

Mistake of Law

Annemieke van Verseveld

Mistake of Law

Excusing Perpetrators of International Crimes

T · M · C · A S S E R P R E S S

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*Ignoring it doesn't work, nor does denouncing it, and there is no disavowing it, never mind denying it. The stain is inescapable and irreversible, and it is ours, and if we have any hope of containing it and living it down it can only come from seeing it whole.*¹

Philip Gourevitch and Errol Morris

¹ Gourevitch and Morris 2008, p. 160.

Preface

Why devote a voluminous book to the issue of mistake of law in international criminal law? Would it not appear frivolous for a person accused, for example, of crimes against humanity to claim that he did not know that what he did was against the law? And even if he was in fact mistaken, why should the law care as long as the perpetrator was aware of what he was doing?

Annemieke van Verseveld brilliantly lays to rest such skeptical queries about the need for her study. In this book, she shows that it is not only worthwhile but even urgently necessary to reflect on mistakes of law. She demonstrates the relevance of her inquiry by showing, in [Chap. 6](#), a host of areas of international criminal law where the applicable law is far from clear. And, based on a comprehensive analysis of four national legal systems (USA, England, Germany, and France) as well as of international criminal law, the author shows that the law in regard to mistakes of law is presently in disarray and lacks a clear direction. Annemieke van Verseveld's concise but thorough treatment of the topic, therefore, is timely and useful. Any practitioner who deals with international criminal law cases should read this book.

But that is not all. The issue of how the law should react to a defendant's claim that he was not aware of the norm he violated raises fundamental questions about the purpose and structure of the criminal law. Does the intent required for conviction of a crime include knowledge of the relevant criminal prohibition, or of the moral wrongfulness of one's conduct? Should the perpetrator's mistake of law affect his culpability rather than the required *mens rea*? Or can such mistakes simply be ignored, in accordance with the maxim *ignorantia iuris neminem excusat*?

Annemieke van Verseveld shows that the correct answer to this question can only be found by taking into account the structure of the criminal law as a whole. Some legal systems content themselves by distinguishing between objective and subjective elements of crime and adding an assortment of "defenses". Such legal systems—and the author shows that international criminal law, at its present state, is one of them—have great difficulty in dealing with (honest) misconceptions of the criminal law because they face the choice between ignoring such mistakes

altogether or acquitting the perpetrator for lack of *mens rea* even where he could easily have avoided his error. Other legal systems offer the prospect of a more differentiated approach. When a system distinguishes between the wrongfulness of a person's conduct (which comprises objective and subjective elements) and that person's individual blameworthiness, it becomes possible to acknowledge that a perpetrator has intentionally committed a crime and yet might be excused because it was not well possible for him to learn about the relevant law.

Annemieke van Verseveld prefers the second approach and, on its basis, drafts a concise and comprehensive provision which would resolve, or at least strongly reduce, the doctrinal problems that mistakes of law presently pose to any legal system, and especially to international criminal law. The charm of her approach lies in its flexibility: it is a matter of criminal policy on what conditions and to what extent a law maker is willing to grant an excuse to the perpetrator who knew very well what he did but failed to know that his acts were legally (or morally?) prohibited. Of course, it remains open to discussion whether the "unavoidability" of any mistake of law—the parameter chosen by the author—provides the correct yardstick for measuring the perpetrator's blameworthiness, how that yardstick relates to any general theory of blameworthiness, and when exactly a mistake of law can be deemed "unavoidable". But the virtue of this book is that its author has clearly identified the issues that matter, and has done away with much of the undergrowth that has so far impeded a rational debate.

Even if this book did not provide for such remarkable progress in the debate of a thorny issue, it would be an excellent work of scholarship. Annemieke van Verseveld has immersed herself in five different legal systems and offers the reader masterful summaries of each system's treatment of the mistake of law problem. Moreover, she presents a remarkably detailed and insightful discussion of the relevant case law, including hard-to-find decisions of various courts purporting to apply international criminal law in the aftermath of the Second World War, as well as an analysis of the relevant provisions of the Statute of the International Criminal Court. At the same time, Annemieke van Verseveld offers profound new insights into the most difficult questions of criminal law theory.

This book is a great achievement. Congratulations!

Cologne, May 2012

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Contents

1 Introduction	1
1.1 Torture At Abu Ghraib	1
1.2 Outlining the Issue	2
1.3 The Occasion	2
1.4 Methodology and Limitations	3
1.5 Definitions	4
1.6 Structure of the Book	6
References	7
2 The Theory of Mistake of Law in National Criminal Law Systems	9
2.1 Introduction	9
2.2 Mistake of Law in the Common Law Systems of the USA and the UK	10
2.2.1 Introduction: Ignorantia Legis Non Excusat	10
2.2.2 The Exceptions to the Rule	10
2.2.2.1 American Law	10
2.2.2.2 English Law	18
2.2.3 Conclusion: An Ad Hoc Approach	24
2.3 Mistake of Law in the Civil Law Systems of Germany and France	25
2.3.1 Introduction	25
2.3.2 Germany: Mistake of Law is an Excuse	26
2.3.2.1 Das Recht	26
2.3.2.2 The Landmark Decision	27
2.3.2.3 The Codification	33
2.3.2.4 The German Border Guard Cases	40
2.3.2.4.1 The German Border Guard Cases: The Principle of Legality	43
2.3.2.4.2 The German Border Guard Cases: Mistake of Law	44

- 2.3.2.5 Conclusion 47
- 2.3.3 France: Mistake of Law is a Ground for Excluding Criminal Responsibility 48
 - 2.3.3.1 The Provision 50
 - 2.3.3.2 Avoidable Mistake 51
 - 2.3.3.3 Conclusion 53
- 2.4 Superior Orders 54
 - 2.4.1 USA and UK 54
 - 2.4.2 Germany and France 56
 - 2.4.3 Conclusion 58
- 2.5 Conclusion: Comparative Analysis 58
- References 59

- 3 Comparing the National Approaches: Theorising About the Issue 63**
 - 3.1 Introduction: Twofold and Threefold Structures 63
 - 3.2 Relevant Distinctions 64
 - 3.2.1 Justification and Excuse 64
 - 3.2.2 Wrongdoing and Attribution 67
 - 3.2.3 Defeasible and Comprehensive Rules 68
 - 3.2.4 Conduct Rules and Decision Rules 68
 - 3.2.5 Analysis 70
 - 3.3 Other Issues 71
 - 3.3.1 Criminal Intent 71
 - 3.3.2 Putative Justifications 72
 - 3.3.3 An Element of ‘Unlawfulness’ in the Crime Definition 73
 - 3.3.4 The Principle of Legality 75
 - 3.4 Conclusion 76
 - References 78

- 4 The Theory of Mistake of Law in International Criminal Law 81**
 - 4.1 Introduction 81
 - 4.2 Article 32(2): Mistake of Law 82
 - 4.2.1 Article 32 Mistake 82
 - 4.2.2 Negate the Mental Element 83
 - 4.3 Article 33: Superior Orders 90
 - 4.3.1 Introduction 90
 - 4.3.2 The Provision 90
 - 4.3.3 Criticism: Departure from Customary International Law 91
 - 4.3.4 Criticism: Manifest Illegality 94
 - 4.3.5 Conclusion: Superior Orders a Separate Defence? 95
 - 4.4 Concluding Analysis 96
 - References 98

5 Applying the Theory of Mistake of Law: An Analysis of (Inter)national Case Law 101

5.1 Introduction 101

5.2 The Case Law 102

5.2.1 Pre-WWII Case Law 103

5.2.2 WWII Case Law 104

5.2.2.1 United States 104

5.2.2.2 United Kingdom 108

5.2.2.3 Other Countries 111

5.2.3 Trials Related to Other Armed Conflicts After WWII 118

5.2.4 Recent Decisions 122

5.2.4.1 International Criminal Tribunal for the Former Yugoslavia 122

5.2.4.2 Special Court for Sierra Leone 123

5.2.4.3 International Criminal Court 126

5.3 Conclusion 127

References 129

6 Applying the Theory of Mistake of Law: An Analysis of Elements of Crimes and a Survey of Dilemmas on the Battlefield 133

6.1 Introduction 133

6.2 Subjective Requirements of Criminal Responsibility 134

6.2.1 Elements of Crimes 134

6.2.1.1 Elements of Crimes Against Humanity 137

6.2.1.1.1 Specific Elements: Deportation, Torture and Persecution 137

6.2.1.2 Elements of War Crimes 138

6.2.1.2.1 Specific Elements: Improper use of a flag, Insignia or Uniform 141

6.2.1.3 Conclusion 143

6.3 Dilemmas on the Battlefield 144

6.3.1 Mistakes About the Prohibition 145

6.3.1.1 Military Objectives 146

6.3.2 Putative Justifications 151

6.3.2.1 Mistake of Self-Defence 151

6.3.2.2 Necessity 152

6.3.3 Mistaken Defences Under Public International Law 154

6.3.3.1 Military Necessity 154

6.3.3.2 Reprisals 157

6.4 Conclusion 161

References 162

7 Concluding Remarks	167
7.1 Introduction	167
References	169
Bibliography	171
Table of Cases.	179