called 'objective' element. The element is objective to such an extent that it is detached from the mental element. No proof is required as to the mental state of the perpetrator in relation to this objective element. It is exactly with regard to these elements that the issue of culpability and mistake of law may arise.\footnote{See also Hullu, J.d., Materieel strafrecht (Deventer: Kluwer, 2006), p. 209-210.} Moreover, allowing the defence of mistake of law in respect of these objective elements only confirms the justifiability of the general rule that no criminal intent is required for the finding that a legal norm has been violated.\footnote{See also Hullu, J.d., Materieel Strafrecht (Deventer: Kluwer, 2006), p. 375. But see Heller, K.J., 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute', 6 Journal of International Criminal Justice (2008), pp. 419-445 (who does not regard legal elements as objective). For a discussion of his arguments see § 4.2.2 and § 6.2 infra.}
means one has to consult a lawyer. On the other hand, a prohibition can be ascertainable, but if the circumstances do not permit even a superficial investigation, the defendant is perhaps not to be blamed for his mistake. This is even more apparent where justifications are concerned. Situations in which a justification arises are generally not situations that allow for (extensive) reflection. This is especially so in cases of international crimes, which are committed in situations of armed conflict and which are likely to seriously affect the opportunities for a participant to consult a competent lawyer.

In the prior discussion of the German Border Guard cases we encountered the 'problem' of the 'dual' use of manifest illegality; both in relation to the principle of legality and in relation to the principle of guilt the same terminology is used, namely the manifest unlawfulness of the act. The German Courts clearly distinguish between the two issues. If there is a violation of the principle of legality, for example criminal punishability was not provided for by law at the time, there is no crime and the question of individual culpability is irrelevant. If the act is punishable, however, the questions of wrongfulness and culpability are not therewith answered and issues of justification and excuse may become relevant. If mistake of law is a relevant excuse then foreseeability under the principle of legality can not have the same meaning as foreseeability (or avoidability) under the defence of mistake of law. As Roxin noted, avoidability of a mistake of law can not mean absolute avoidability, because the principle of legality already prevents acts from being punishable that are not, in an absolute sense, foreseeably so. The distinction between the two concepts of foreseeability, under the principle of legality and under mistake of law, is that the first concept encompasses an objective test, i.e. what the individual defendant subjectively thought or knew is irrelevant, and the second concept requires a more normative assessment. Accepting foreseeability under the first principle does not automatically imply that the unlawful nature of the act was foreseen by an individual defendant. This requires a subjective assessment, which is, on the final issue of guilt, than again made objective, in the sense that the actual absence of Unrechtsbewußtsein must have been unavoidable or reasonable in order to exculpate the defendant.

The ECHR also assessed whether the conviction of the German Border Guard was in conformity with the principle of guilt. In fact the Court did so while assessing whether there had been a violation of article 7 ECHR, which concerns the principle of legality.

389 Roxin, C., Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre (Munchen: C.H. Beck, 2006), p. 945, Rn. 38, see also § 2.3.2.3., 3) supra.

As Arnold et al. noted, thus far the assessment under this heading had always been one of objective foreseeability. In this case, however, the Court discussed how the principle of guilt requires that the defendant could subjectively have foreseen criminal liability. Like the German Courts, it answered this question in the affirmative. Arnold et al., welcome this incorporation of the principle of guilt into article 7. It is true that the Court in this way acknowledged the exculpating effect of lack of Unrechtsbewußtsein, which is more than can be said of the international regulation of this defence. But there are strong arguments to justify keeping the two notions of foreseeability separated. The conflation creates confusion. What is unlawful seems to be dependent on the personal circumstances and personal capacities of the defendant; it may appear as if the law is not the same for everyone. This confusion is exactly what may cause ‘fear’ for the defence of mistake of law. This fear is completely unjustified precisely because mistake of law is an excuse, i.e. a personal ground for exculpation. It does not negate the abstracted wrongful nature of the act itself.

Under Foreseeability of the conviction, the ECHR covers both the principle of legality and the individual guilt of the defendant. In defence of the prosecution of the border guard, the Court reiterates the rule of law argument made by the BVerfG; indeed a ‘rule of law’ state can not leave these crimes unpunished. This is a strong argument in favour of prosecution but it does not say anything about foreseeability, however, let alone about the subjective foreseeability in the individual case of, for example, the border guard. In fact, the separation of the two principles, of legality and guilt, allows those in a state observing the rule of law to express general indignation about the cruel border policy of a totalitarian state or of a former regime; and further to do justice to the understandable expectations or mistakes of an individual who lived and worked in a state not governed by the rule of law.

3.4 CONCLUSION

Under a twofold system, defences deny the wrongfulness of the act. Thus, also excuses negate the wrongfulness of the act even though in fact they are not concerned with the wrongfulness but with the culpability of the defendant, i.e. the attribution of the

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392 Ibid. p. 87.
393 Ibid. p. 86-87.
wrongful conduct to the defendant. Under a threefold system, mistake of law does not negate the wrongfulness of the act. All elements pertaining to the culpability of the defendant concern blameworthiness; the issue is, whether the mistaken actor can be excused for having made the mistake. Under a threefold system only unavoidable mistakes are not blameworthy. Under a twofold system, admitting a mistake of law would almost appear to let the (mistaken) defendant determine the law. This ‘problem of appearances’ does not arise under the threefold system that distinguishes between justification and excuse, between wrongdoing and attribution.

Mistake of law is almost by definition an excuse, expressly because criminal intent is not required. Criminal intent is not required because it would be impossible to specifically prove that the defendant intended to break the law, and proof of legal knowledge can never be a requirement, because then only lawyers, or those proved to have a specific knowledge of the relevant law, can commit crimes. But the most convincing argument as to why criminal intent is not required is that, if it were, a mistake of law, even an unreasonable one, would negate the wrongfulness of the conduct.

That criminal intent is not required does not imply that mistakes of law are irrelevant per se. As we saw in Chapter 2, the German threefold structure adopts a presumption of Unrechtsbewusstsein when the defendant has fulfilled the elements of a crime definition. This presumption is rebuttable. If the defendant acted under mistake of law, meaning that he lacked awareness of the wrongfulness of his conduct, and his mistake was unavoidable, he is not culpable.

The distinction between decision rules and conduct rules turns out to be helpful in defining mistake of law. The statutory prohibition, or the crime definition, is a decision rule; it guides the judges or jurors on how to value the defendant’s conduct. The conduct rule is the underlying substantive norm of the prohibition or of justificatory norms. Mistake of law is ignorance of, or a mistake as to, the underlying substantive norm.

Mistake of law is an excuse. The relevant question in case of a mistaken defendant is whether or not he could have avoided the mistake, because then he could have avoided committing the wrongful act. As Fletcher says it: "If we leave aside the issue of intention, the primary normative question in assessing accountability is whether the actor could fairly have been expected to avoid committing the wrongful act. This single recurrent question unites the issues of ignorance as to excessive risk-taking, duress, insanity and mistake of law."394

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The advantageous implications of the threefold system have been discussed. The
distinctions applied in this system justify the general rule that no criminal intent is
required and allow for a more precise determination of the perpetrator's culpability and
thus of the reproach that befalls him. Fletcher has noted how the threefold mode of
analysis is gaining growing support among North American lawyers and this "system is
not a German doctrine, any more than Einstein's theory of relativity represents a German