Mistake of law: excusing perpetrators of international crimes

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CHAPTER 5 APPLYING THE THEORY OF MISTAKE OF LAW – AN ANALYSIS OF (INTER)NATIONAL CASE LAW

5.1 INTRODUCTION

This chapter is dedicated to an analysis of selected case law concerning defendants who pleaded mistake before national and international courts in cases concerning international crimes. The main focus is on proceedings that followed the Second World War. To a large extent the case law under discussion reflects the general prerequisites for mistake of law as a defence, already explored in the comparative law and theoretical parts of this thesis.

Complicating factors in studying the case law, however, have been that cases where the defendant invokes, or seems to invoke, mistake of law often also involve other defences like mistake of fact and actual or putative duress, necessity and self-defence. Putative justifications can in themselves be based on a mistake of law. However, they can also be based on mistakes of fact. Because the different defences are often so intertwined, it is difficult to filter out the arguments and legal reasoning related exclusively to the mistake of law defence. Another complicating factor in the analysis of American case law is that military trials have no judgment; the reasoning underlying the verdict remains unknown.

Still, in the studied case law one recognizes the theory of mistake of law and superior orders; important parameters are the unavoidability or reasonableness of the mistake and the manifest illegality of the superior orders. One can also recognize the conclusions of the comparative law analysis of Chapter 2; common law jurisdictions try to uphold the ignorantia legis non excusat rule (while allowing reasonable mistakes to

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491 If there is a conviction one perhaps can assume that the judges followed the view of the Judge Advocate. See also Green, I.C., 'Fifteenth Waldemar A. Solfe Lecture in International Law, Superior Orders and Command Responsibility', 175 Military Law Review (2003), pp. 309-384, p. 319-320.
mitigate the punishment or sometimes even to acquit the defendant) and civil law jurisdictions recognize an unavoidable mistake of law as an excuse in principle, often rejecting the plea on the facts of the case.

The case law reveals that at one end of the spectrum of possible verdicts is acquittal on the basis of legal uncertainty, and, on the other, is denial of the defence based on the manifest illegality of the superior order followed by the defendant. The intermediate area, where the law is sufficiently clear but the order was not manifestly unlawful, is of particular interest in determining the scope of the defence of mistake of law.

5.2 THE CASE LAW

The selected case law is mainly derived from the proceedings following the Second World War. It covers other criminal proceedings in the decades thereafter as well, as some cases related to the wars in Korea and Vietnam and a few more recent cases before the ICTY and the ICC.

As Röling describes, the courts after WWII were confronted with the plea of ignorance of the law because the law of war was mainly based on outdated treaties and the Martens-clause and had therefore not been able “to follow the technical developments and changed spiritual climate”. There existed great uncertainty in the law of war, as recognized in the I.G. Farben trial. The legality, under the law of war, of reprisals, “illegal acts done with the purpose to compel the adversary to legal conduct”, also explains the plea of mistake of law as put forward. The circumstances under which reprisals were allowed were very hard to discern for ordinary soldiers. First of all, it must have been difficult for them to know the applicable rules and second, they were probably

492 As seen earlier, the fact that many international crimes are committed within the context of the military organization makes the defence of superior orders of particular relevance to the determination of the scope of the defence of mistake of law.
493 Swart describes how this case law has been a valuable source for the ad-hoc tribunals in establishing customary rules, Swart, A.H.J., Algemene leerstukken van materieel strafrecht in de rechtspraak van de ad hoc-tribunalen, (ed.), J ogoslawië- en Rwanda-tribunalen: impact op het Nederlandse strafrecht (Amsterdam: Universiteit van Amsterdam, 2002), pp. 5.
495 Ibid., p. 370; I.G. Farben Trial (1948), US Military Tribunals at Nuremberg, Case No. 6, Military Tribunal VI, N.M.T., vols. 7-8.
not sufficiently aware of the relevant factual situation.\textsuperscript{497} Even up to the present day the issue of reprisals remains far from settled.\textsuperscript{498}

The cases in this chapter are discussed in a more or less chronological order. The cases are not divided into those that concern pleas of mistake of law and those in which superior orders were raised. As noted in the first paragraph the different defences are often intertwined, a mistake of law is a prerequisite for a successful plea of superior orders. Moreover, as argued by Dinstein, superior orders are not a defence \textit{per se}, but may be a relevant circumstance in other defences like duress and mistake of law. The focus here is on the latter defence.

\subsection*{5.2.1 Pre-WWII case law}
The \textit{Dover Castle} case and the \textit{Llandovery Castle} case are the two cases most often referred to when illustrating the general approach to the defence of superior orders prior to the Second World War.\textsuperscript{499} Both cases were decided by the Leipzig Court which considered cases of German war crimes committed in World War I. The \textit{Dover Castle} case (1921)\textsuperscript{500} concerned the sinking of a British hospital ship by a German submarine. The British ship was clearly identifiable as a hospital ship; the defendant, Commander Karl Neumann, did not contest this. He argued that he was following orders of the German Admiralty, which had declared that it would fire at unannounced hospital ships since it suspected the British to use these ships for military purposes. The defendant believed that the order consisted of a legitimate reprisal.\textsuperscript{501} The Court held that the \textit{respondeat superior} rule applied; the subordinate has a duty to obey the orders of his superiors and therefore only the superior giving these orders is responsible. Article 47 of the German Military Code only provided for two exceptions to this rule: when the subordinate goes beyond (the scope

\begin{enumerate}
\item \textsuperscript{497} Ibid. p. 371.
\item \textsuperscript{500} \textit{Dover Castle case} (1921), Supreme Court of Leipzig, 16 Am. J. Int'l L. 704 (1922).
\item \textsuperscript{501} Ibid., p. 706-707.
\end{enumerate}
of) the order or when the subordinate knows that the act ordered is criminal, the subordinate is liable too. In the case at hand, however, there was no evidence that either of these exceptions applied; the defendant was acquitted.502

The *Llandovery Castle* case (1921)503 concerned a Canadian steamer that was torpedoed by a German U-Boat, because it was believed to be transporting troops and munitions, while in fact it was not. The Commander of the German U-boat, First-Lieutenant Patzig, had ordered the torpedoing of the Llandovery Castle, while aware of being acting against orders, because he believed that the enemy used hospital ships to transport troops and munitions.504 Shortly after the first attack, which sank the ship in about 10 minutes,505 the survivors in life boats were fired upon and most of them were killed. The defendants in this case, Lieutenants Dithmar and Boldt (Patzig had disappeared), refused to give their account of what happened that day, because they said they had promised Patzig to be silent on the matter. They added that they did not shoot and whatever part they played they were acting under superior orders. They said they did not know they were doing something unlawful. However, this last attack, against defenceless survivors was, according to the Leipzig court, universally known to be against the law.506 The court establishes that the defendants, as naval officers by profession, must have known that killing defenceless people is unlawful.507 According to Lippman a manifest illegality rule was seemingly added to the subjective knowledge test of the *Dover Castle* case.508 One could also conclude from the court’s reasoning that ‘knew’ in article 47 of the German Military Penal Code includes ‘must have known’. The Court held that since they knew that killing defenceless people is not legally authorized they should have refused to obey.509 The defendants, Lieutenants Dithmar and Boldt, were held responsible for having taken part in homicide. They were sentenced as accessories510 to four years imprisonment, the fact that they had acted on superior orders was considered a mitigating circumstance.511

503 *Llandovery Castle case* (1921), Supreme Court of Leipzig, 16 Am. J. Int’l L. 708 (1922).
504 Ibid., p. 710.
505 Ibid., p. 710.
510 Ibid. p. 721.
511 Ibid. p. 723.
5.2.2 WWII case law

The main case law concerning superior orders is to be found in the proceedings after the second World War. The trend from respondeat superior to the conditional liability of the subordinate was continued. In fact, the Statute of the International Military Tribunal at Nuremberg banned the raising of a defence of superior orders all together; the subordinate was responsible and the fact that he had acted on superior orders could only mitigate his sentence if justice so required.\footnote{Article 8 IMT Nuremberg; and Article 6 IMTFE.} Control Council Law No. 10 drafted for the subsequent proceedings provides the same in Article II (4)(b). The subsequent proceedings and national prosecutions following the Second World War show a mixed result, however, sometimes only allowing mitigation but sometimes also resulting in acquittal or at least a recognition of the existence in principle of a complete defence of mistake of law or superior order.\footnote{See also Bantekas, I. and S. Nash, International Criminal Law (London: Routledge-Cavendish, 2007), p. 58-59 and Garraway, C.H.B., 'Superior Orders and the International Criminal Court: Justice delivered or justice denied', 81(836) International Review of the Red Cross (1999), pp. 785-794.}

5.2.2.1 United States


The accused in this case were former high-ranking officers in the German Army and Navy, and officers holding high positions in the German High Command.\footnote{Von Leeb (The High Command Trial) (1948), US Military Tribunals at Nuremberg, Friedman, The Law of War, vol. II, p. 1421-1470; UNWCC, vol XII, p. 1-127, UNWCC, vol. XII, p. 1.} One of the issues that arose concerned the responsibility of field commanders for passing on unlawful superior orders. The United States Military Tribunal at Nuremberg (NMT) held that to a certain extent a field commander has a right to assume the lawfulness of orders from his superiors. If he does not know the order to be unlawful, and his mistake is reasonable, that is, the order was not criminal upon its face, he is not liable for passing it
on. On the one hand, the Law Reports note that this test is applied as a rule to the plea of superior orders in general. On the other, the Law Reports comment that the Tribunal in the High Command case stands out as an exception in the legal effect it attributes to the plea of superior orders: acquittal as opposed to merely mitigation of punishment.

In the *Hostages Case* (1948), the NMT indeed held that the plea of superior orders could only lead to mitigation of punishment, it could never afford a complete defence. The following, however, suggests to the contrary, i.e. that under certain circumstances superior orders is a defence, except in case of a manifestly unlawful order: “We are of the view, however, that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates International Law and outrages fundamental concepts of justice.” The Tribunal than states however that “[i]nternational Law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10”. In this case superior orders was only considered to potentially give rise to some mitigation of punishment, not to an acquittal.

The Judgement in the *Einsatzgruppen* case discussed the superior orders defence both in light of the defence of mistake of law and in light of the defence of duress. The Tribunal concludes both forms of the superior orders defence are absent: there is no

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518 Ibid. UNWCC, vol. XII, p. 74, footnote 1.
519 Ibid. UNWCC, vol. XII, p. 98.
523 Ibid. UNWCC, vol. VIII., p. 52.
524 Ibid.
526 Ibid., p. 480-483 (under the heading “Duress Needed for Plea of Superior Orders”).
ignorance of illegality when one participates in an illegal enterprise and no duress when the subordinate "is in accord with the principle and intent of the superior". Knowledge of illegality is inferred from the circumstances of participating in an illegal enterprise.

Anton Dostler (1945), commander of the 75th German Army Corps, was prosecuted by the US Military Commission in Rome for "having ordered the shooting of fifteen American prisoners of war in violation of the Regulations attached to the Hague Convention Number IV of 1907, and of long-established laws and customs of war". Dostler’s defence was that he believed he was executing a lawful reprisal. Dostler’s plea of superior orders failed because in ordering the execution he had acted outside the Führer’s orders that “if members of Allied commando units were encountered by German troops they were to be exterminated either in combat or in pursuit. If they should fall into the hands of the Wehrmacht through different channels they were to be handed over to the Sicherheitsdienst without delay.” And even if there was a superior order underlying his criminal act, this order could never justify the summary execution of P.O.W.’s. The Military Commission probably rejected his plea, holding that all acts of reprisals are forbidden against prisoners of war (Geneva Prisoners of War Convention of 1929). “No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal”. One could say Dostler was mistaken in a double sense, first of all as to the existence and/or scope of the order, and secondly as to the lawfulness of its presumed contents. The first mistake can be considered a mistake of fact, but when the facts, even if they were as the defendant believed or perceived them to be, would not justify the defendant’s behaviour, his mistake was in fact a mistake of law; he was mistaken as to a ground for justification. In such a case, the mistake of fact is subsumed by a mistake of law; the mistake of fact is no longer relevant.

The judgement in the Sawada trial (1946) held that the defendants had acted on superior orders; "they exercised no initiative to any marked degree”. According to the

527 Ibid., p. 473 and 480 respectively.
530 Ibid., p. 26-27.
531 Ibid., p. 33.
532 Ibid., p. 31.
533 See also the Almelo trial, §5.2.2.2 infra.
Commission, though, this did not absolve them from guilt. The fact that they had acted on superior orders only led to a substantial mitigation of their punishment.534

The UNWCC notes on this case are interesting for they give an overview of the history of the defence of superior orders in international criminal law, which had been raised in war crime trials more frequently than any other defence.535 The conclusion is that the defence of superior orders is not successful when the orders are manifestly unlawful or when a man of ordinary sense and understanding knows the order to be unlawful.536 The discussion is somewhat confused, however, because no distinction is being made between superior orders – mistake of law and superior orders – duress.537 The main denominator however is, arguably, "whether moral choice was in fact possible", i.e. whether the defendant had a moral choice to behave differently.538 The commission probably did not have superior orders – mistake of law in mind when it discussed the moral choice test, but it can be argued that both in case of duress and of mistake of law, the defendant had no moral choice to act differently.

In other trials reported in the Law Reports, so the note summarises, the validity of the plea turned "upon the illegality, the obvious illegality, or the knowledge or presumed knowledge of the illegality of the order given".539 This seems rather obvious, a subordinate following lawful superior orders will not likely face prosecution for criminal behaviour. Thus, the superior orders defence will only be invoked in cases of illegal superior orders; illegality plays a fundamental role. But the test applied, either of illegality per se, or knowledge of illegality or manifest illegality, is precisely the determining factor in relation to the defendant's culpability. The UNWCC lacks precision in its analysis on this point.

The commission further summarises the general legal effect of a successful plea of superior orders. According to the commission, most sources show "a great reluctance to regard superior orders as a complete defence".540 The general legal effect has been, according to the commission, mitigation of punishment.541 Not all the sources that the

535 Ibid., p. 13.
537 This is confusing because in case of duress, a mistake of law is no requirement.
539 Ibid., p. 16.
541 The Commission refers to Article 8 of the Nuremberg Charter, Article 6 of the Tokyo Charter, Article II(4)(b) of the Allied Control Council Law No. 10, 'Regulation 9 of the US Mediterranean regulations, Regulation 16(f) of the Pacific regulations, September 1945, regulation 5 (d), (6) of the Pacific regulations, December 1945, and Regulation 16(f) of the China Regulations', the 'Norwegian Law of 13th December, 1946, on the Punishment of Foreign War Criminals' and other domestic regulations. Ibid., p. 19-20.
commission refers to, however, exclude the possibility of superior orders leading to the acquittal of the defendant.\textsuperscript{542}

5.2.2.2 United Kingdom

In \textit{Peleus} (1945) the defendants were charged with the killing of the survivors of a sunken steamship, the Peleus.\textsuperscript{543} The defence argued that the defendants should be acquitted because they were unaware of the illegality of the order they followed. The defence referred to the \textit{Dover Castle} case.\textsuperscript{544} The defence for the defendant Eck, the commander of the U-Boat, who gave the order, also invoked the defence of operational necessity.\textsuperscript{545} The facts of the case are very similar to the \textit{Llandovery Castle} case.\textsuperscript{546} The defence of reliance on superior orders was rejected because the order was manifestly unlawful.\textsuperscript{547} With regard to operational necessity the Prosecutor argued that it would have been much more effective to save the ship and his crew by removing the boat as fast as possible instead of taking five hours to sink the wreckage.\textsuperscript{548}

The \textit{Peleus} Trial is often referred to for its famous quote from the summing up of the Judge Advocate: “It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one.”\textsuperscript{549}

In two other cases before British Military Courts, the \textit{Buck} trial and the \textit{Almelo} trial, it is questionable whether the defendants actually acted under mistake of law. The cases give some insight in the treatment of this defence before British Military Courts. Notwithstanding the general rule, that ignorance of the law is no excuse, it was accepted in principle that there are circumstances, i.e. superior orders concerning violations of international law, in which the defence of mistake of law must lead to an acquittal. In \textit{Buck} (1946) all eleven defendants except one were found guilty, "charged with

\begin{footnotesize}
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\item \textsuperscript{542} The Commission refers to e.g. Article 15 of the Canadian War Crimes Act of 31st August, 1946; Article 43 Dutch Criminal Code; The United States Basic Field Manual F.M. 27-10 (Rules of Land Warfare), paragraph 345. Ibid., p. 20-22.
\item \textsuperscript{543} \textit{Peleus Trial} (1945), British Military Court, Hamburg, UNWCC, vol. I, pp. 1-21, p. 2.
\item \textsuperscript{544} Ibid., p. 9.
\item \textsuperscript{545} Ibid., p. 4.
\item \textsuperscript{546} See also Ibid., p. 19 (the motive of both commanders (Patzig and Eck) was different. Patzig’s motive was concealment of criminal acts and Eck’s was operational necessity (UNWCC, p. 19), the latter is arguably a justification. The prosecutor based its case on this case (\textit{Llandovery Castle}) (UNWCC, p. 10-11).
\item \textsuperscript{548} \textit{Peleus Trial} (1945), British Military Court, Hamburg, UNWCC, vol. I, pp. 1-21, p. 12.
\item \textsuperscript{549} Ibid., p. 12.
\end{itemize}
\end{footnotesize}
committing a war crime, in that they, in violation of the laws and customs on war, were concerned in the killing of six British prisoners of war, four American prisoners of war and four French nationals".550 The defence claimed that all of the accused had acted under superior orders. The purport of the so-called Leader Order of 18 October 1942 was that all "members of so-called Commando detachments who were parachuted from the air behind the German Lines to do acts of sabotage and interference" were not to be treated as POWs but were to be shot.551 With regard to the defence of superior orders "the Judge Advocate expressed the view that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was obviously unlawful, secondly if the accused knew that the order was unlawful, or thirdly if he ought to have known it to be unlawful had he considered the circumstances in which it was given".552 The defence claimed that the accused acted under mistake of fact, they "had no other information on the matter than that the prisoners had been tried and condemned, and had acted on that assumption".553 The Prosecutor, however, held that "the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution".554 With regard to the defence of mistake of law the Court considered that "it is a rule of English law that ignorance of the law is no excuse […] There are some indications that this principle when applied to the provisions of international law is not regarded universally as being in all cases strictly enforceable".555 The Judge Advocate summed up what the requirements of mistake of law are. What did the defendants know about the rights of prisoners of war? Their knowledge is not to be compared to the knowledge of legal experts. Their knowledge should be compared with what an ordinary soldier, like the defendants, know as a general fact of military life about the rights of prisoners of war. The Judge Advocate held that such a reasonable soldier is, or should be, aware of the fundamental right of a prisoner of war to security of his person.556 Hence, although accepted in theory, both the defence of mistake of law and that of superior orders were denied on the facts of this case.

In the Almelo trial (1945), the accused were charged with committing a war crime in that they, in violation of the laws and usages of war, killed a British prisoner of war and a

551 Ibid., p. 42.
552 Ibid., p. 43.
553 Ibid., p. 43.
554 Ibid., p. 43.
555 Ibid., p. 44.
556 Ibid., p. 44.
Dutch civilian. "The Judge Advocate asked whether there was any evidence upon which the court could find that, these three men or any of them honestly believed that this British officer had been tried according to law, and that they were carrying out a lawful execution. If the court was satisfied that this was not so, then it would be clearly quite right to reject any defence that might have been put up under that heading." The first prerequisite for a successful plea of mistake is obviously that the defendant was honestly mistaken. His plea must be credible. The Judge Advocate continues: "On the other hand, if the court felt that circumstances were such that a reasonable man might have believed that this officer had been tried according to law, and that they were carrying out a proper judicial legal execution, then it would be open to the court to acquit the accused." The mistake has to have been reasonable in order to exculpate the defendant.

One could dispute whether the mistake in this case was a mistake of law and not a mistake of fact. What were the defendants mistaken about? They believed the P.O.W.'s had been tried according to the law and the order to execute them was thus based on a legal decision. This is a mistake of fact, because there was no legal decision holding the verdict of execution. This mistake of fact is only subsumed by a mistake of law, when it would be a rule of international humanitarian law that prisoners of war can never be sentenced to death and the defendant was ignorant of such a rule.

In *Falkenhorst* (1946) the defendant pleaded having acted on a superior order, which he believed involved a reprisal. The annotator notes that the defence of superior order, in this case as in others, "raised with the question of reprisal, has not been strongly stressed by the defence". The annotator notes how very complicated the legal principles relating to reprisals are and how in fact "[t]he whole basis of the wrongfulness of disobeying unlawful orders may fall to the ground" because reprisals precisely concern otherwise unlawful acts. This case gives a foretaste of the conditions for a successful plea of superior orders, as now codified in article 33 of the Rome Statute. According to the Notes on the case, the question is to what extent the defendant can be exonerated from responsibility for carrying out an illegitimate reprisal, if the defendant did not know about "the inadequate grounds that purported to give rise to the reprisal by his

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558 Ibid., p. 41.
560 Ibid., p. 27.
Nevertheless, the note continues, “the laws of war demand that there must be a concurrence of a considerable number of factors before an occasion to exercise the right or reprisal arises.” And “Article 2 of the Geneva Convention of 1929 forbids measures of reprisal being taken against prisoners of war.”\textsuperscript{562} One could say that an order violating this rule is manifestly unlawful. As seen before, in case of manifestly unlawful orders inference of personal knowledge is often justified.\textsuperscript{563}

\subsection{Other countries}
Reprisals have been the object of many more cases before criminal courts after the Second World War. As Best notes, not the decisions of these courts, but the Geneva Conventions of 1949 have banned reprisals (but not completely).\textsuperscript{564} Reprisals still remain a controversial issue. The problem with reprisals is that under certain strict conditions they make legitimate what would otherwise be wrongful conduct when they are necessary and the only means to stop the adverse party in their unlawful behaviour.\textsuperscript{565}

Controversial issues in international law will be conducive to an acquittal on the basis of mistake of law. An example of this can be found in the \textit{Latza} trial (1948); the defendants, three German judges, were acquitted on the basis of having made a mistake of law.\textsuperscript{566} On the 8\textsuperscript{th} of February 1945 a German Standgericht was set up in Oslo, as a countermeasure to growing acts of sabotage of the Norwegian underground movement. The accused Latza acted as president of the Standgericht. On the day of the establishment of the Standgericht, five Norwegians, who were arrested earlier that same day, were sentenced to death by Latza and two other judges. The death sentences were carried out the following day. After the liberation of Norway Latza and the two other judges were "charged with having committed a war crime in that he through a denial of a fair trial and judging against their better knowledge had unlawfully caused the death of the five […] Norwegian citizens".\textsuperscript{567} All three accused were eventually acquitted, after two judgements by the Lagmannsrett and the Supreme Court.

\begin{itemize}
\item \textsuperscript{561} Ibid., p. 26.
\item \textsuperscript{562} Ibid., p. 27.
\item \textsuperscript{565} See also Chapter 6, Part II infra.
\item \textsuperscript{566} \textit{Helmut Latza and 2 others} (1948), Eidsivating Lagmannsrett (Court of Appeal) and the Supreme Court of Norway, UNWCC, vol. XIV, pp. 49-85.
\item \textsuperscript{567} Ibid., p. 49.
\end{itemize}
In the Latza trial the defence of mistake of law concerned the question of “the legality under international law of the enforcement of a provision punishing failure, on the part of inhabitants of occupied territory, to impart information to the occupying power regarding the activities of other inhabitants against the occupying power”.\(^{568}\)

One of the Norwegian defendants before the Standgericht had, pursuant to article 3 of a German Verordnung of 12\(^{th}\) October 1942, been sentenced to death for failure to denounce his two brothers-in-law for certain contemplated acts of sabotage. The Lagmannsrett decided that the accused had acted in an excusable mistake of law when they applied this provision of the German Verordnung, since even legal experts differed in their opinions as to whether this provision was at variance with international law.\(^{569}\) The Norwegian Supreme Court upheld the decision of the Court of Appeal. It concluded that it could not be claimed that the illegality of imposing punishment for a failure to notify an occupation power of the activities of a patriotic movement had already been established as an unquestionable rule of international law.\(^{570}\)

Although the defendant in this case pleaded mistake of law and he was eventually acquitted, it remains uncertain whether that acquittal was based on this defence of mistake of law or whether it was based on the dubiousness of the illegality of the German provision to begin with. The Law Reports comment that “[i]n the Latza Trial a Norwegian Lagmannsrett held that the accused had been under a pardonable misconception in incorrectly believing that a certain German law was consistent with international law, but on appeal the Norwegian Supreme Court stated that it could not find, in view of the uncertainty of international law on the point, that the German provision was in fact illegal.”\(^{571}\)

In the Dutch case *Wintgen* (1949), the defendant was acquitted because he did not know the concerned acts of reprisal were unlawful under international law.\(^{572}\) This case is more interesting for our purposes than the Latza trial because the Court did find that the alleged acts constituted war crimes; the plea of mistake of law was thereafter assessed on

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\(^{568}\) Ibid., p. 83.

\(^{569}\) Ibid., p. 69-70.

\(^{570}\) Ibid., p. 82-83.


\(^{572}\) *Wintgen* (1949), Dutch Special Court of Cassation, NJ 1949, 540, 981-5; Excerpts in Annual Digest 1949, 484-6.
its merits. The evaluation of Wintgen’s plea of mistake of law depended on the defendant’s intellectual capacities and his military position on the one hand and the gravity of the crimes on the other. In Rauter the Special Court had already determined that the rule on superior orders applicable was not art. 43 of the Dutch Criminal Code but art. 47 of the German Military code, which read:

1) Wird durch die Ausführung eines Befehls in Dienstshachen ein Strafgesetz verletzt, so ist dafür der befehlende Vorgesetzte verantwortlich. Es trifft jedoch den gehorchenden Untergebenen die Strafe des Teilnehmers:
   1. wenn er den erteilten Befehl überschritten hat; oder
   2. wenn ihm bekannt gewesen ist, dass der Befehl des Vorgesetzten eine Handlung betraf, welche ein allgemeines oder militärischen Verbrechen oder Vergehen bezwecket.

2) Ist die Schuld des Untergebenen gering, so kann von seiner Bestrafung abgesehen werden.

The Court in Wintgen then established that knowledge of unlawfulness is not an element of the alleged war crime ‘devastation not justified by military necessity’. It found that there was some dispute about the wrongfulness of the burning of the houses. § 358 (e) US Basic Field Manual stipulated that burning of houses is a form of reprisal. Oppenheim-Lauterpacht (II, §250) interpreted Article 50 of the Hague Regulations to allow for the burning of houses by way of reprisals. The Court, however, rejects these claims and determines the acts to be war crimes. The Court then continues that this does not per se imply the defendant should be punished. The defendant can claim he did not know about the wrongfulness of his acts. The Court warns that this defence should not be accepted too easily and states the terms on which its applicability should be accepted to be: the practical training the defendant received or intellectual capacities of the defendant and his military position on the one hand and the nature of the crimes committed on the other. With regard to this last aspect, the Court held that “according to everyone’s moral understanding the killing of defenceless prisoners or innocent

575 Translation (AvV): 1) If the execution of a military order leads to the commission of a crime, the superior who issued the order is responsible for this crime. The executing subordinate is however criminally responsible as accomplice:
   1. if he went beyond the scope of the order; or
   2. if he knew of the fact that the order of his superior required an act which constituted a (military) crime.

2) Is the culpability of the defendant remote, it can be decided not to punish him.
576 *Wintgen* (1949), Dutch Special Court of Cassation, NJ 1949, 540, 981-5; Excerpts in Annual Digest 1949, 484-6, p. 984.
civilians is far more serious than the devastation of property. In the current case, in light of the discussion about military crimes, it can not be established that the defendant, a low ranking policeman, knew about criminal nature of his behaviour under humanitarian law.” The defendant was acquitted.

In an annotation to this case the famous commentator Röling noted that the German provision required knowledge that execution of the order led to a (military) crime. “In this case the defendant was acquitted because of a mistake regarding the *punishability* of the act, not because of an unavoidable mistake of law regarding the wrongfulness.” As seen in Chapter 2, German doctrine has changed in this respect, requiring *Unrechtsbewusstsein*, which means knowledge of the *wrongfulness* of the behaviour; knowledge about the *criminal nature* is irrelevant.

Another Dutch case in which the Court applied § 47 MStGB is *Zühlke* (1948). The UNWCC Notes on the Case state that this trial offered an opportunity for the Dutch Special Court to establish their view on the defence of superior orders and article 8 of the Nuremberg charter. The Dutch war crimes legislation did not contain a specific provision on the issue. The penal code provided for a defence of superior orders in article 43 WvSr. The Supreme Court applied the German provision. It held that Article 8 of the Nuremberg charter only applied to major war criminals and was no rule of customary law. Zühlke, a former German prison warder and member of the Waffen-SS, charged with illegal detention and ill-treatment of prisoners, was unsuccessful in his plea of superior orders. Although the defendant, as a low ranking prison warder, had only limited descretionary powers, the Court was satisfied that there existed no duty of blind obedience and that his plea of superior orders was rejected in conformity with § 47 MStGB. The Court concluded with the finding that in as far as his plea of superior

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578 Wintgen (1949), Dutch Special Court of Cassation, NJ 1949, 540, 981-5; Excerpts in Annual Digest 1949, 484-6, NJ 1949, 540, p. 985 (translation AvV).
579 Ibid. NJ 1949, 540, p. 985 (translation AvV).
580 See also § 5 WStG which uses the term 'rechtswidrige Tat', and § 3 VStGB, *see also §2.2.4 supra*.
583 *Zühlke Trial* (1948), Special Court in Amsterdam, The Netherlands, NJ 1949, No. 85; UNWCC, vol. XIV; Friedman, The Law of War (1972), vol. II, pp. 1543-1554, NJ 1949, No. 85, p. 134-135. I do not fully support the account of the reasoning of the Court given by the UNWCC in Friedman, p. 1551, where it is stated that Zühlke, "who was not only a prison warder by occupation but had also been trained as a non-commissioned officer, must have known" that the detention and the ill-treatment and humiliation of the prisoners was illegal.
orders implied a plea of supposed Befehl ist Befehl, this plea is understood to mean a plea of duress. The facts of the case did not support this plea.\textsuperscript{584}

In Zimmermann (1949) the defendant pleaded mistake of law with regard to the deportation of P.O.W.’s for forced labour in Germany.\textsuperscript{585} In this case too, the plea was rejected on the basis of inference of knowledge on the part of the defendant from the evidence presented.\textsuperscript{586} The Dutch Special Court referred to the public indignation in respect of similar practices in WWI. Deportation of civilians for forced labour in the German war industry must have been evidently unlawful because during the First World War these acts were publicly condemned.\textsuperscript{587} Sluiter remarks that "[t]he Court did not refer to any treaty provision in this respect."\textsuperscript{588}

The defendant in Lages (1950), believed he had merely executed a lawful execution. The Court rejected his plea. It held that the executions authorized by the commander of the Sicherheitspolizei were in flagrant violation of occupation law, and Lages, a high, well educated military officer, must have known this. According to the Court the evidence justified this inference.\textsuperscript{589}

In Arlt (1949), the Dutch Special Court of Cassation recognised the excuse of unavoidable mistake of law in principle.\textsuperscript{590} Arlt, a German Judge in a summary Court Martial (\textit{Polizeistandgericht}), had sentenced a Dutch civilian to death for participating in a strike. The Special Court found that the Court Martial had been established in violation of public international law. In determining whether Arlt should be punished the Supreme Court decided it should be assessed how Arlt had discharged himself of his judicial duties within the established framework.\textsuperscript{591} This test, referring to the established framework, seems rather lenient. It implied that it was considered a given fact that the defendant had to operate in an unlawfully established court martial. The issue was, according to the Court, whether he discharged of his duties in a proper way, respecting the basic

\begin{itemize}
\item\textsuperscript{584} Ibid. NJ 1949, No. 85, p. 134-135.
\item\textsuperscript{585} Zimmermann (1949), Dutch Special Court of Cassation, NJ 1950, No. 9, 30-2; Annual Digest 1949, 552-3.
\item\textsuperscript{586} See also Röling, B.V.A., \textit{The Law of War and the National Jurisdiction since 1945} (Leiden: A. W. Sythoff, 1961), p. 375.
\item\textsuperscript{587} Zimmermann (1949), Dutch Special Court of Cassation, NJ 1950, No. 9, 30-2; Annual Digest 1949, 552-3, NJ 1950, No. 9, p. 31.
\item\textsuperscript{589} Lages case (1950), Dutch Special Court of Cassation, NJ 1950, No. 680, pp. 1201-1209, p. 1206.
\item\textsuperscript{591} Arlt (1949), Special Court of Cassation at Arnhem, The Netherlands, NJ 1950, no. 8, pp. 27-29; Summary in Annual Digest 1949, 462-4, NJ 1950, no. 8, p. 29.
\end{itemize}
principles of a good administration of justice,\textsuperscript{592} that would be applicable in a legitimate court.

In the prosecution of two members of the Dutch Resistance movement, \textit{Van E.} and his commander \textit{B.} (1951), the Field Court Martial found both defendants not guilty on the basis of superior orders and mistake of law respectively.\textsuperscript{593} The particular unit of which the defendants were members was granted the status of armed forces as part of the Dutch Army by a Dutch royal decree of 1944.\textsuperscript{594}

In April 1945 Commander \textit{B.} had ordered \textit{Van E.} to execute four Dutch collaborators, who previously had been taken prisoner. According to \textit{B.} the execution of the prisoners was necessary because they could not take the prisoners with them, while, together with French parachutists, they had to change position. \textit{Van E.} executed the order together with two others and killed the four persons. After the war both defendants were charged with manslaughter.

Commander \textit{B.} was acquitted because the Court found that under the circumstances, it was very likely that the four collaborators, if released, would form a threat. They would attack the members of the \textit{B.}’s unit and the French parachutists they had to protect or would tell the Germans their whereabouts. Among the members of the group and the French parachutists it was not considered to be unlawful to execute collaborators. Additionally, this unit of the Dutch Resistance Movement had been given instructions to follow all the orders of the allied forces and to do anything in their power to protect them. The defendant had to take the decision without being able to consult a superior, he found himself in a position for which he was not educated nor trained and the circumstances were such that there was no time for deliberation.\textsuperscript{595} The Court concluded that the defendant did not know of the unlawfulness of his acts and that, taking into account the circumstances and his personal capacities, he could not be blamed for this ignorance.\textsuperscript{596}

\begin{footnotesize}
\textsuperscript{593} \textit{E. van E. case} (1951), Dutch Special Court of Cassation, NJ 1952, No. 246, pp. 514-16; \textit{B. case} (1951), Dutch Special Court of Cassation, NJ 1952, No. 247, pp. 516-526.
\textsuperscript{596} \textit{B. case} (1951), Dutch Special Court of Cassation, NJ 1952, No. 247, pp. 516-526, p. 524-525.
\end{footnotesize}
In the case against Van E. the Court decided that "given the circumstances in which the order was given, the accused was entitled to assume in good faith that his commanding officer was authorized to give that order for the liquidation of the prisoners, and that this order was within the scope of his subordination".\textsuperscript{597}

In these cases the different conditions related to the defence of superior orders and mistake of law surface. Superior orders will exculpate if the subordinate followed the order, which fell within the scope of his subordination in good faith. Mistake of law will exculpate if the mistake was unavoidable. Again, however, it is unclear whether these cases represent true cases of mistake of law.\textsuperscript{598} The pleas could imply a plea of putative self-defence or (military) necessity, mistake of fact (did the defendant know that their victims had POW status?) or mistake of law. As noted earlier, a mistake of fact, for example as to the protected status of the victims, is subsumed by a mistake of law when had the facts been as they were perceived, this would not have justified the executions.

To conclude the discussion of Dutch cases, it should be noted that these cases have brought about discussion on alleged differences in punishment meted out to national defendants and enemy defendants. In earlier case law the Netherlands Special Court of Cassation, imposed harsh punishments for arbitrary execution. It was held that it was generally accepted that arbitrary execution are always illegal and every right-minded person knows this.\textsuperscript{599}

In \textit{SAH Alsagoff} (1946)\textsuperscript{600} mistake of law as a defence was rejected. Only when the belief one has to obey superior orders is based on a mistake of fact, this may exculpate the subordinate. This mistake of fact must be made in good faith and must be reasonable. Mistake of law may only serve as mitigation of punishment. The defendants, in obeying the unlawful orders, did not act on the basis of a mistake of fact; their mistake as to the question whether their superiors were lawfully empowered to order beatings constituted a mistake of law.\textsuperscript{601}


\textsuperscript{598} See also supra \textit{Trial of Sandrock (Almelo Trial)} (1945), British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, UNWCC, vol. I, pp. 35-45.


\textsuperscript{601} Ibid.
In the South African case *Werner* (1947) mistake of law as a defence was rejected as well. The defendants held that they were given orders by a superior officer which they thought they were under a duty to obey. Reference was made to the famous case *Reg. v. Smith* which held that in case of doubt the subordinate should obey. In this case, however, the Court held that "the so-called trial of Haensel by Major von Lubke was entirely illegal and the order given by him that Haensel should be executed was an unlawful order." The Court held that the defendants were not bound by these orders, because as prisoners of war they fell under the South-African command, the German command did not apply. Perhaps the defendants thought they were bound to obey all superior orders; this is a mistake of law, and mistake of law, under the law of South Africa, is not an excuse. Here the issue of mistake of law concerned the question as to if and which superior orders should be obeyed and not the contents of the particular superior order.

Gaeta discusses two Italian cases concerning the defence of superior orders, *Kappler* (1948) and *Priebke* (1998). Both cases concerned the same facts but were decided 50 years apart. The facts concerned the massacre at the Ardeatine Caves in Italy on 24 March 1944; 335 men and boys were killed as a reprisal measure in reaction to a partisan attack the day before in which 33 Germans were killed. The 335 victims were not involved in the partisan attack. The SS Lieutenant Kappler was head of the police in Rome and in charge of the summary executions. In his prosecution in 1948 the Rome Military tribunal "found that it was doubtful that the accused possessed ‘the conscience and the intent to obey an unlawful order’. This doubt on the existence of mens rea stemmed from various factors: ‘the mental habit to promptly obey…(within) an organization based on extremely rigid discipline’ namely the SS; ‘the fact that an order with the same content had been executed in various combat zones’; and that the order ‘had been issued by the Head of State and Supreme Commander of armed forces and therefore had great moral strength.’ Kappler was therefore acquitted of the charge of the murder of 320 Italians out of the 335 people executed at the Fosse Ardeatine and was found guilty only of the

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murder of the remaining fifteen. At that time, Kappler's subordinates were acquitted because they acted on superior orders; they did not knowingly execute an illegal order.

Gaeta describes how in recent case law the judicial opinion changed radically. In Priebke, who was one of the main executioners and had evaded prosecution for several decades, the defence of superior orders was denied. Although the Germans had a right to resort to reprisals, this particular reprisal was illegitimate because it lacked proportionality and necessity. Priebke could not rely on the ordered reprisal, because the order was manifestly unlawful. Gaeta has argued that "the Rome Military Court of Appeal went so far as to hold that an order to commit war crimes can never constitute a defence because such an order is always manifestly unlawful." She argued that the Rome Military Court rightly applied the Nuremberg rule. She continued: "How could the order to commit such a ‘most serious crime’ relieve a subordinate of his criminal responsibility, thus giving him full impunity for that crime?" It may be thought, however, that this argument is unfounded for it ignores the fact that the defence of superior orders only excuses the subordinate if certain requirements are met. It is not true, for the defence of superior orders in any (inter)national legal system, that the fact of obeying orders on its own will exculpate. If the act committed in obedience to a superior order is in fact manifestly unlawful than the defendant will not be excused. Instead of understanding Article 8 IMT Nuremberg as applicable to the crimes before this Court, one could also argue that Article 8 IMT is applicable to the defendants before this Court.

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608 ICRC: http://www.icrc.org/EN.NSF/2e1c3527422f8c65c125673e0050f75e/0807b8c5675e0050f75e0050f75e0050f75eOpenDocument.
610 Ibid., pp. 759-760.
5.2.3 Trials related to other armed conflicts after WWII

The defendant in *U.S. v. Kinder* (1954) was prosecuted for premeditated murder of a Korean prisoner. Kinder, an airman on interior guard duty, had killed the victim on a superior order. The status of the Korean prisoner was unclear, but regardless of his status, the order was unlawful under the circumstances because he did not behave violently, nor did he try to commit an offence or try to escape and he was almost unconscious from injuries previously inflicted. This order was unlawful and the superior was well aware of this.

In this case mistake of law was pleaded in two aspects: 1) the defendant pleaded having acted on orders from his superior, believing them to be lawful and 2) the defendant believed he was under a duty to obey all orders of his superiors. In dealing with this plea of superior orders the Judgement of the Court refered to the Manual for Courts-Martial, United States, 1951, par. 197b:

"the general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal, or the subordinate wilfully or through negligence does acts endangering the lives of innocent parties in the discharge of his duty to prevent escape or effect an arrest." 616

Then follows a review of other authorities both civil and military, which all confirm this manifest illegality approach of the Manual for Court Martial.617 As Osiel holds, the reasoning of the court in this case confirms that in a case of reasonable doubt a soldier should obey the superior order.618 This implies a difference between the defence of mistake of law and the defence of superior orders. The rule with the defence of mistake of law is, in case of doubt, try to resolve your doubts if possible. In case of superior orders reasonable doubt means the order is not manifestly unlawful and the subordinate should follow it. The absolute necessity of discipline and hierarchy within the military organisation arguably justifies this distinction.619

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614 Thomas L. Kinder (1954), 14 CMR 742; 1954 CMR LEXIS 906, 774-6, 14 CMR 765.
615 Ibid. 14 CMR 769-770.
616 Ibid. 14 CMR 770.
617 Ibid. 14 CMR at 771.
619 See Chapter 4 supra.
The defence of superior orders was rejected on the facts of the case. The military court decided that there was no honest and reasonable belief that the superior order was lawful and that the evidence justified the inference that the defendant was aware of the unlawfulness of the superior order. Not only was the order itself palpably illegal, but it also had to be executed under surreptitious circumstances. Moreover, the belief that one is under a duty to obey all superior orders is absolutely unwarranted and therefore neither honest nor reasonable.\(^{620}\) "[N]o rational being of the accused's age [twenty], formal education [grade eleven], and military experience [two years] could have […] considered the order lawful. Where one obeys an order to kill […] for the apparent reason of making [the] death an example to others, the evidence must be strong, indeed, to raise a doubt that the slayer was not aware of the illegality of the order […] The inference of fact is compelling […] that the accused complied with the palpably unlawful order fully aware of its unlawful character."\(^{622}\)

In Sergeant W. (1966)\(^{623}\) the defendant was “a sub-officer, who at the time of the event was chasing rebels, serving in the Congolese army within the framework of military technical co-operation between Congo (DRC) and Belgium”.\(^{624}\) He was accused of wilfully killing a civilian. He pleaded that he had acted on a superior order to shoot at any ‘élément incertain’ in the military zone which civilians were prohibited to enter. The incident did not take place within this restricted zone. The defendant held that because of the imprecise delimitation of the zone he was mistaken about this. The Brussels War Council found that this mistake of fact was by no means unavoidable (n'était nullement invincible); the defendant had ample opportunity to verify whether he was within the military zone. Because the order was not applicable in the first place, it could not be a justification for his shooting. Even if the defendant had found himself in the restricted military zone, the order he was referring to did not have the meaning he attributed to it, which was that they were not supposed to take any prisoners and they should kill every unidentifiable person that they encountered. This would have been a manifestly unlawful order. Its

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\(^{620}\) Thomas L. Kinder (1954), 14 CMR 742; 1954 CMR LEXIS 906, 774-6, 14 CMR 773-774.


\(^{622}\) Thomas L. Kinder (1954), 14 CMR 742; 1954 CMR LEXIS 906, 774-6, 14 CMR 770, 773-775.


illegality would not have been doubtful, it would have been obvious and the defendant had the obligation to refuse to obey it. In reaction to the defendant’s plea that the superior orders was imprecise, the Court referred to the fact that a subordinate is permitted to ask for explications when he is uncertain about the precise scope of a superior order.

One of the most notorious cases in American military history concerned the killing of more than 500 civilians by American soldiers in the Vietnamese village of My Lai. The disclosure of the horrendous events of that morning in March 1968 is said to have marked "a turning point in the public perception of the Vietnam War." Lieutenant William Calley (1974) was convicted of multiple counts of murder committed during the My Lai massacre. When C Company entered the village of My Lai on the morning of 16 March 1968 it was on a search and destroy mission. On entering the village, "the unit encountered only unarmed, unresisting, frightened old men, women, and children, and not the expected elements of the 48th Viet Cong Battalion". "In the course of three hours more than 500 Vietnamese civilians were killed in cold blood at the hands of US troops".

Lieutenant Calley, a member of C Company, personally shot villagers after having pushed them into a ditch and ordered his subordinates to do the same. Calley unsuccessfully contended that he was "not guilty of murder because he did not entertain the requisite mens rea". Amongst other arguments, he held that "he genuinely thought the villagers had no right to live because they were enemy, and thus [he] was devoid of malice because he was not conscious of the criminal quality of his acts". The US Army Court of Military Review rejected this contention on the following grounds. It held that in so far the alleged state of mind reflected "a mistake of fact, the governing principle is: to be exculpatory, the mistaken belief must be of such a nature that the conduct would have been lawful had the facts actually been as they were believed to be. […] An enemy in

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632 Ibid. at 46 C.M.R. 1174.
633 Ibid. 46 C.M.R. 1179, see also 1174.
custody may not be executed summarily”.\textsuperscript{634} In so far as the alleged state of mind constituted a mistake of law, the Court held that "[m]ere absence of a sense of criminality is likewise not mitigating, for any contrary view would be an excrecent exception to the fundamental rule that ignorance of the law violated is no defense to violating it. The maxim ignorantia legis neminem excusat applies to offenses in which intent is an element”.\textsuperscript{635}

Calley also based his argument of lack of mens rea on the plea of having acted in obedience to the superior orders of Captain Medina.\textsuperscript{636} Calley referred to several instructions by Medina, one of which was a briefing the night before the My Lai operation. According to Calley, Medina had started the briefing by listing the men that they had lost and they were down 50 percent in strength. Medina stressed the importance of neutralizing My Lai, destroying everyone and everything there. Calley further said that he remembered Medina saying that all civilians had left the area and anyone there would be considered the enemy.\textsuperscript{637} Medina, who was called as a witness, gave a different account of the briefing the night before the operation.\textsuperscript{638} The Court of Military Review states that whether Calley "was ever ordered to kill unresisting, unarmed villagers was a contested question of fact".\textsuperscript{639} An answer to this question can not be found in the findings of the court martial because these have the nature of general verdict.\textsuperscript{640} The Court continued that if the members of the court martial "found his claim of acting on superior orders to be credible, he would nevertheless not automatically be entitled to acquittal. Not every order is exonerating".\textsuperscript{641} The Court approved of the trial judge’s instructions on this matter.\textsuperscript{642} The instructions from the Military Judge to the Court Members read:

“A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience to orders. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

\textsuperscript{634} Ibid. 46 C.M.R. 1179.
\textsuperscript{635} Ibid. 46 C.M.R. 1179-1180.
\textsuperscript{636} Ibid. 46 C.M.R. 1180.
\textsuperscript{637} Ibid. 46 C.M.R. 1180.
\textsuperscript{638} Ibid. 46 C.M.R. 1181-1182.
\textsuperscript{639} Ibid. 46 C.M.R. 1180.
\textsuperscript{640} Ibid. 46 C.M.R. 1180.
\textsuperscript{641} Ibid. 46 C.M.R. 1182-1183.
\textsuperscript{642} Ibid. 46 C.M.R. 1183.
The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior’s order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful. 643

The Court of Military Review also approved the further instructions of the trial judge which held that, if the members found that Calley knew the orders to be illegal, the orders would be no defence and, if they found that Calley was unaware that the orders were illegal, they were to apply a more objective standard: Calley "must be acquitted unless the members were satisfied beyond reasonable doubt that a man of ordinary sense and understanding would have known the orders to be unlawful". 644

The Court of Military Review concluded the discussion of the defence of absence of mens rea by stating that "[t]he aggregate of all his contentions against the existence of murderous mens rea is no more absolving than the bare claim that he did not suspect he did any wrong act until after the operation, and indeed is not convinced of it yet. This is no excuse in law". 645

On Appeal the defense counsel’s contention that the standard applied should be that of a person of "commonest understanding" instead of "ordinary sense and understanding" was rejected. The Appellate Court approved of the standard applied by the trial judge and held that: "[w]hether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the persons involved here. The United States Supreme Court has pointed out that "[t]he rule that 'ignorance of the law will not excuse' […] is deep in our law". It further referred to the palpable illegal character of the order. 646

In this case the issues of mistake of fact, mistake of law and superior orders surfaced. A mistake of fact is not a defence if the facts, if they were as the defendant believed them to be, would not make lawful the acts the defendant is accused of. Mistake of law is never a valid excuse. Although when the defendant acted on superior orders, a mistake of law may become relevant; the jury should acquit the defendant if it is not satisfied beyond reasonable doubt that a person of ordinary sense and understanding would have known the order to be unlawful.

643 Ibid. 46 C.M.R. 1183; Friedman, p. 1722.
644 Ibid. 46 C.M.R. 1183 and Friedman, p. 1723.
645 Ibid. 46 C.M.R. 1184.
5.2.4 Recent decisions

5.2.4.1 International Criminal Tribunal for the Former Yugoslavia (ICTY)

In the Čelebići trial (2001), on appeal, defendant Mucić’s first argument in relation to the conviction for unlawful confinement of detainees in the Čelebići prison camp was that the detainees were lawfully confined.647 The Appeals Chamber rejected this plea;648 it was established that at least some of the prisoners were not lawfully confined.

The second argument Mucić put forward is that he lacked the requisite mens rea for the crime of unlawful confinement, because he did not know and could not have known “that the confinement of people at Čelebići could, or would be construed as illegal under an interpretation of an admixture of the Geneva Conventions and Article 2(g) of the Statute of the Tribunal, a Statute not then in existence”.649

The response of the Prosecutor was that whether the defendant thus contends that knowledge of the law is an element of the crime or whether he raises a defence of error of law, the argument is irrelevant since “there is no general principle of criminal law that knowledge of the law is an element of the mens rea of a crime” and mistake of law is not available as defence under international humanitarian law.650 The Appeals Chamber interpreted this plea of the defence as a breach of the legality principle and rejected it on the basis that the detention of those persons was at that time already illegal under the fourth Geneva Convention.651

The Appeals Chamber than responded to the defendant’s mistake of law defence. The defence held that the Trial Chamber erred in relying upon evidence that he “had reason to know” as a basis for finding that the defendant in fact knew that the detainees were unlawfully confined. The Appeals Chamber indicated that knowledge of the rights of the prisoners is part of the required mens rea for unlawful confinement. As part of the required mens rea, knowledge of the rights of prisoners means knowledge of the existence of such rights, their social significance, not knowledge of the specific legal rules applying to prisoners. The Trial Chamber decision reflected that this knowledge could be inferred from the available evidence.652

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648 Ibid. § 330.
649 Ibid. § 373.
650 Ibid. § 374.
651 Ibid. § 374.
652 Ibid. §§ 380-386.
However, establishing that the defendant acted with knowledge of the social meaning of the rights of prisoners, does not answer the issue of mistake of law. This issue has not been addressed by the Court. It seems to be that the Appeals Chamber agreed with the Prosecutor that mistake of law is no defence.

5.2.4.2 Special Court for Sierra Leone (SCSL)
Uncertainty of the law is the most obvious reason for accepting the defence of mistake of law, and it shows the relation between this defence and the principle of legality, *nulla poena sine lege previa.* It must be noted that the above discussed decisions as to uncertainty of the law mainly concerned cases related to WWII and may now be outdated because of enhanced codification of international criminal law and international humanitarian law and the increase in number of prosecutions for international crimes. However, as recently as 2007 the Special Court for Sierra Leone was confronted with a question of legal uncertainty relating to an international crime. This was in AFRC trial, against amongst others defendant Kanu (2007), a senior member of the Armed Forces Revolutionary Council.

The Trial Chamber first establishes, as the Appeals Chamber had already determined in the Norman case, that the crimes relating to child soldiers, punishable under article 4(c) of the statute, had crystallized as norms entailing individual criminal responsibility under customary international law at the time the alleged acts were committed.

The Trial Chamber refers, in a footnote, to a dissenting opinion of Justice Robertson in the Norman case. This interesting dissent deserves more attention, however, for it sheds again some light on the principle of legality. Robertson wondered whether “if it was not clear to the Secretary-General and his legal advisers that international law had by 1996 criminalized the enlistment of child soldiers, could it really have been any clearer to Chief Hinga Norman or any other defendant at that time, embattled in Sierra Leone?”

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653 *See also* Chapter 3 *supra.*
657 Ibid., at § 728, footnote 1417.
killed in conflicts not of their own making was abhorrent to all reasonable persons in 1996 […]. But abhorrence alone does not make that conduct a crime in international law. Robertson distinguishes two stages in determining when enlistment of children became a war crime: the first stage is identifying when it became a rule of international law binding on states; the second stage is “identifying when this so-called ‘norm’ of international law metamorphosed into a criminal law for the breach of which individuals might be punished.” He then continues to explain why this second stage is necessary, “even – indeed, especially – in relation to conduct which is generally viewed as abhorrent.” The second stage is necessary “to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime.”

In the AFRC trial the Trial Chamber followed the majority opinion of the Appeals Chamber. The Trial Chamber then turned to the elements of the crime of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities. The Trial Chamber takes the Rome Statute as guideline.

The defence submits that “there had been a practice by various governments in Sierra Leone of recruiting persons under the age of 15 into the military prior to the Indictment period. […] this practice impacts on the awareness as to the unlawfulness of conscripting, enlisting or using child soldiers below the age of 15. As such conduct was not, it is submitted, on its face manifestly illegal, no conviction should be entered on Count 12 on the grounds of mistake of law”. Here the defence seem to argue along the lines of a superior orders defence. As seen earlier there is a difference between mistake of law per se and mistake of law when obeying superior orders. Only in the latter situation will acting on not-manifestly unlawful orders per se exculpate the mistaken defendant. However, the defendant in this case did not follow superior orders, which means that the generally more stringent rule on mistake of law applies. The defence rephrases its plea of mistake of law on appeal.

In rejecting the plea the Trial Chamber, in my opinion, confused the plea of mistake of law with the rule that international law has priority over national law, that is

659 Ibid., § 9.
660 Ibid., § 10.
661 Ibid., § 10.
662 Ibid., § 12. See also the discussion of the GBG cases in § 2.3.2.4.1 supra and the reference there to comments by Ferdinandusse in the same vein.
664 Ibid., § 730.
the rule that national law cannot make lawful what is unlawful under international law.\textsuperscript{665} Rejecting even the possibility of invoking mistake of law, on the basis that the conduct is a crime under international customary law, the court does not enter into an assessment of the defence. It appears therefore that the Trial Chamber displayed a total misconception of the implications of mistake of law as an excuse; the applicability of the defence does not make the conduct lawful, but merely purports a culpability assessment.

On appeal the defence, adapting its language to the Rome Statute, held that “the Trial Chamber had erred in law in dismissing [Kanu’s] argument that ‘the absence of criminal knowledge on his part vitiated the requisite \textit{mens rea} to the crimes relating to child soldiers’. He [argued] that the \textit{mens rea} element required for the crime was in this matter negated by a mistake of law on his part. […] [Kanu submitted] that ‘he believed that his conduct […] was legitimate’.”\textsuperscript{666} The defence too seems to have failed to capture in its plea the rationale of the defence of mistake of law. The Appeals Chamber very briefly dismissed the plea as being “frivolous and vexatious”.\textsuperscript{667}

These judgements of the Trial Chamber and Appeals Chamber of the Special Court for Sierra Leone indicate how many misconceptions surround the issue of mistake of law and how in fact the ICC Statute, at least how it has here been interpreted by the SCSL, has reintroduced the \textit{ignorantia legis} rule into international criminal law. Allowing the defence of mistake of law in this case would admittedly not have changed the ultimate result. The Court would determine the mistake to have been avoidable or unreasonable, alternatively the Court could have inferred consciousness of wrongdoing from the facts of the case (the children were being abducted and drugged etcetera). However, rejecting the defence on the basis of the unreasonableness, or the avoidability, of the mistake or inference of consciousness would have been more satisfactory because this would specify the reproach directed at the defendant by expressing the principle of individual guilt. It is not that Kanu’s mistake was irrelevant, on the contrary, it is part of what he is blamed for because he could and should have known about the wrongfulness of conscripting or enlisting children.


\textsuperscript{667} Ibid. § 296.
5.2.4.3 International Criminal Court (ICC)

In Lubanga (2007) the ICC Pre-Trial Chamber (PTC) inferred personal knowledge of the unlawfulness of recruiting children from the available evidence. The defence held that Lubanga was unaware of the fact that, voluntarily or forcibly, recruiting children under the age of fifteen entailed criminal responsibility under the statute. The PTC considered that the scope of the defence of mistake of law is limited, referring to Article 32(2) first sentence. Then the PTC turned to the exceptions of art. 32(2) second sentence. It held that the defence of mistake of law can only succeed if Lubanga was “unaware of a normative objective element of the crime as a result of not realizing its social significance (its everyday meaning)” There was no evidence admitted to support this. In fact, the PTC adds, there is sufficient evidence that the defendant was aware of the criminal nature of his behaviour. On the one hand, the decision reveals that indeed, the scope of the mistake of law defence as provided for in article 32(2) is limited to mistakes that negate the required mental element. On the other, it is somewhat hopeful that the PTC, in addition to rejecting this plea, holding that there were no reasons to assume that Lubanga was unaware of the social significance of this legal element, apparently found it necessary to conclude there is enough evidence to support the finding that Lubanga was aware of the wrongful, or even criminal nature of his behaviour. On the basis of article 32(2) the Court was not required to do so.

5.3 CONCLUSION

The first issue in assessing a plea of mistake of law concerns its credibility. In most cases where the defence of mistake of law has been raised in order to avert criminal liability for

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668 Prosecutor v. Lubanga (2007), ICC Pre-Trial Chamber, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, §§ 304-316.
670 Prosecutor v. Lubanga (2007), ICC Pre-Trial Chamber, Case No. ICC-01-04-01/06, Decision on the confirmation of charges, 29 January 2007, §§ 306-314 (The evidence the Court refers to is the ratification of the ICC statute (11 April 2002) before the relevant period; Geneva Conventions and two Additional Protocols (protected persons); 1989 Convention on the Rights of the Child; Appeals Chamber decision SCSL (31 May 2004); already before July 2002 awareness about the statute; testimony of Kristine Peduto that on 30 May 2003 she discussed this issue in relation to ratification of the statute with Lubanga).
671 Ibid., at § 306.
international crimes, knowledge of wrongdoing was inferred from the facts. This means that the defendant must have known that his conduct violated a legal rule. Thus, in such a case, the mistake does not warrant an assessment of its avoidability or reasonableness (a should have known test). Moreover, the conclusion is that the defendant was not mistaken at all. In the case of international crimes such a conclusion is usually justified.

Several cases discussed in this chapter concerned instances of uncertainty of the law. Reprisals, providing for a justification under international law for an international wrongful act, have always been a delicate issue. Where the plea of superior orders concerned the lawfulness of executions, frequently the mistake will have been one of fact, not of law. The case law reveals different outcomes as to the question of whether or not superior orders are merely a ground for mitigation of punishment or if superior orders provide a complete defence.

In the case law after WWII there was great confusion about the legal effect of plea of superior orders. According to the Law Reports, the general effect was mitigation of punishment, the only exception being the High Command case, where it was recognized that the plea could give rise to a complete defence. Mitigation of

672 See e.g. Zimmermann (1949), Dutch Special Court of Cassation, NJ 1950, No. 9, 30-2; Annual Digest 1949, 552-3; Lages case (1950), Dutch Special Court of Cassation, NJ, 1950, No. 680, pp. 1201-1209; U.S. v. Kinder (1953), 14 C.M.R. 742 (1954); and Prosecutor v. Lubanga (2007), ICC Pre-Trial Chamber, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007.
674 See e.g. Wintgen (1949), Dutch Special Court of Cassation, NJ 1949, 540, 981-5; Excerpts in Annual Digest 1949, 484-6; and Falkenhorst trial (1946), British Military Court, Brunswick, Norway, UNWCC, vol. XI, pp. 18-30.
675 See e.g. Buck Trial (1946), British Military Court, Wuppertal, Germany, UNWCC, vol. V, pp. 39-44; Trial of Sandrock (Almelo Trial) (1945), British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, UNWCC, vol. I, pp. 35-45; B. case (1951), Dutch Special Court of Cassation, NJ 1952, No. 247, pp. 516-526; and E. von E. case (1951), Dutch Special Court of Cassation, NJ 1952, No. 246, pp. 514-16.
punishment was of course in line with the Charter of the IMT and Control Council Law No. 10. This rule, however, was not generally recognized in (inter)national law.\textsuperscript{679} As the case law here under discussion shows, it was recognized in many different courts and tribunals that the plea of superior orders could provide for a complete defence. In this respect it is interesting to refer to the Dutch case \textit{Zülßke}, where the Special Court of Cassation held that Law No. 10 did only apply in trials against major war criminals; in other trials the plea of superior orders could, under certain strict conditions, lead to an acquittal.\textsuperscript{680}

The case law discussed in this chapter indicates that superior orders are in principle recognised as a ground for excluding criminal responsibility for international crimes, although acquittal only follows under very strict conditions. Only when the illegality of the order was not known to the subordinate, and the order was not manifestly unlawful, will the defendant be successful in his plea.\textsuperscript{681} To a certain extent the subordinate has a right to assume that the orders of his superior are in conformity with international law,\textsuperscript{682} especially when the order’s unlawfulness under international law is uncertain.\textsuperscript{683} In the case of a manifestly unlawful order, however, the subordinate is no longer entitled to assume lawfulness and he is criminally responsible for the crimes committed in obedience.\textsuperscript{684} In such a case knowledge of wrongdoing is imputed to the defendant.\textsuperscript{685}


As stated in the introduction, an obstacle in finding cases concerning the plea of mistake of law has been that the different defences, mistake of law, superior orders, duress and mistake of fact, are often intertwined. As seen, the case law sometimes mixes superior orders – duress and superior orders – mistake of law. Where the IMT Nuremberg stated that, in a case of the defence of superior orders, the real issue is whether the defendant had a moral choice to behave differently, the court referred to superior orders – duress. It seems that, the same rationale underlies the defence of superior orders – mistake of law. In the case of duress, the pressure of the threat is so high that no one can be expected to be a hero and resist it. In case of a mistake of law, one can say that the defendant who does not know the law and could not have known the law, can not choose for the lawful conduct. In both cases the rationale of the defence is that he who had no moral choice between actions is not blameworthy.

As anticipated, the case law has not delivered many clear examples of mistake of law in the area between the two outer limits of the spectrum, legal uncertainty and manifestly illegal superior orders. In Chapter 6, after an analysis of the elements of international crimes, there are examples of situations in the intermediate area in which an excuse on the basis of mistake of law seems warranted, but where Article 32(2) ICC Statute does not apply.

686 I find it remarkable that in most cases concerning superior orders the requirement was that the defendant acted under mistake of law, while this did not imply that the particular case actually concerned a situation of superior orders – mistake of law. The requirement of mistake of law also seem to apply in case of superior orders – duress. This is remarkable, because the two defences, mistake of law and duress, although they arguably are based on the same rationale, namely that no moral choice was possible, are separate defences. Mistake of law is not a requirement of the defence of duress.