Mistake of law: excusing perpetrators of international crimes

van Verseveld, A.

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.
CHAPTER 4  THE THEORY OF MISTAKE OF LAW IN INTERNATIONAL CRIMINAL LAW

4.1 INTRODUCTION

Chapter 2 reflected on mistake of law in national law systems. This chapter gives a theoretical account of mistake of law in international criminal law. The chapter discusses Articles 32 and 33 of the ICC Statute, the first codification of mistake of law as a ground for excluding criminal responsibility in the history of international criminal law.396 These provisions could mark an important step in the development of the general part of international criminal law.397 Article 32(2) refers to the general principle ignorantia legis non excusat, ignorance of the law is no excuse. Article 32 (2) also indicates the possible exceptions to this principle, namely when the mistake of law negates the mental element required or as provided for in Article 33. Article 33 provides that acting on superior orders does not relieve a person from criminal responsibility unless he was under a legal obligation to obey, he did not know the order to be unlawful and the order was not manifestly unlawful. This article can be read in the light of the fact that many international crimes are committed in the context of the military organization. A subordinate may find himself confronted with the dilemma of incurring responsibility for disobeying superior orders or incurring responsibility for crimes committed in obedience to superior orders. It is argued that the reality of the battlefield requires a special defence to be available to the subordinate faced with this dilemma.398

Articles 32 and 33, being the result of treaty negotiations, have the character of compromise. A discussion in this chapter of the implications of these articles shows that the general part of international criminal law is still in need of further theoretical

396The ICC predecessors (the International Military Tribunal (Nuremberg), The International Military Tribunal for the Far East (Tokyo), The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda) did not provide for a provision on mistake of law and regulated the defense of superior orders merely as a ground for mitigation of punishment.
398See also Ibid., p. 339 and Robinson, P.H., Criminal Law Defenses (St. Paul, Minnesota: West Publishing Co., 1984), § 185, p. 421 (where he refers to a slightly different rationale, combining duress and mistake of law: "Specifically, if an order is unlawful because it demands unjustified conduct and if that order precludes the independent exercise of judgment as to the unjustified aspect of the conduct commanded, then the compulsion inherent in military orders, compels an especially broad mistake excuse when such an unlawful military order is mistakenly obeyed").
4.2 ARTICLE 32(2) – MISTAKE OF LAW

4.2.1 Article 32 Mistake

Article 32 of the ICC Statute provides:

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 32 provides both for a rule on mistake of fact and a rule on mistake of law. Article 32(1) provides that, as in most national legal systems, a mistake of fact which negates the required mental element is a ground for excluding criminal responsibility. This provision, although perhaps redundant because already on the basis of Article 30 ICC Statute there can be no criminal responsibility if the defendant lacks the required

---


mens rea, is uncontested. This is different with regard to the provision on mistake of
law.401

The first sentence of Article 32(2), on mistake of law, could be regarded as
referring to the general principle *ignorantia legis non excusat*, ignorance of the law is no
excuse.402 Applicability of this principle in international criminal law is often based on the
fact that international crimes are of such a grave nature that the unlawful character must
be obvious to everyone. Arguments are often also made along the lines of the distinction
between crimes *malum in se* and *mala prohibita*.403 International crimes are then generally
characterised as *malum in se*, i.e., that everyone knows the underlying norms and when
these are violated. Ambos, however, holds that, especially among war crimes, there are
also *mala prohibita* and that the principle of individual guilt requires a limitation of or at
least a flexible approach toward the *ignorantia legis non excusat* rule.404 Moreover, the
existence of justificatory grounds for otherwise unlawful conduct are less likely to be
clear405 than the crime definition itself and here an exception to the *ignorantia legis non
excusat* rule seems especially warranted. The second sentence of Article 32(2) indicates the
available exceptions, that is, when a mistake of law negates the mental element required,
or as provided for in Article 33, the mistake is a ground for excluding criminal
responsibility.

---

401 Triffterer, O., Article 32: Mistake of Law, in O. Triffterer (ed.), *Commentary on the Rome Statute of the
International Criminal Court: Observers’ Notes, Article by article* (München: C.H. Beck oHG, 2008), pp. 895-914,
p. 900.

402 See also Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*
University Press, 2008), p. 294. This principle is an outmoded dogma according to Fletcher, Fletcher, G.P.,
*Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), p. 154; but see Cassese, A.,
reflects customary law). This sentence also refers to the irrelevance of mistakes of procedural law. See
Scaliotti, M., 'Defences before the International Criminal Court: Substantive grounds for excluding criminal
Article 32: Mistake of Law, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal
Court: Observers’ Notes, Article by article* (München: C.H. Beck oHG, 2008), pp. 895-914, p. 906, § 32; Ambos,
817. In this respect the provision is not problematic; in national systems too this type of mistake of law is
always irrelevant, see Ch. 2 and 3 supra.

403 Ambos, K., *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (Berlin: Duncker &

404 Ibid. p. 817-818.

405 Wise, E.M., 'Commentary on Parts 2 and 3 of the Zutphen Intersessional Draft: General Principles of
4.2.2 Negate the mental element

The requirement that the mistake should negate the required mental element in order to exculpate the perpetrator has been subject to much criticism. This requirement, on the one hand, makes the article actually redundant because on the basis of article 30 there can be no criminal responsibility unless the crime is committed with the required mental element.\(^{406}\) On the other hand, the ‘negate mental element-requirement’ restricts a ‘mistake of law defence’ to an absolute minimum, for the article thus fails to recognize mistakes not covered by the mental element criterion, like mistakes about norms of justification or mistakes about the prohibition as such.\(^{407}\) In requiring a mistake of law to negate the mental element, which essentially focuses on facts, Article 32(2) leaves little room for mistake of law to exclude criminal responsibility.\(^{408}\) It is helpful to once more refer to the the statement by Jescheck that: "[i]n truth, mistake of law is not concerned with the elements of crime, but rather with the unlawfulness of the conduct in a given situation."\(^{409}\)

As will now be demonstrated, the ‘negate mental element requirement’ in article 32, read in conjunction with article 30, reveals that the structure of crimes in the ICC statute is based on a “twofold system along the lines of the Anglo-American actus reus/mens rea versus defences dichotomy.”\(^{410}\)

In Article the drafters of the ICC Statute have provided for a default rule on the mental element required for criminal responsibility for international crimes. The article provides:

Article 30 - Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purpose of this article, a person has intent where:
   a. In relation to conduct, that person means to engage in the conduct;
   b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

This article, like Articles 32 and 33, is a novelty; for the first time in the history of international criminal law the mental element as a general requirement of individual criminal responsibility has been codified. Article 30 defines the ‘mental element’ as some degree of awareness of the material or definitional elements of the offence. Material elements refer to the positive definitional elements of crime. As Ambos points out 'material elements' could also have referred to 'substantive' and not 'procedural' elements, but on the basis of the drafting history and the fact that article 30 refers to the conduct, consequences and circumstances, 'material elements' must be understood as part of the *actus reus*, the objective elements of the crime definition. The required mental element does not, at least not explicitly, include an element of unlawfulness or *Unrechtsbewusstsein*.

---

412 Ibid., p. 38.
too, Unrechtsbewuβtsein is not an independent requirement for criminal responsibility; it is therefore also not explicitly recognized as part of the required mental element.\textsuperscript{416} Some authors welcome article 30 as an establishment in international criminal law of the principle of individual culpability. They refer to the general principle \textit{actus non facit reum nisi mens sit rea}.\textsuperscript{417} In order to hold a person criminally liable, that person should have sufficiently been aware of what he was doing and of the consequences of his actions.\textsuperscript{418} Criminal responsibility on the basis of strict liability should be rejected. This is a widely recognized principle, in domestic as well as in international criminal law systems.\textsuperscript{419} Werle and Jessberger refer, in relation to this point, to the following statement of the ICTY in the Mucic trial judgement: “It is apparent that it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects. The first of these may be termed the actus reus – the physical act necessary for the offence… The second aspect … relates to the necessary mental element, or mens rea.”\textsuperscript{420}

However, as Jescheck argues, “[a]ccording to the principle of culpability – if we take it to mean more than the requirement of [descriptive]\textsuperscript{421} mens rea in Anglo-American law – means and measures of punishment must be based on a court’s conviction that the defendant is personally reproachable for the crime he or she has committed.”\textsuperscript{422} Under the principle of culpability in this sense, that is the general principle \textit{nullem crimen sine culpa}, criminal punishment requires the blameworthiness of the actor. I therefore do not agree with Piragoff who holds that article 30 deals with “the


\textsuperscript{421} My insertion; on this term see Fletcher, G.P., \textit{Basic Concepts of Criminal Law} (New York: Oxford University Press, 1998), p. 99; see also § 3.2.3 supra.

issue of moral culpability". On the contrary, article 30, headed ‘mental element’, concerns only the requirement of *mens rea* as understood in Anglo-American law, not the moral culpability or blameworthiness of the defendant. The principle of guilt, in the sense of a moral meaning of culpability, is, however, a fundamental principle of international criminal law.

On the basis of article 30 it is argued that the ‘negate mental element requirement’ in article 32(2) sentence 2, must be interpreted as requiring the mistake of law to negate the awareness of the definitional or physical elements of the offence. In fact, if it were not for article 30, it could have been argued that ‘mental element’ in article 32 comprises the broader meaning of *mens rea*, including *Unrechtsbewuβtsein*, consciousness of wrongdoing. However, this broad interpretation seems unlikely, since the drafters, as in common law, do not seem to distinguish between intent and *Unrechtsbewuβtsein*. Moreover, a restrictive interpretation of 'mental element' to mean only 'intent' entails the very limited scope of mistake of law that the drafters most likely intended to provide for.

Once more, the ‘negate mental element requirement’ in article 32, read in conjunction with article 30, reveals that the structure of crimes in the ICC statute is based on a twofold structure. As observed in Chapters 2 and 3, one of the main consequences of a twofold structure of crimes is that it does not separate the issue of intent from the issue of *Unrechtsbewuβtsein*. It does not allow for a true weighing of the defendant’s culpability or blameworthiness in making a mistake of law.

Criticism of article 32 is mainly directed against this ‘negate mental element-requirement’, because knowledge of unlawfulness is hardly ever part of the definitional

---


424 This does not include *Unrechtsbewuβtsein*, knowledge of wrongdoing, see § 2.2 supra.


427 See also Ibid. p. 806-807.

elements of an offence. Eser holds that here “the Rome Statute disregards growing
sensitivity to the principle of culpability, particularly with regard to consciousness of
unlawfulness (as distinct from and in addition to the fact-oriented intention)”.

Fletcher, discussing the shortcomings of the Model Penal Code (MPC) provision on
mistake, which also requires negation of the mental element, gives an elaborate overview
of mistakes which are erroneously not covered by this MPC provision. He explains that a
mistake of law may negate the mental element (in case of an authoritatively defined
intent), may negate the culpability (e.g. in case of a mistake as to the legal requirements
for justification), or may be irrelevant (e.g. where it relates to a mistake about a decision
rule). Since article 32(2) also has shortcomings in that it does not contemplate all these
possible results of mistakes, it does not allow the judges to find doctrinally correct and
just solutions.

Some authors, like Clark, try to limit the unjust results of the ‘negate mental
element requirement’ by recasting mistakes of law as mistakes of fact. Chapter 2
showed that this is the way common lawyers try to deal with any unjust results of the
requirement. Other authors try to repair the 'negate mental element' issue by suggesting
that the court should read an unavoidability test, recognized by many national law
systems, into the text of article 32(2). These authors, referring to a similar requirement
in national legal systems, seem to base their contention that the Court could implement
such an avoidability test on Article 21(1)(c). This contention may not be correct, for

See also Eser, A., Mental Elements - Mistake of fact and Mistake of Law, in A. Cassese, P. Gaeta and J.R.W.D.

the same shortcomings of art. 32(2) see Ambos, K., Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer

See also Ambos, K., 'General principles of criminal law in the Rome Statute', 10 Criminal Law Forum

See Clark, R.S., 'The Mental Element in International Criminal Law: The Rome Statute of the
p. 310. Boister critically discusses this “orthodox common law” solution, Boister, N., Reflections on the
relationship between the duty to educate in humanitarian law and the absence of a defence of mistake of
International Conflict and Security Law. Essays in Memory of Hilaire McCoubrey (Cambridge: University Press,

See § 2.2 supra.

See e.g. Eser, A., Mental Elements - Mistake of fact and Mistake of Law, in A. Cassese, P. Gaeta and J.R.W.D.

the same shortcomings of art. 32(2) see Ambos, K., Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer

See also Ambos, K., 'General principles of criminal law in the Rome Statute', 10 Criminal Law Forum

See Clark, R.S., 'The Mental Element in International Criminal Law: The Rome Statute of the
p. 310. Boister critically discusses this “orthodox common law” solution, Boister, N., Reflections on the
relationship between the duty to educate in humanitarian law and the absence of a defence of mistake of
International Conflict and Security Law. Essays in Memory of Hilaire McCoubrey (Cambridge: University Press,

See § 2.2 supra.

See e.g. Eser, A., Mental Elements - Mistake of fact and Mistake of Law, in A. Cassese, P. Gaeta and J.R.W.D.
this article allows resort to general principles only where the others sources are unclear. The reports of the Preparatory Committee indicate that the unavoidability test was proposed, but did not make it into the final text. This may suggest that the avoidability test has deliberately been left out. The proposed solution of implementing it nevertheless is, in my opinion, not very satisfying either, for fact is, that the ‘negate mental element-requirement’ still stands. Applying an unavoidability test on top of the ‘negate mental element-requirement’ leads to an even more unjustifiable limitation of the scope of mistake of law. Arguably, authors who suggest this solution while referring to the object and purpose of prosecuting international crimes appear to attach greater value to convictions than to just convictions. If the mental element is negated by a mistake of law, then there is no more room to require the mistake to have been reasonable or unavoidable; the conclusion must already be that there is no criminal act because of a successful failure-of-proof defence.

Triffterer states with regard to the negate mental element that if a mistake of law “negates the mental element required, the consequence is as self-evident as for an error of fact. On the other side, the mere belief that certain conduct is not punishable or does not fall within the jurisdiction of the Court does not concern the material elements of which the perpetrator has to be aware before he may build the mens rea required. As expressed in sentence 2, only in exceptional cases may such an error negate this element; therefore, paragraph 2 also clarifies, though without precisely expressing, when and where such a consequence can be drawn.” In my opinion, however, such a mistake can never negate the mental element or the required Unrechtsbewusstein for that matter. The mistake these authors are referring to is an irrelevant mistake; mistakes about the punishability or the procedural issue of the Court’s jurisdiction are always irrelevant, there are likewise no exceptions to this rule in national criminal law systems.

---


437 Here I would like to refer again to the distinction made by Kelk between the constitutional dimension of the principle of legality and to the legal protection dimension; see § 2.3.2.4.1, footnote 241.


439 Emphasis AvV.

According to Triffterer “the Court may judge that even in these cases [of wrongful legal evaluation] a mistake of law may negate the mental element required and thus exclude responsibility, because the error was unavoidable”.441 It appears that this statement is incompatible both with a threefold concept of crime and with a twofold concept. As seen in Chapters 2 and 3 a threefold structure applies a threefold responsibility assessment. Triffterer’s statement seems to deny the compulsory order of these steps because, if the mental element is negated, you do not even reach the third step. The first step is a matter of proof; does the defendant’s behaviour, including his mental element, fall within the specific crime definition. Only if this is the case, and there are no justifications (the second step) do you reach the issue of the defendant’s culpability, in case of mistake of law, the unavoidability of this mistake. Triffterer’s analysis is incompatible with the twofold structure because it ignores the 'inexorable logic rule', which holds that every mistake negating the mental element (i.e. intent or recklessness) excludes the finding of a wrongful act, not only reasonable or unavoidable mistakes.442

Heller points out an interesting and potentially disturbing issue. He holds that under the current provisions, art. 32(2) and art. 30, the scope of the defence of mistake of law is, in opposition to the above expressed views, actually very wide, since most international crimes contain legal elements. Heller discusses how different authors try to solve the issue of legal elements. These authors for example refer to the Parallelenwertungslehre.443 The defendant is only required to have been aware of the social meaning of a legal element, not of legal technicalities. Heller rejects this solution, amongst other things because it is a typical civil law, or more precisely German, concept.444 As Heller holds, and as has been stated earlier in Chapters 2 and the current Chapter, article 32 is based on the common law system. And, Heller contends, a solution of the problem of legal elements should therefore also be sought in the common law. He holds that under common law mistakes of legal elements (MLEs) are not excuses but failure-of-proof

---

442 It should be noted that under the threefold system too any reasonable or unreasonable mistake that negates the required intent excludes the finding of a wrongful act. The only way to assess such a mistake more objectively is to incorporate a 'must have known' standard. See § 2.2.2.2, footnote 118+119 and accompanying text supra.
443 See also § 2.3.2.3, 2 supra.
defences, which means that the requirement of reasonableness can not be applied to mistakes about these elements.\textsuperscript{445} This is arguably exactly where the problem lies, but let us first look at the amendments to the Statute that Heller proposes:

"First, a fourth paragraph could be added to Article 30: 'Notwithstanding paragraphs 1 to 3, material elements that contain one or more legal rules need only be committed with negligence. A person acts negligently with regard to a legal rule when that person knew or should have known the definition of the rule'. That change would, as noted above, have the effect of requiring MLEs to be reasonable.

Second, Article 32 could be amended directly. Specifically, sentence 2 in paragraph 2 could be altered to read either; 1) 'A mistake of law may, however, be a ground for excluding criminal responsibility if the person neither knew nor had reason to know of the legal rule'; or 2) 'A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, provided that the mistake is reasonable'.\textsuperscript{446}

The first solution requires knowledge of the legal definition; this solution, which would apply to all legal elements, should be rejected because then only legal experts can commit international crimes. The same objection applies to the second solution if 'to know of the legal rule' refers to knowledge of the legal definition of the rule. If it refers to *Unrechtsbewu\ss{}tsein*, knowledge of wrongdoing, however, this solution could be supported. It is very unlikely that Heller meant to refer to this meaning, since he searches for a solution in common law, not civil law. The final proposed amendment hardly solves the problem of the irreconcilability of intent and reasonableness.

In sum, the proposed solutions do not solve the complex issues of mistake of law. In fact, Heller fails to discuss other relevant mistakes of law, such as mistake as to the prohibition as such and mistakes as to justifying norms. As seen in Chapter 2, Anglo-American law has not found a principled solution to the issue of mistake of law. Mistake of law was generally excluded as a defence, and only because in some situations this led to unjust results, the solution was adopted to require knowledge of unlawfulness when a crime definition reads 'wilfully' or 'knowingly'. This brought about the difficult issue of where to fit in dogmatically the sometimes desired requirement of reasonableness of a mistake; an issue that has remained unanswered in common law.

\textsuperscript{445} Ibid. p. 441.
\textsuperscript{446} Ibid. p. 444-445.
True, the solution of the Parallelenwertungslehre is somewhat artificial too. It does not truly solve the substantive problem either because, as to some legal elements, it can hardly be said that the social meaning can be understood without legal knowledge. This solution, which purports that no criminal intent is required, is however justified because Unrechtsbewuβtsein is a separate element of criminal responsibility. If, because of lack of legal knowledge about a legal element, the defendant acted with the required intent, but without Unrechtsbewuβtsein, and his ignorance of mistake of law was unavoidable, the defendant will be acquitted.

In sum, it is reasonable to conclude that, however hard we try to interpret article 32(2) otherwise, in its current state it does not lead to dogmatically correct and just results. By requiring the mistake to negate the mental element the drafters have only complicated, if not excluded, the means to arrive at an adequate normative account of culpability.

As Boister holds, authors who “take the subjective test for culpability seriously” are dissatisfied with article 32(2). Many authors who are dissatisfied with article 32(2) argue that incorporating an avoidability test into the provision will solve the main problems of the current codification. As we saw, this solution is however problematic. Perhaps this means that Jescheck’s call for an amendment of the provision should be supported. Before addressing a possible solution in section 4.4, it is instructive to turn to the second exception to the ignorantia legis non excusat rule provided for in article 32(2), the defence of superior order.

4.3 ARTICLE 33 – SUPERIOR ORDERS

4.3.1 Introduction
Weigend argues that it is unlikely that an ‘isolated’ mistake of law ever arises in connection with the crimes enumerated in the ICC Statute. He argues that it will be very difficult “to make a court believe that someone did not and could not realize that, for

---

example, maltreating of civilians or prisoners of war, […] was prohibited by law”. 450 He notes that “the only practically conceivable exception might arise when the actor is being ordered to commit an act of this kind by his military or civilian superior”. 451

One can dispute Weigend’s assumption as to the obvious illegal character of international crimes, but the fact that many international crimes are committed in the context of the military organizations, makes the defence set out in article 33 of particular relevance to the scope of the defence of mistake of law. The defence of superior orders acknowledges the fact that a soldier may be faced with the dilemma of incurring responsibility for disobeying superior orders or incurring responsibility for committing crimes in obedience to superior orders.

4.3.2 The provision
Article 33 provides:

**Superior orders and prescription of law**

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
   a) The person was under a legal obligation to obey orders of the Government or the superior in question;
   b) The person did not know that the order was unlawful; and
   c) The order was not manifestly unlawful
2. For the purpose of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The provision stipulates that in principle acting on superior orders does not relieve a person of criminal responsibility. Only when the three cumulative conditions of the first paragraph are met, can acting on superior orders lead to an acquittal. One of the prerequisites is that the subordinate made a mistake as to the lawfulness of the superior order. The knowledge of unlawfulness referred to in paragraph (1)(b), can be inferred from the available evidence; meaning that the evidence may justify the inference that the defendant knew the order to be unlawful – in other words, the conclusion that he must

---

451 Ibid., p. 332.
have known the order to be illegal is justified.\textsuperscript{452} It could be argued, as Dinstein has, that the logic underlying this requirement of absence of personal knowledge is that of \textit{ignorantia juris excusat}.\textsuperscript{453}

For this mistake of law to be relevant it does not have to negate the mental element as stipulated in article 32(2).\textsuperscript{454} The scope of the mistake of law under article 33 is therefore broader than the scope of mistake of law under article 32(2); the provision is in this sense more favourable to the defendant.\textsuperscript{455} Article 33 allows for the defence to be invoked for example in case of a mistaken justification or in case of mistake as to the prohibition as such. Paragraph 2 of article 33 excludes the possibility of invoking the defence of superior orders, however, when the acts ordered constitute genocide or crimes against humanity.

\subsection*{4.3.3 Criticism – Departure from customary international law}

The fact that article 33 allows the defence of superior orders to exclude criminal responsibility for war crimes is open to criticism. In the debate one can distinguish two schools of thought. There are those who support Dinstein’s contention that this provision is at variance with customary international law, which according to him treats superior orders merely as a factual element relevant to other defences, specifically duress and mistake (of fact or law) and not as a defence per se.\textsuperscript{456} Conversely there are those

\begin{flushright}
\end{flushright}
supporting Green, who argues that orders which are lawful on their face, and thus not manifestly illegal, constitute a defence per se.457

Authors often support their contention that article 33 is at variance with customary international law by referring to the IMT Nuremberg judgement and the subsequent proceedings under Control Council Law No. 10 (CCL No. 10).458 On the basis of the statutes applicable to these proceedings superior orders was only a ground for mitigation of punishment.459 Dinstein for example holds that the rule of article II(4)(b) CCL No. 10, banning superior orders as a defence, applied whenever the defence was raised, even if it was raised in conjunction with other defences like coercion or mistake, because the article is based on a doctrine of absolute liability. Dinstein holds that this may not be just, but that it is the Law nevertheless.460

Gaeta argues that, despite its merits,461 “article 33 must be faulted, primarily because it departs from customary international law without a well-ground motivation. This departure is even more questionable given that article 33 is basically inconsistent with the codification of war crimes effected through article 8 of the Rome Statute. How would it be possible to claim that the order to commit one of those crimes is not manifestly unlawful or that subordinates cannot recognize its illegality?462 Ambos too holds that article 33 should have excluded the defence in case of war crimes. In his opinion, the legal values protected by international criminal law override the need to maintain discipline in the military organisation.463

458 For a discussion of some of this case law see chapter 5.
459 Article 8 IMT Nuremberg, art. 6 IMTFE and art. II(4)(b) CCL no. 10.
460 Dinstein, Y., The Defence of Obedience to Superior Orders' in International Law (Leiden: A.W. Sijthoff, 1965), p. 169 and p. 117-118 (where Dinstein explains that the same is the inevitable purport of art. 8 IMT, but this does not conclusively determine the issue of obedience to orders in general international law. Dinstein argues that from the standpoint of general international law, he "think[s] that there is more merit in the initial American proposals, which refuse the standing of a defence per se to the fact of obedience to orders but confer upon the tribunal the right to take this fact into account among the other circumstances of the case within the purview of another defence").
461 Which are, according to her, the fact that art. 33 excludes the possibility of invoking superior orders in case of crimes against humanity and genocide. Gaeta, P., 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law', European Journal of International Law (1999), pp. 172-191, p. 190.
462 Ibid., p. 190. (But see Dinstein, Y., Defences, in G.K. McDonald and O. Swaak-Goldman (ed.), Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts (The Hague: Kluwer Law International, 2000) I Commentary, pp. 369-388, p. 381 (arguing that even the statement that all crimes against humanity are manifestly unlawful is unjustified because "almost every phrase of in paragraph 1 of art. 7 is defined and explained at some length in paragraph 2").
Other authors, supporting Green’s analysis, welcome the codification of superior orders as a defence and regret the article’s distinction between war crimes on the one hand and genocide and crimes against humanity on the other.\textsuperscript{464} Zimmermann holds that there is no basis in customary international law or in national law systems for this distinction.\textsuperscript{465}

One could argue that there is no difference in illegality between these three types of international crimes.\textsuperscript{466} The distinction is basically political;\textsuperscript{467} some states thought their soldiers would never commit crimes against humanity or genocide. Another argument against the distinction could be that war crimes are better known to soldiers than the norms relating to crimes against humanity. It is less obvious that a soldier would make a mistake about the wrongfulness of acts constituting war crimes than crimes against humanity. Finally, Scaliotti holds that “the difficult position in which a subordinate may easily find himself cannot be overlooked. Even in the context of international crimes, justice requires that the situation of submission typical for subordinates be rightly weighed”.\textsuperscript{468} Besides, there are no reasons why the purpose of the defence, excluding criminal responsibility when the defendant made an honest mistake about a not manifestly unlawful order, would no longer be legitimate in case of crimes against humanity and genocide.\textsuperscript{469}

In this discussion, on the applicability of the defence in cases of crimes against humanity and genocide, it should not be overlooked that these crimes require specific knowledge and specific intent respectively. One could argue that once these specific mental elements are established, the plea of the defendant that he acted on superior orders is very likely to be denied on the basis of the (inferred) knowledge of the unlawfulness of the orders or on the manifest illegality of them.\textsuperscript{470} Article 33(2) is simply redundant. But it could also, and arguably more convincingly, be concluded to the

\textsuperscript{467} See also Ibid., pp. 63.
\textsuperscript{469} See also Cryer, R., Superior orders and the International Criminal Court, in R. Burchill, N.D. White and J. Morris (ed.), \textit{International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey} (Cambridge: University Press, 2005), pp. 49-67, p. 65 (stating that if there are such reasons, these should have been indicated).
\textsuperscript{470} See also Ibid., pp. 65.
contrary, i.e. that article 33(2) is harmful, because the issue of mental element and culpability should be determined by a court on a case by case basis and although a defendant is very unlikely to be successful in bringing forward the defence of superior orders in these cases, it should not be excluded a priori. 471

McCoubrey is very persuasive in his argument that the provision on superior orders in the ICC statute does not, except for the exclusion provided for art. 33(2), constitute a radical change with the Nuremberg legacy.472 Like other authors473 he explains how the Nuremberg law was situation specific.474 According to Wise there is no departure from international customary law since “there is still no special defence; the real ground of exculpation is the broader one that someone who could not reasonably be expected to know that his conduct was illegal, or who could not reasonably be expected to have disobeyed an order, acts without culpability”.475 In such a case of unavoidable mistake of law, the unblameworthy defendant should go unpunished. Merely mitigation of punishment does not do justice to the lack of culpability in case of an unavoidably mistaken defendant. It seems that article 33 correctly provides for a ground for excluding criminal responsibility. It might be disputed, though, whether article 33 allows for a true culpability test, especially since article 33 does not refer to the unavoidability of the mistake and since the provision excludes the defence in case of certain crimes entirely. We will return to this issue at the end of this section.

4.3.4 Criticism – Manifest illegality
Besides its alleged departure from customary international law, article 33 is criticised for the use of the ‘not manifestly unlawful-requirement’ in paragraph 1(c). When the order is manifestly unlawful, the subordinate cannot invoke the defence of superior order in order to be relieved of criminal responsibility. But when is an order manifestly illegal?

471 Ibid., pp. 65-66.
According to Zimmermann an order is manifestly illegal, when the unlawfulness is "obvious to a person of ordinary understanding [...]". The unlawfulness is not to be determined with regard to a specific domestic legal order; instead the true test is whether the order was manifestly unlawful under international law: a layman with only basic knowledge of international humanitarian law should have considered the action to be unlawful and constitute a punishable crime."\textsuperscript{476} It should be noted that some war crimes fall, per se, outside the scope of the defence of superior orders; for example an order to commit rape, because this is no activity relating to military duties to begin with.

Osiel strongly opposes to the ‘manifest illegality’ rule. His objections generally concern the uncertainty of the scope of ‘manifest illegality’. The rule implicates the existence of a standard of what a reasonable person would recognize as manifestly illegal. Indicators of this standard, like the clarity of the legal prohibition, the moral gravity of the act and the procedural irregularity of the order, prove to be very inadequate as to the establishment of the manifestness of the illegality of an order. Osiel further convincingly demonstrates the inability of the manifest illegality rule to respond to issues of individual responsibility under totalitarian regimes.\textsuperscript{477} Besides, sociological and psychological research indicates that "the behaviour of the individual is rarely determined principally by its ethical references". The ICRC therefore argues "we have to make international humanitarian law a judicial and political rather than a moral issue".\textsuperscript{478}

Keijzer, however, has argued that the manifest illegality principle ”results from the superior’s authorization deriving from the power of the legitimate government – the essence of authorization being that the legality of orders may be presumed […]], unless […] an order can under no circumstances be compatible with the law".\textsuperscript{479} Keijzer finds that the manifest illegality principle acknowledges the importance of hierarchy and authorization within the military organization. He has argued in favour of a separate provision on the defence of superior orders in order to do justice to the position of subordinates in this military hierarchy; subordinates must be able in general to rely on their superiors.

\textsuperscript{478} International Committee of the Red Cross, \textit{The Roots of Behaviour in War}, (Geneva, Switzerland 2004), p. 110-111.
\textsuperscript{479} Keijzer, N., \textit{The Military Duty to Obey} (Amsterdam: Vrije Universiteit Amsterdam, 1977), p. 238-239.
To conclude, as Cryer has noted, 'manifest' could be interpreted as a subjective criterion, in which case it would resemble the unavoidability (or reasonableness) test as part of the assessment of the individual's culpability. If it is an objective criterion, however, it could be said that it is too narrow and too broad at the same time.\textsuperscript{480} Too narrow or lenient, because in case of a non-manifestly but nevertheless unlawful order, all subordinates will be exculpated. This includes subordinates who, because of their personal capacities, should have known about the unlawfulness of the order. The objective test is, at the same time, too broad or harsh, since it accounts for personal capacities as little as for personal incapacities. If the order is manifestly unlawful, the defence is not available and there is no consequential assessment of the individual subordinates' culpability on the basis of mistake of law.

4.3.5 Conclusion – Superior orders a separate defence?

With article 33 the ICC Statute provides for superior orders as a separate defence. The excuse here provided for is, on the one hand, narrower and, on the other, wider than the defence of mistake of law per se. It is narrower, since it is excluded in case of crimes against humanity and genocide. It is wider for it excuses the subordinate when he has followed an unlawful order that was not manifestly unlawful, if he did not know the order to be unlawful, regardless of whether he \textit{should} have known the order to be unlawful.

Keijzer argued in favour of a separate superior orders defence because the military organization needs a hierarchical structure in which subordinates can rely on the lawfulness of orders from the legitimate superior authority.\textsuperscript{481} He has also argued, however, that the limited responsibility approach as applied in the US, Germany and the Netherlands\textsuperscript{482} should be preferred over the full responsibility approach followed in the UK and France.\textsuperscript{483} This is because “in the latter two countries, mistake of law not generally being admitted as a defence and mistake of fact being no defence against a charge of an offence of strict liability (U.K.) or a non-intentional offence (France), in

\textsuperscript{482} No responsibility for obeying unlawful superior orders unless they were manifestly unlawful, see also Chapter 2 supra.
\textsuperscript{483} Full responsibility, not a defence per se, but may give rise to a defence on other grounds, e.g. by negativing the mens rea: mistake or duress, see also Chapter 2 supra.
cases of compliance in good faith with superior orders this may lead to unjust
decisions").484

It could be argued then, that if a system recognizes mistake of law (and duress) as
an excuse, in its 'proper' meaning, i.e. entailing a culpability assessment, then perhaps
the separate limited responsibility provision in case of superior orders should be
abandoned. If it is established that a subordinate who obeyed an unlawful order had (or
should have had) reason to doubt the lawfulness of the order and had the opportunity
and means to resolve these doubts, he should be held responsible for neglecting to do so.
Both in cases of ‘isolated’ mistake of law and in cases of superior orders as a specialis of
mistake of law the true issue is whether the defendant could have avoided making the
mistake and whether he can, therefore, fairly be blamed for his committing the wrongful
act. Under such a culpability assessment, the designation ‘avoidable mistake’ will follow
less readily when the defendant acted on superior orders, especially on the battlefield.

4.4 CONCLUDING ANALYSIS

Article 32(2) only provides for a failure-of-proof defence. We must conclude that the
mistake of law excuse is not provided for in the Statute. This would mean that the Court
could apply this excuse on the basis of Articles 31(3) and 21. Olásolo sees such an
opportunity for mistakes of law as to whether a given circumstance constitutes a ground
for justification, but not for a mistake of law as to whether a particular type of conduct is
a crime within the jurisdiction of the Court "because art. 32(2) RS expressly excludes this
as a ground for excuse".486 But what if we could convincingly argue that the first sentence
of Article 32(2) refers to mistake of procedural law or a mistake as to the punishability of the
act? This would then mean that the Statute does not cover, nor reject, mistakes about the
prohibition as such. It would be a stretch to argue this was the intention of the drafters
because, as seen in Chapter 2, in most common law systems, mistake of law is still looked

p. 216-217.
485 As seen in Chapter 3, it could be argued that the ICC Statute provides for neither excuse. Article
31(1)(d) seems to correct the ICTY Appeals Chamber majority decision in Erdemović (which excluded
duress in case of murder charges), but the statute in fact does not provide for a classical case of duress, as
the excuse is understood in most civil law jurisdictions. In fact the provisions does not even provide for a
moral choice test.
486 Olásolo, H., Unlawful Attacks in Combat Situations; From the ICTY’s Case Law to the Rome Statute (Leiden:
at with Argus' eyes. However, this could be a 'way out' for the Court if it is confronted with a credible plea of mistake as to the prohibition as such.

If Olásolo is correct, however, and the drafters expressly excluded this type of mistake of law, adding a new provision to the Statute will be the only solution to correct this unjustified neglect of a fundamental component the principle of culpability. The Statute does not cover mistake of law; adding a new provision is the only means to fill this lacuna.

The new provision should provide for a principled approach to mistake of law, recognizing the true character of this defence as an excuse. The determinative issue is then whether the mistake was unavoidable. As Fletcher holds "the issue of 'unavoidability' resolves into a normative assessment about whether under the circumstances and in the light of his personal capacities, the defendant could have been expected to be more careful before undertaking the act that turned out to be illegal."487

Only by acknowledging the importance of the distinction between justification and excuse, and providing for mistake of law as a valid excuse, can international criminal lawyers be true to the principle *nulla poena sine culpa*, one of the most fundamental principles of criminal law. It is proposed that the following provisional is adopted:

**Article 32a**

**Mistake of law or mistake of fact**488

If it is concluded that the defendant acted in the mistaken belief that his conduct was lawful, or that he was mistaken about a fact extrinsic to the required mental element, and if this mistake was unavoidable, the defendant shall not be convicted in respect of such a wrongful act.

Such a new provision would, in my opinion, allow abandoning the separate defence of superior orders. I realise that in national systems a separate defence of superior orders often purports that subordinates have no duty to investigate. This marks the main difference between the defence of superior orders and mistake of law. Where mistake of law, however, entails a true weighing of the individuals culpability, taking into account his personal circumstances, (military) training and education and the circumstances of the

488 Arguably it is unnecessary to provide for a separate defence of mistake of law and fact; both mistakes, if relevant and not negating the mental element of the offence, fall under the category of excuses, requiring the mistake to have been reasonable or unavoidable.
case, for instance, whether the subordinate had time to reflect or not, a separate defence is no longer necessary to account for the soldier's dilemma. If, nevertheless, the defence of superior orders is upheld, Cryer's suggestion that the manifest illegality test in Article 33 could be interpreted as a subjective test, resembling the unavoidability or reasonableness test, should be supported. Moreover, the proposed provision on mistake of law would also apply to cases of genocide or crimes against humanity committed under superior orders. Only if the mistake as to the lawfulness of the ordered act was unavoidable will the subordinate be excused.

The proposal for the new provision is based on a statement made by Professor Wise, commenting on an early draft of the ICC Statute. Arguably this statement says it all: "With respect to both mistake of fact and of mistake of law, the crucial question should be whether the accused acted in the mistaken belief that his conduct was lawful, and whether the mistake was unavoidable. In the case of such an unavoidable mistake, there is no culpability" and, on principle, should be no criminal responsibility.489