Mistake of law: excusing perpetrators of international crimes

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Mistake of law may excuse the perpetrator of an international crime. The provision in the ICC Statute, nevertheless, does not provide for this excuse. Based on the common law approach toward mistake of law, article 32 is limited to a failure-of-proof defence. Only when the mistake negates the required intent will the defendant be exculpated. In truth, however, mistake of law does not concern the issue of intent; mistake of law concerns the culpability of the defendant. The result of the current codification is twofold. First, some mistakes, namely mistakes as to the prohibition as such and mistakes about justifications, are unduly not covered by the Statute. Second, under the current codification there is no room for differentiation according to the culpability of the defendant in making the mistake.

Chapters 2 and 3 demonstrated how in a twofold structure there is actually no principled solution to deal with issues of mistake of law. Applying a strict rule of *ignorantia non excusat* led to unjust results in case of reasonable mistakes of law. An answer was found in requiring knowledge of the law when a crime definition’s mental element is termed ‘wilfully’ or ‘knowingly’, turning mistake of law into a failure-of-proof defence. However, in a failure-of-proof defence there is no room for the requirement of reasonableness, at least not in case of intentional crimes. In a threefold structure, the key to the solution was found in requiring *Unrechtsbewusstsein* as an element of criminal responsibility besides the required intent. This element of *Unrechtsbewusstsein* is an element of culpability and is presumed when the crime definition has been fulfilled. The presumption is rebuttable. A mistake of law, or better, a mistake of *Recht*, will negate the defendant’s culpability if it was an unavoidable mistake. A mistake of *Recht*, because no legal knowledge is required. Legal elements in a crime definition are subjected to the *Parallelenwertungslehre*; only if the defendant does not even know the social, everyday meaning of a legal element will his intent be negated. If he recognizes this social meaning, but nevertheless believes his conduct to be lawful, this will not negate the required mental element, but may negate his culpability when he unavoidably lacked *Unrechtsbewusstsein*. The requirement of *Unrechtsbewusstsein* facilitates and at the same time justifies the rule that no criminal intent is required.

Essential to the German solution has been the recognition of the distinction between justification and excuse, wrongdoing and attribution, defeasible and comprehensive rules and conduct rules and decision rules. As seen in Chapter 3 these
distinctions also have important implications for issues like criminal intent, putative justifications and the meaning of an element of unlawfulness or wrongfulness in the crime definition.

Chapter 4 confirmed that the ICC Statute is based on a twofold system of crimes, which has serious implications for issues of defences like mistake of law. Many authors have recognized this and have tried to repair the 'damage' by suggesting for example that an avoidability test should be applied to cases of mistake of law. It was argued, however, that this is not an option if the drafters have deliberately left out the avoidability requirement. The solutions offered perhaps reveal a feeling of having to make do with what one has got. Alternatively a 'way out' was offered by suggesting that the ICC Statute does not provide for, nor reject, the excuse of mistake of law. In that case, Articles 31(3) and 21 would offer a tool to incorporate a mistake of law defence. But if these solutions do not deliver a principled answer to the issue, adding a new provision to the Statute is inevitable. I proposed the following provision:

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.

This provision would recognize the true character of this defence as an excuse, requiring a culpability assessment: Could the defendant have avoided making the mistake and thus be blamed for committing the wrongful act? The proposed provision would also allow abandoning the separate provision on superior orders. I accept the standard will actually be higher than under some national laws and international case law, because under the new provision even the reasonableness or avoidability of obedience to a non-manifestly unlawful order will be assessed. On the other hand, the provision would apply to all international crimes and the standard of assessment will be more subjective or personal, taking into account the subordinate's personal (in)capacities and the opportunities he had under the circumstances to behave differently.

The case law discussed in Chapters 5 revealed that mistake of law per se has only rarely been invoked; superior orders has been a more common defence. Because it was difficult to disentangle the mixed defences, of mistake of law, mistake of fact, superior orders and duress, this investigation did not reveal the (theoretical) reasons for rejecting or accepting pleas of mistake of law. To make sure that mistake of law, after all the theoretical reflections on it in the preceding chapters, did not end up as being seen as
merely a lawyer’s concoction, Chapter 6 sketched a few practical scenarios. The aim was to demonstrate that, although only rarely and under strict conditions, mistake of law may be a valid excuse. The sketched scenarios of mistake of law do not fall under the current ICC provision; in these cases there is a risk of conviction of non-culpable perpetrators.

Most pleas of mistake of law encountered in this study have been rejected on the basis of inference of consciousness of wrongdoing; the plea was regarded as incredible, the defendant must have known his conduct violated an international legal rule. In the case of international crimes this inference of consciousness will almost always be justified. This would probably also be our conclusion in the case outlined in the Introduction; the plea of torturing on superior orders, because you thought you were just doing your job, or even a good job, is simply implausible. Or is it? Does the fact that, as may now be stated with certainty, the US government was responsible for allowing, no, even promoting interrogation techniques that include torture when the detainee is a so-called 'unlawful enemy combatant', change the credibility of the pleas of superior orders and mistake of law? Perhaps we need to be careful not to let our moral indignation speak out of turn. An assessment of the avoidability of mistakes may bring to light circumstances that would otherwise remain undisclosed; circumstances that may affect the culpability of the perpetrator, but also circumstances that may implicate the responsibility of others. The excuse mistake of law, being both essential to the finding of the perpetrator's culpability and to the establishment of the full facts of the case, constitutes an indispensable component of the general part of international criminal law.

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