Mistake of law: excusing perpetrators of international crimes

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SUMMARY

CHAPTER 1
The pictures of American soldiers abusing prisoners in the Abu Ghraib prison in Iraq caused a worldwide wave of shock and disbelief. The pictures revealed a wide range of scenes of abuse: naked Iraqi prisoners in stress positions, lying in a pile on top of each other, with a hood over their head standing on a box with electric wires attached to their hands, driven into a corner under attack of a prison guard dog. In some of the pictures, next to the abused prisoners, American soldiers can be seen, posing for the camera, smiling, giving the thumbs up.

Back in America, being prosecuted for these crimes, some of the soldiers argued they had not committed any crime. They invoked the defence of mistake of law. To their minds they were just doing their jobs. Holding that their superiors did not object to their behaviour, they also invoked the defence of superior orders as a ground for exculpation.

The question arises whether these defences are also applicable in international criminal law. International crimes constitute serious offences and it could be argued that he who commits such an offence must know his act is punishable. After all, everyone is presumed to know the law. However, it is not as simple as that. Application of the principle that everyone is presumed to know the law may be in violation of another fundamental principle: no punishment without guilt. Applying the proverb that everyone knows the law may violate the principle no punishment without guilt when it is demonstrated that the perpetrator cannot be blamed for being ignorant about the wrongfulness of his act. This situation may also occur in international criminal law and this is what this book is about.

The central issue of this book therefore concerns the scope and content of the defence of mistake of law in international criminal law. International crimes are of such a grave nature that one is inclined to consider this scope as very limited. However, whether this is so, remains to be seen. Not all norms of international criminal law, including justifications, have fully crystallized. Uncertainties about the scope of individual criminal responsibility may arise. These uncertainties may also arise with respect to the responsibility of the subordinate who follows superior orders which turn out to have been unlawful. The defence of mistake of law could prevent unjust punishments in these situations.
For the first time in the history of the codification of international criminal law there is an explicit provision on mistake of law. This provision can be found in article 32(2) of the Statute of the International Criminal Court (ICC). It has been the starting point for this research. Article 32 has the character of a compromise, since the Statute came about by treaty negotiations between States with different legal systems. It is the outcome of negotiations in which a certain interpretation of the issue of mistake of law prevailed. In order to fully comprehend this outcome it is of paramount importance to investigate the meaning of mistake of law in the national criminal law systems of the countries that have had the main influence on the drafting process of the Statute. An analysis of international case law is obviously also warranted.

**CHAPTER 2**

Chapter 2 contains a comparative law study of the approach to mistake of law in the common law systems of the United States of America and the United Kingdom and the civil law systems of Germany and France. This Chapter also includes an analysis of the defence of superior orders in these systems. The ICC Statute directly links the defences of mistake of law and superior orders. One of the requirements in article 33 (superior orders) is that the subordinate has been unaware of the wrongfulness of the order. In the national systems under discussion too, the defence of superior orders is a specialis of mistake of law.

The outcome of this comparative law study is that in the common law systems the principal *ignorantia legis non excusat* (mistake of law does not excuse) is applied nearly without exception. These systems seem to hold on strictly to the proverb ‘everyone is presumed to know the law’. In common law systems mistake of law is regarded as a failure-of-proof defence, negating the required intent. This may be explained by the fact that common law systems apply a so-called twofold structure of offences. Characterising mistake of law as a failure-of-proof defence has two undesirable implications. The perpetrator who can demonstrate he did not act with the required intent because he made a mistake of law will be exculpated even when his mistake was blameworthy. The perpetrator who cannot invoke mistake of law because his mistake does not negate the required intent may be punished even though his mistake was reasonable or unavoidable. The comparative law study reveals that American and English judges apply ad hoc solutions in order to avoid these undesirable outcomes. In this way the maxim *ignorantia legis non excusat* is being attenuated.
In German law the approach toward mistake of law is much more balanced and well thought-out. This may be explained on the basis of the fact that this system applies a threefold structure of offences.

**CHAPTER 3**

A further investigation into the theoretical implications of applying a threefold structure of offences follows in Chapter 3. It contains a discussion of the distinction between justification and excuse, wrongdoing and attribution, defeasible and comprehensive rules, conduct rules and decision rules. Other issues under discussion, which also bring to light important consequences of applying one system instead of the other, are: 1) criminal intent, 2) putative justifications, 3) the meaning of an element of unlawfulness or wrongfulness in the crime definition and 4) the principle of legality. This Chapter reveals that the mistake of law defence leads to less convincing results in a twofold structure compared to in a threefold structure. In a twofold structure the perpetrator may still be punishable even though he is not culpable and he may still be exculpated even though his mistake is blameworthy. These problems do not arise in a threefold structure, where the issue of culpability is separated from the issue of intent.

**CHAPTER 4**

The codification of mistake of law (article 32(2) ICC), discussed in Chapter 4, is by all appearances grafted onto the common law approach to the issue. The provision is based on a twofold structure of offences. Mistake of law is only a ground for excluding criminal responsibility when the mistake negates the required intent (i.e. when the perpetrator lacked the required intent because he was ignorant about the wrongfulness of his behaviour). Since knowledge of wrongdoing is hardly ever part of the definitional elements of an offence, the scope of article 32(2) is limited to an absolute minimum. The article thus fails to recognize mistakes not covered by the mental element criterion, like mistakes about the prohibition as such or mistakes about norms of justification. This is unjustifiable since these are particularly the situations in international criminal law where uncertainties about the scope of individual criminal responsibility might still exist. The conclusion in Chapter 4 is that the ICC Statute shows a lacuna in this respect. A new provision could be the solution. This new provision would provide for mistake of law as an excuse; the perpetrator is excused if he acted in the mistaken belief that his conduct was lawful and if this mistake was unavoidable. This provision could also replace article
33 ICC (superior orders). The issue of the individual criminal responsibility of the subordinate who mistakenly obeys an unlawful order should also be resolved on the basis of the avoidability of his mistake.

CHAPTER 5
Chapter 5 is dedicated to an analysis of selected case law concerning defendants who pleaded mistake of law before national and international courts in cases concerning international crimes. The main focus is on proceedings that followed 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. In most cases where the defence of mistake of law has been raised in order to avert criminal liability for international crimes, knowledge of wrongdoing was inferred from the facts; the defendant must have known about the wrongfulness of his acts, the superior orders were manifestly unlawful. In exceptional cases the defence was successful because the legal rule concerned was uncertain. The selected case law shows only a few examples of cases where mistake of law is invoked as a defence on itself.

CHAPTER 6
Chapter 6 first contains an analysis of the structure of international crimes, with an emphasis on the element of criminal intent. The second part of the this Chapter contains a survey of situations in which the defendant acts under an understandable and relevant mistake of the law, but which are not covered by article 32(2) ICC. The aim of this final substantive Chapter is to demonstrate that what is at stake is not merely a theoretical argument, for there are situations conceivable which, under the current provision on mistake of law, could lead to unjust convictions.

CHAPTER 7
In Chapter 7 it is pleaded that mistake of law should, in international criminal law as well, be recognized as an excuse which the perpetrator of an international crime can invoke whatever the circumstances. As argued, thereto a new provision should be incorporated. The new provision would also explicitly allow for the defence of mistake of law to be invoked in case of mistakes about norms of justification. The determinative issue should be whether or not the defendant is to blame for his mistake; could he have avoided making it?
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 a(n international) legal rule. In the same vain it could be argued that the American soldiers who tortured prisoners in Iraq must have known that their acts were punishable. However, is this conclusion justified, now that it has become evident that 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'? Does that change the credibility of the pleas of superior orders and mistake of law? 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. It is essential that mistake of law is recognized in international criminal law as an excuse.