# Mistake of law: excusing perpetrators of international crimes

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# CHAPTER 2 THE THEORY OF MISTAKE OF LAW IN NATIONAL CRIMINAL LAW SYSTEMS

## 2.1 INTRODUCTION

This Chapter explores different approaches toward mistake of law in national criminal law systems of the common law and the civil law tradition. There are indications that the provision on mistake of law in the ICC Statute is mainly determined by the common law tradition,[16] in which ignorance of law is generally held to be no defence. A comparative law perspective allows us to understand the scope of this international provision and, in Chapter 4, to give a theoretical account of which approach could be followed in international criminal law.

There is, obviously, commonground between the common law and civil law systems. Both systems require "knowledge of facts underlying the *actus reus* as an essential element for criminal liability" and "ignorance of the law is treated differently from ignorance of facts".[17] The way in which both systems deal with issues relating to mistake of law, however, is different. In civil law systems mistake of law is a defence under exceptional circumstances; in common law systems it is generally held to be no defence, a rule that is applied rigidly in English law.[18] The first part of this Chapter focuses on the common law systems of the United States and the United Kingdom, the second part focuses on the civil law systems of Germany and France. The third part briefly discusses the approach to the defence of superior orders in these national systems. The international codification of the mistake of law defence directly links the two defences. In the national systems under discussion too, the defence of superior orders is a *specialis* of

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[16] *See* Fletcher, G.P., *The Grammar of Criminal Law. American, Comparative, and International, Volume one: Foundations* (New York: Oxford University Press, 2007), p. 108. *See also* Scaliotti, M., 'Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility - Part 2', 2 *International Criminal Law Review* (2002), pp. 1-46, p. 12; Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), p. 307; Ambos, K., *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (Berlin: Duncker & Humblot, 2004), p. 806; Ambos, K., 'Towards a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*', 28(6) *Cardozo Law Review* (2007), pp. 2647-2673, p. 2670-2671 (but see 2667-2671 where the author argues that it can not be said that the drafters of the Rome Statute decided the question of which system, common law or civil law, should be applied).

[17] International Committee of the Red Cross, *Paper relating to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law*, (New York), Preparatory Commission for the International Criminal Court, Working group on Elements of Crimes, PCNICC/1999/WGEC/INF/2/Add.4, p. 9.

[18] Ibid., p. 9.

mistake of law. A successful plea of superior orders requires the subordinate to have been unaware of the unlawfulness of the order.

The purpose of the comparative law analysis in this chapter is not to find the most common approach towards mistake of law. The four systems under scrutiny on the contrary provide us with four distinct approaches; I am seeking to identify the approach which in my opinion is best suited to be applied in international criminal law.

## 2.2 MISTAKE OF LAW IN THE COMMON LAW SYSTEMS OF THE USA AND THE UK

### *2.2.1 Introduction - ignorantia legis non excusat*

In the common law systems of the United States and the United Kingdom the adherence to the principle that ignorance of the law should be no excuse has been remarkably persistent.[19] Smith speaks of an "almost mystical power held by the maxim over the judicial imagination".[20] The reasons to adhere to this principle have been mainly utilitarian, referring to social welfare considerations and the necessity to maintain objective morality.[21] However, while the *ignorantia legis non excusat* rule is still applied in common law countries, to avoid unjust results, Courts have in some cases interpreted a statutory element of a crime to require knowledge of the law.[22] These are *ad hoc* solutions, however, and a general rule on when a statutory element requires knowledge of the law can not be inferred from it. In the next section I explore the statutory provisions and case law that form the basis of the general finding that *ignorantia legis non excusat* is still to a large extent the general rule in common law systems.

### *2.2.2 The exceptions to the rule*

#### *2.2.2.1 American law*

First, I will discuss the relevant provisions of the American Model Penal Code (MPC), an authoritative text on common law concepts. The MPC is not binding on the States, but it

[19] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 16.
[20] Ibid. , p. 16.
[21] Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 61. *See also* Fletcher, G.P., *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), p. 154.
[22] See also Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 59.

has had a large influence on the statutes and case law of many different States.[23] The provisions relevant to the scope of the defence of mistake of law are: §2.02(9), §2.04(1)(a) and §2.04(3). The first provision states the general rule *ignorantia legis non excusat*:

§2.02(9) MPC Culpability as to Illegality of Conduct
Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

The provision states that no legal knowledge is required. Vogeley refers to this provision stating that it holds that "knowledge of the law defining the offense is not itself an element of the offense".[24]

The Code subsequently provides in §2.04(1)(a) MPC:

§2.04 MPC Ignorance or Mistake
(1) Ignorance or mistake as to a matter of fact or law is a defence if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense

According to §2.04(1)(a) the defendant is not liable when the mistake negates the mental element required to establish a material element of the offence. Under §2.02(9) knowledge of the criminal nature of the act is generally no element of an offence. This means that only when the legislator has provided for consciousness of unlawfulness as an element of the required intent, will a mistake of law exculpate the defendant. Hence, these provisions, that focus on the intent and internal components of the offence, show great deference to the legislator. Fletcher criticizes this deference; it shows too much

[23] *See* Robinson, P.H. and J.A. Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond', 35 *Stanford Law Review* (1982-1983), pp. 681-762, p. 683-685. *See also* Lensing, J.A.W., *Amerikaans Strafrecht. Een vergelijkende inleiding* (Arnhem: Gouda Quint, 1996), p. 7 and Nill-Theobald, C., *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA: zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrarechts* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1998), p. 136.
[24] Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 94. This issue is related to the distinction between conduct rules and decision rules (*see.*, § 3.2.4 *supra*; the (statutory) crime definition is a decision rule, the underlying norm is a conduct rule).

faith in the capabilities of the legislator to solve theoretical and philosophical problems, such as issues of mistake.[25]

The defence of mistake of law is thus only available in the exceptional circumstance where knowledge of the prohibited nature of the conduct itself is an express element of an offence.[26] This circumstance is exceptional, because most crime definitions do not contain the requirement that the defendant acts with the intent or knowledge to violate the law.[27]

Smith therefore correctly holds that the scope for the application of section 2.04(1) MPC "to mistakes of fact is far wider than it is for mistakes of law, for the simple reason that the mental element in most crimes does not include any knowledge of the existence and scope of the proscription defining the offence. All turns on what the statute itself says, or at least on the degree of *mens rea* that the court is prepared to read into it, and in general, a court is reluctant to read into a statute a requirement that the defendant should be familiar with the law".[28]

Moreover, by requiring the mistake to negate the required mental element, the American legislature has complicated the means to normatively assess the mistake. If the required mental element is 'intent', any mistake, reasonable or not, will bar a finding of this mental element.[29] I will return to this issue in the section on English law.

The next exception to the general rule *ignorantia legis non excusat* in the Model Penal Code is §2.04(3), which provides:

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[25] Fletcher, G.P., *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), p. 155.
[26] Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 66.
[27] Husak, D. and A.v. Hirsch, Culpability and Mistake of Law, in S. Shute, J. Gardner and J. Horder (ed.), *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), pp. 157-174, p. 158.
[28] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 5.
[29] *See also* Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 66. *For application of the same rule in English law see* Ormerod, D.C., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 2008), p. 315. (also explaining that where the law requires negligence, only a reasonable mistake can afford a defence). Since almost all international crimes require intent, the current discussion is limited to the consequences of the negate mental element requirement for intentional offences. *See also* Ambos, K., Other Grounds for Excluding Criminal Responsibility, in A. Cassese, P. Gaeta and J.R.W.D. James (ed.), *The Rome statute of the International Criminal Court: A commentary*: Oxford University Press, 2002) I, pp. 1003-1048, p. 1031. It should be noted that in a civil law system which applies a threefold structure of offence, a mistake which negates the required intent can not be normatively assessed either; any mistake, reasonable or not, will bar the finding of intent. On the distinction between twofold and threefold structures of offences, *see* Chapter 3 *infra*.

§2.04 MPC Ignorance or Mistake

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

The MPC here provides for a defence in case of mistake of law, when the law was unavailable to the defendant or when he has relied on an official statement or interpretation of the law from a person or agency charged with defining the offence.[30]

With regard to §2.04(3)(a), concerning the case where the statute has not been published, I believe Husak and Von Hirsch are correct when they hold that "the rationale for exoneration should be based on the principle of legality rather than on the defendant's lack of culpability. […] The rationale for a defence in such cases is analogous to that which prohibits retroactive or vague legislation".[31] An important difference between this provision and the principle of legality is, however, that the provision in respect of mistake of law requires that the defendant believed in the lawfulness of his conduct. If the defendant, on the basis of the principle of legality, cannot be held criminally liable for his conduct, then, what the defendant actually believed is irrelevant.

With regard to the exception in case of reasonable reliance on an official statement of the law, §2.04(3)(b), Fletcher notes that the types of legal advice that may be relied upon are circumscribed tightly: official statements of law, afterwards determined to be invalid or erroneous. This excludes reliance on advice by counsel and unofficial advice from law enforcement personnel, and also total ignorance of the law, however reasonable.[32]

[30] *See also* Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 66.
[31] Husak, D. and A.v. Hirsch, Culpability and Mistake of Law, in S. Shute, J. Gardner and J. Horder (ed.), *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), pp. 157-174, p. 166.
[32] Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 755.

The provisions in the MPC show a tendency towards an extensive application of the principle *ignorantia legis non excusat*. Smith sums up the classical justifications for persisting in this maxim: problems of proof, to admit the defence would be to encourage ignorance, allowing the defence could undercut the rule of law and ignorance of the law is itself culpable.[33] The American system thus, as a general principle rejects the mistake of law defence. In practice however, according to Vogeley, "the defence is often employed to avoid unjust results".[34]

Unjust results can be mitigated by a variety of devices. An example of such a device is manipulating the distinction between mistakes of fact and mistakes of law. An unjust result may be mitigated by treating a mistake about an issue of law "collateral" to the penal law as a mistake of fact, negating the mental element of the crime.[35] As Grace noted, both mistakes of fact and mistake of noncriminal law "usually involve a mistake concerning circumstances relevant to the prohibited nature of the activity".[36]

Further, unjust results can be effectively mitigated by interpreting terms like 'wilfully' or 'knowingly' to incorporate a requirement of knowledge of unlawfulness. The case law discussed below can be distinguished according to whether the crime definition requires the particular intent of 'wilfulness'[37], or requires the defendant to have acted 'knowingly'[38], or does not contain such a particular intent element.[39]

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[33] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 16-21. *See also* Kahan, D.M., 'Ignorance of the Law is an Excuse - But only for the Virtuous', 96 *Michigan Law Review* (1997), pp. 127-154, p. 133 (referring to a decision of the NY Court of Appeals, 507 N.E.2d at 1073)(according to Kahan the argument against the mistake of law excuse, that it would encourage ignorance, is false).

[34] Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 97.

[35] *See* Kahan, D.M., 'Ignorance of the Law is an Excuse - But only for the Virtuous', 96 *Michigan Law Review* (1997), pp. 127-154, p. 132 (referring for an example to United States v. Anton, 683 F.2d 1011, 1018 (7th Cir. 1982).

[36] Grace, B.R., 'Ignorance of the Law as an Excuse', 86 *Columbia Law Review* (1986), pp. 1392-1411, p. 1394.

[37] *Cheek v. U.S.* (1991), 498 U.S. 192, 111 S.Ct. 604 (attempting to evade income taxes and failing to file income tax returns); *Ratzlaf v. U.S.* (1994), 510 U.S. 135, 114 S.Ct. 655 (structuring financial transactions to avoid currency reporting requirements); *U.S. v. Rogers* (1994), 18 F.3d 265 (conspiracy to evade and violate reporting and return requirements for currency transactions); *U.S. v. Obiechie* (1994), 38 F.3d 309 (engaging in the business of dealing in firearms without a license) ; *U.S. v. Curran* (1994), 20 F.3d 560 (causing election campaign treasurers to submit false reports to the Federal Election Commission); *Bryan v. U.S.* (1998), 524 U.S. 184, 118 S.Ct. 1939 (conspiring to engage in and actually engaging in the sale of firearms without a license).

[38] *U.S. v. International Minerals & Chemical Corp.* (1971), 402 U.S. 558, 91 S.Ct. 1697 (violating Interstate Commerce Commission regulations relating to shipment of corrosive liquids in interstate commerce).

[39] *Lambert v. People of the State of California* (1957), 355 U.S. 225, 78 S.Ct. 240 (violating the Los Angeles felon registration order); *Reyes v. United States* (1958), 258 F.2d 774 (violation of statute regulating border crossings of narcotic addicts and violators); *Long v. State* (1949), Supreme Court of Delaware, 5 Terry 262, 65 A.2d 489 (bigamy).

The term 'wilfully' has sharply divided the US Supreme Court.[40] In *Cheek v. U.S.* (1991),[41] the Supreme Court held that in tax cases the element of 'wilfulness' "requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty".[42] This means that a good faith mistake, whether reasonable or not, will negate the element of wilfulness.[43] In *Bryan v. U.S.* (1998),[44] where the defendant was charged with 'wilfully' dealing in firearms without a federal licence, the Supreme Court held that the 'wilful' requirement was met by the defendant's knowledge that his conduct violated some law.[45] Hence, any good faith mistake, even an unreasonable one, will negate the "wilfully" mental element, which requires knowledge that the conduct violated some law, but not knowledge of which specific law was violated.[46]

In *Lambert v. California* (1957)[47] the Supreme Court held that applying a registration act, which requires former felons to register as such with the local police, "to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge" violates the due process clause of the United States Constitution.[48] The defence of mistake of law was successful because of lack of fair notice. If the defence had not been available the defendant would have had no "opportunity either to avoid the consequences of the law or to defend any prosecution brought under it".[49] In *Reyes v. U.S.* (1958)[50] the 9th Circuit held that *Lambert* does not apply in case of narcotic addicts and narcotic violators neglecting to register at border

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[40] Loewy, A.H., *Criminal Law in a Nutshell* (St. Paul, Minn.: West Group, 2000), p. 140.
[41] *Cheek v. U.S.* (1991), 498 U.S. 192, 111 S.Ct. 604 (attempting to evade income taxes and failing to file income tax returns).
[42] Ibid., p. 201, 610.
[43] Ibid., p. 202, 611. *See also* Loewy, A.H., *Criminal Law in a Nutshell* (St. Paul, Minn.: West Group, 2000), p. 140 and Kahan, D.M., 'Ignorance of the Law is an Excuse - But only for the Virtuous', 96 *Michigan Law Review* (1997), pp. 127-154, p. 145-146.
[44] *Bryan v. U.S.* (1998), 524 U.S. 184, 118 S.Ct. 1939 (conspiring to engage in and actually engaging in the sale of firearms without a license).
[45] Ibid., p. 193, 1946. *See also* Loewy, A.H., *Criminal Law in a Nutshell* (St. Paul, Minn.: West Group, 2000), p. 140.
[46] *See also* Travers, M.L., 'Mistake of Law in Mala Prohibita Crimes', 62 *University of Chicago Law Review* (1995), pp. 1301-1331, p. 1304.
[47] *Lambert v. People of the State of California* (1957), 355 U.S. 225, 78 S.Ct. 240 (violating the Los Angeles felon registration order).
[48] Ibid., p. 229-230, 243-244. Loewy, A.H., *Criminal Law in a Nutshell* (St. Paul, Minn.: West Group, 2000), p. 143. *See also* Fletcher, G.P., *The Grammar of Criminal Law. American, Comparative, and International, Volume one: Foundations* (New York: Oxford University Press, 2007), p. 81 ("absent a fair warning of impending sanctions, the state has more difficulty justifying conviction and punishment of the citizens acting in good-faith reliance on the permissibility of their conduct").
[49] *Lambert v. People of the State of California* (1957), 355 U.S. 225, 78 S.Ct. 240 (violating the Los Angeles felon registration order), p. 229, 243.
[50] *Reyes v. United States* (1958), 258 F.2d 774 (violation of statute regulating border crossings of narcotic addicts and violators).

crossings. According to the Court, other than in *Lambert*, the charged offence concerned an act "under circumstances that should alert the doer to the consequences of his deed".[51] Vogeley notes that "[r]ead narrowly, *Lambert* may apply only to *mala prohibita* crimes involving a regulatory scheme where an individual has no prior notice of a duty to perform an affirmative act".[52] The case law indeed reveals a distinct approach according to the nature of the crimes involved. A distinction is made between *mala in se* crimes and *mala prohibita* crimes, between morally wrong behaviour and regulatory or technical offences. As Artz holds, "the more complex our rules become, the less realistic is the assumption that factual knowledge works as an indicator of the unlawfulness or wrongfulness of the conduct involved".[53] Travers sees potential for a wider scope of the mistake of law defence in case of *mala prohibita* crimes requiring wilfulness as the *mens rea* for violation in recent case law of the Supreme Court. He refers to *Ratzlaf v. United States* (1994),[54] in which the Supreme Court recognized that it has often held that 'wilful' is "a word of many meanings" and "its construction is often influenced by its context".[55] In this case the Court held that in the federal money laundering statute the word 'wilfully' requires the defendant to have knowledge of the unlawfulness of the structuring he undertook.[56]

Travers notes, however, that the current status of mistake of law is that the meaning of wilfulness is unclear in the aftermath of *Ratzlaf*, *Curran*[57], *Obiechie*[58], and *Rogers*[59]: "*Ratzlaf* itself acknowledged that the meaning of wilfulness is variable and context dependent. Consequently, no clear rule emerges from these cases for determining whether this term encompasses violation of a known legal duty".[60]

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[51] Ibid., p. 784. *See also* Loewy, A.H., *Criminal Law in a Nutshell* (St. Paul, Minn.: West Group, 2000), p. 143-144.
[52] Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 71.
[53] Artz, G., 'The Problem of Mistake of Law', (3) *Brigham Young University Law Review* (1986), pp. 711-732, p. 726.
[54] *Ratzlaf v. U.S.* (1994), 510 U.S. 135, 114 S.Ct. 655 (structuring financial transactions to avoid currency reporting requirements).
[55] Ibid., p. 141, 659.
[56] Ibid., p. 138, 658 and 149, 663. *See also* Travers, M.L., 'Mistake of Law in Mala Prohibita Crimes', 62 *University of Chicago Law Review* (1995), pp. 1301-1331, p. 1301.
[57] *U.S. v. Curran* (1994), 20 F.3d 560 (causing election campaign treasurers to submit false reports to the Federal Election Commission).
[58] *U.S. v. Obiechie* (1994), 38 F.3d 309 (engaging in the business of dealing in firearms without a license).
[59] *U.S. v. Rogers* (1994), 18 F.3d 265 (conspiracy to evade and violate reporting and return requirements for currency transactions).
[60] Travers, M.L., 'Mistake of Law in Mala Prohibita Crimes', 62 *University of Chicago Law Review* (1995), pp. 1301-1331, p. 1315-1316.

The meaning the Supreme Court attaches to the word 'knowingly' is also unsettled. In *U.S. v. International Minerals* (1971)[61] for example the Supreme Court held that 'knowingly violates any regulation' does not require knowledge of the regulation itself, 'knowingly' refers to knowledge of the facts.[62] It held that where dangerous products or "obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation".[63] If you possess these dangerous products or deal with them, without consulting the applicable regulations, you knowingly risk criminal liability. In *Liparota v. U.S.* (1985)[64], on the other hand, the Supreme Court held that 'knowingly' requires the *Government* to prove that the defendant knew that he was acting in a manner not authorized by statute or regulations. The Court found this construction here appropriate because "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct".[65]

In *Long v. State*(1949)[66], a case concerning bigamy, the Supreme Court of Delaware held that also in cases concerning offences which do not require a particular intent like 'wilfully' or 'knowingly', mistake of law can negate a general criminal intent "as effectively as would an exculpatory mistake of fact".[67] In order to show that the reasons for disallowing the mistake are of a practical nature, the Court distinguished three situations of mistake of law: 1) the ignorance consists in "unawareness that such conduct is or might be within the ambit of any crime; or 2) although aware of the existence of criminal law relating to the subject of such conduct, or to some of its aspects, the defendant erroneously concludes (in good faith) that his particular conduct is for some reason not subject to the operation of any criminal law"; or 3) "the defendant made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliance upon the results of such effort."[68] The Court held that the first two situations are justifiably covered by the *ignorantia juris* rule, but that the

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[61] *U.S. v. International Minerals & Chemical Corp.* (1971), 402 U.S. 558, 91 S.Ct. 1697 (violating Interstate Commerce Commission regulations relating to shipment of corrosive liquids in interstate commerce).
[62] Ibid., p. 563-564, 1701. *See also Bryan v. U.S.* (1998), 524 U.S. 184, 118 S.Ct. 1939 (conspiring to engage in and actually engaging in the sale of firearms without a license), p. 192-193, 1945-1946; Loewy, A.H., *Criminal Law in a Nutshell* (St. Paul, Minn.: West Group, 2000), p. 144.
[63] *U.S. v. International Minerals & Chemical Corp.* (1971), 402 U.S. 558, 91 S.Ct. 1697, p. 565, 1701-1702.
[64] *Liparota v. U.S.* (1985), 471 U.S. 419, 105 S.Ct. 2084 (unlawfully acquiring and possessing food stamps).
[65] Ibid., p. 426, 2088. *See also* Grace, B.R., 'Ignorance of the Law as an Excuse', 86 *Columbia Law Review* (1986), pp. 1392-1411, p. 1398-1400.
[66] *Long v. State* (1949), Supreme Court of Delaware, 5 Terry 262, 65 A.2d 489 (bigamy).
[67] Ibid., p. 278, 497.
[68] Ibid., p. 279, 497.

third situations is "significantly different".[69] The Court's reasoning in relation to the third situation is interesting. The Court reasoned that considerations which justify the rejection of a mistake of law of the first and second category, namely that mistake of law would encourage ignorance and problems of proof, are absent in case of a mistake of law of the third category.[70] In fact, the Court continues, it is "difficult to conceive what more could be expected of a 'model citizen' than that he guide his conduct by 'the law' ascertained in good faith […] by efforts […] designed to accomplish ascertainment as any available under our system".[71] The Court then consolidates its finding by holding that it believes that "such circumstances should entitle a defendant to full exoneration as a matter of right, rather than to something less, as a matter of grace".[72] The reasoning of this Court, holding that the defendant is entitled to a mistake of law defence as a matter of principle, to a certain extent resembles the German approach.[73] However, this reasoning has not been followed by any court and its implications are rejected by the Model Penal Code in § 2.04(3) as this provision exlcudes reliance on advice by counsel.[74]

In general it can be concluded that the American case law recognises an exception to the *ignorantia juris* rule in case of crimes *mala prohibita* which require a particular intent, such as 'wilfully'. Cases of total ignorance do not form part of this exception, except where the defendant did not receive a fair warning concerning the unlawfulness of his behaviour. The case law is however by no means uniform. The American legislature complicates the route by which to arrive at an adequate normative account of a mistake of law, by requiring the mistake to negate the mental element. A mistake negating the required mental element of the crime will do so whether the mistake is reasonable or unreasonable.[75] This may explain the reluctance to accept mistake of law as a defence. In the MPC mistake of law is formulated as a failure of proof defence.[76] But as Jescheck notes, "in truth mistake of law is not concerned with the elements of crime,

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[69] Ibid., p. 279, 497.
[70] Ibid., p. 280, 497-498.
[71] Ibid., p. 281, 498.
[72] Ibid., p. 281, 498.
[73] *See* § 2.3.2 *infra*.
[74] Loewy, A.H., *Criminal Law in a Nutshell* (St. Paul, Minn.: West Group, 2000), p. 142. *See also* Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 755.
[75] *People v Weiss* (1938), New York Court of Appeals, 276 NY 384, 12 NE2d 514, 114 ALR865. *See also* Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 67. This is different in some civil law systems, where a requirement of reasonableness applies to all mistakes, *see* Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), footnote 402, p. 316. For a further discussion see § 2.2.2.2, footnotes 118+119 and accompanying text *infra*.
[76] *See also* Husak, D. and A.v. Hirsch, Culpability and Mistake of Law, in S. Shute, J. Gardner and J. Horder (ed.), *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), pp. 157-174, p. 157-158.

but rather with the unlawfulness of the conduct in a given situation".[77] Many authors criticize the American instrumentalist approach and argue in favour for a more principled solution, treating the mistake of law not as a 'failure of proof defence', but as an excuse, bearing on the culpability of the defendant.[78]

*2.2.2.2 English law*

English law applies the maxim *ignorantia legis non excusat* even more strictly than American law. The presumption that every man knows the law is irrebuttable.[79] The English jurisprudence relating to mistake and ignorance of the law is, according to Smith, compared with "American Law (let alone the German) woefully underdeveloped".[80] He brings forward two explanations. The first explanation is the fact that the English Courts lack the power to declare statutes unconstitutional, like American courts can under §2.04(3)(b) MPC.[81] "There is a power to declare subordinate legislation ultra vires and void, in which case one would expect the principles expressed in the Model Penal Code to apply," but there seems to be no authority on the point.[82] As a result, Smith shows, there is very little room for reliance cases (defendants reasonably relying on official advice or (earlier) Courts' interpretations of the law).[83] The second explanation brought forward by Smith is the fact that the English system applies without much difficulty the doctrine of strict liability to a whole range of regulatory offences in which mistake of law is most likely to occur.[84]

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[77] Jescheck, H.H., 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute', 2(1) *Journal of International Criminal Justice* (2004), pp. 38-55, p. 47.
[78] *See e.g.,* Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 754-756; Husak, D. and A.v. Hirsch, Culpability and Mistake of Law, in S. Shute, J. Gardner and J. Horder (ed.), *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), pp. 157-174, p. 172-174; Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 3+9+21-24; Kahan, D.M., 'Ignorance of the Law is an Excuse - But only for the Virtuous', 96 *Michigan Law Review* (1997), pp. 127-154, p. 152-153; Grace, B.R., 'Ignorance of the Law as an Excuse', 86 *Columbia Law Review* (1986), pp. 1392-1411, p. 1395+1414-1416; Vogeley, S., The Mistake of Law Defense in International Criminal Law, in S. Yee (ed.), *International Crime and Punishment* (Oxford: University Press of America, Inc., 2003), pp. 59-99, p. 74.
[79] May, R., *Criminal Evidence* (London: Sweet & Maxwell, 1999), p. 72. *See also* Mitchell, S. (ed.), *Archbold, Pleading, Evidence & Practice in Criminal Cases* (London: Sweet & Maxwell, 1979), p. 944 (§ 1439c.)
[80] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 9.
[81] Ibid. , p. 9+14. §2.04(3)(b) MPC does not grant this power to the courts, it refers to the situation where someone has relied on an official interpretation of the law, afterward determined to be invalid or erroneous (for example by a court).
[82] Ibid. , p. 14.
[83] Ibid. , p. 14-16. *See further infra.*
[84] Ibid. , p. 9.

The English rule makes a distinction between mistake of fact and mistake of law. Mistake or ignorance of fact may exculpate and mistake or ignorance of law, however reasonable, does not.[85] This is so because mistake is only a defence when it precludes *mens rea* and mistake of law generally does not negate *mens rea*.[86] Like their American colleagues, British judges have tried to come to just results by manipulating the distinction between law and fact.[87] Here too, these cases mainly concern issues of mistakes about civil laws, rather than criminal law.[88] In addition, there are also cases where the courts have found that for specific situations the legislature had determined that mistake of law should be a defence.[89] An example can be found in the definition of blackmail in the Theft Act of 1968 and the definition of criminal damage in the Criminal Damage Act of 1971. These definitions read as follows:

21. Blackmail

(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief-
(a) that he has reasonable grounds for making the demand; and
(b) that the use of the menaces is a proper means of reinforcing the demand.

Criminal Damage

Section. 5 (2) (2) A person charged with an offence to which this section applies shall […] be treated […] as having a lawful excuse-
(a) […]
(b) if he destroyed or damaged or threatened to destroy or damage the property in question […] and at the time of the act or acts alleged to constitute the offence he believed-
(i) that the property, right or interest was in immediate need of protection ; and
(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

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[85] Ibid. , p. 11. *See also* Ormerod, D.C., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 2008), p. 132-133.
[86] Ormerod, D.C., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 2008), p. 317+318.
[87] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32 , p. 13.
[88] Smith refers to following examples: *Smith*, [1974] Q.B. 354 (mistakes as to the ownership of property); *Tolson*, (1889) 23 Q.B.D. 168 (that the defendant believed herself to be a widow was a defence); *Wheat and Stocks*, [1921] 2 K.B. 119 (mistake as to marital status), Ibid. , p. 11. *See also* Ormerod, D.C., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 2008), p. 320.
[89] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 13.

Ashworth points out how the individual criminal responsibility on the basis of these provisions is entirely dependent on the actor's beliefs; the demand with menace is warranted if the defendant believes it to be so subject to the statutory requirement, i.e. "reasonable" and "proper" and the actor has a lawful excuse if he damages property in order to protect other property and he believes the means to be reasonable.[90]

Finally, English law provides for an exception to the *ignorantia legis non excusat* principle when the law or regulation has not been published or when it is otherwise practically impossible to discover the terms of a particular law.[91] As argued in the preceding section on mistake of law under the US legal system, the rationale of exoneration in this situation is based on the principle of legality rather than on the individual culpability of the defendant.

Smith argues that, contrary to American law, there seems to be no room for reliance on official authority cases in English law.[92] He finds an explanation for this in the fact that, as mentioned above, there is no power of judicial review of the courts to declare a statute unconstitutional, because of the "English doctrine of Parliamentary Sovereignty according to which any measure enacted by Parliament is automatically an unchallengeable valid law".[93] There is little authority on the issue whether a defendant has an excuse when he reasonably relied on a decision of the courts or on advice official authorities entrusted with the interpretation of the law.[94] "Although it is nowhere clearly articulated, the fear seems to be that to permit the defence would be to enable the officials to operate a sort of suspending or dispending power, relieving citizens from their obligations to obey the law".[95] It would run counter to the doctrine of Parliamentary Sovereignty if a defendant could rely on a Court's interpretation of the law, which apparently deviates from the meaning Parliament had in mind. Jefferson holds that "it is not unknown for Parliament to afford a defence to a person who relies on official advice".[96] In practice, however, reliance cases are very scarce.[97]

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[90] Ashworth, A.J., 'Excusable Mistake of Law', *Criminal Law Review* (1974), pp. 652-662, p. 653.
[91] Ibid. , p. 654 (referring to *Lim Chin Aik* v. *R.* (1963). See also Ormerod, D.C., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 2008), p. 319.
[92] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 14.
[93] Ibid. , p. 14.
[94] Ibid. , p. 14-15.
[95] Ibid. , p. 14.
[96] Jefferson, M., *Criminal Law* (Harlow: Longman/Pearson Education, 2003), p. 303.
[97] Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 14-16.

The draft Criminal Code of 1989 provides, with regard to mistake of law, that:

> Ignorance or mistake as to a matter of law does not affect liability to conviction for offence except (a) where so provided, or (b) where it negatives the fault element of the offence.[98]

In British law the basic rule that ignorance or mistake of law is no defence is preserved in the draft criminal code. Jefferson argues that "parliament of course retains the power to create exceptions" and also preserved is the present rule that mistake of law provides a defence where it negatives a fault element of the offence.[99]

As appeared in the previous section on American law, the problem with the negate mental element requirement, or fault element requirement, is that, if the crime definition requires intent or recklessness, any mistake, even an unreasonable one, excludes the defendant's liability.[100] This is referred to as the 'inexorable logic rule'; if the mental element is lacking with respect to one of the conduct elements specified in the definition of the crime, then as a matter of 'inexorable logic'[101] the defendant should be acquitted even if the mistake was wholly unreasonable.[102] This rule does not allow for a differentiated approach based on reasonableness. The much discussed English case *Morgan,*[103] raises the issue of the consequences of applying the inexorable logic rule in case of a mistake about consent. The House of Lords in *Morgan* "upheld a conviction but also concluded that any mistake, even an unreasonable mistake as to the victim's consent in rape cases, would preclude liability".[104] The facts of this case are that "the four defendants had overpowered the victim and had forcible intercourse with her. Yet they allegedly had been told by the victim's husband that she would dissemble resistance presumably to gain some perverse satisfaction in being "forced" to submit".[105] The mistake made by the defendants in this case was arguably a mistake about a ground for justification, a mistake about an element extrinsic to the mental element required by the crime definition. In this case the element about which the defendants were mistaken was the consent of the victim. The House of Lords in *Morgan* chose the 'inexorable logic'

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[98] Law Com. No. 177, 1989, cl 21.
[99] Jefferson, M., *Criminal Law* (Harlow: Longman/Pearson Education, 2003), p. 304.
[100] *See also* Ormerod, D.C., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 2008), p. 315.
[101] Ibid. , p. 314 (referring to Lord Hailsham using this term in Director of Public Prosecutions v. Morgan [1976] AC 182, [1975] 2 All ER 347, p. 361.
[102] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press, 2006), p. 229.
[103] *Regina v. Morgan* (1975), 2 W.L.R. 923.
[104] Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 699.
[105] Ibid. , p. 699.

approach, treating the claim of mistake as a mere denial of the required mental element.[106] The majority of judges thus construed the intent required for rape as the intent to have intercourse against the woman's will.[107] The justification serves as a negative requirement incorporated into the definition of the crime. The majority concluded that non-consent is an element of the prohibited act, according to Fletcher, "without attending to the distinction between inculpatory and exculpatory elements, definition and justification".[108] Fletcher holds that this case shows that reliance on ordinary language and textbook statements of the law fails to constitute a method appropriate to the task of determining when a mistake must be reasonable.[109] In determining this issue one has to make theoretical distinctions between definition and justification and between wrongdoing and attribution.[110] Especially since the penetration in *Morgan* was forcible, it is argued that the consent of the woman should have functioned as a justification.[111] "Using force is *prima facie* wrongful and should put a citizen on notice to examine the grounds for doing so – if, of course, time and circumstance permit".[112] "If the perpetrators were mistaken about the supposed justification for forcible intercourse, their wrongful act might well be excused. But if the focus is on excusing their conduct, it is appropriate to require […] that their mistake be free from fault".[113]

Duff illustrates how Fletcher's reasoning is based on two premises: 1) the mistake can only exculpate if it was reasonable and 2) lack of the victim's consent is not part of the definition of rape, but the victim's consent is a justification for what would otherwise be a wrongful act.[114] The first premise can only be true if the second is. Duff sees it differently; I understand his argument as to imply that the inexorable logic rule should be abandoned. He points out how Fletcher's theory falls apart, because the actor's belief in the victim's consent does in fact negate the intent, since lack of the victim's consent is

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[106] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press, 2006), p. 229.
[107] Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 701.
[108] Ibid. , p. 703.
[109] Ibid. , p. 703.
[110] For a discussion of these theoretical distinctions see Chapter 3 *infra*.
[111] Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 705; *but see* Ambos, K., 'Towards a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*', 28(6) *Cardozo Law Review* (2007), pp. 2647-2673, p. 2661 (arguing in footnote 75 that 'it is more convincing to consider [consent] as part of the definition of the offence since rape is a specific form of coercion and as such implies the overcoming of the victim's free will'). The Elements of Crime to the provision in the ICC statute on the war crime of rape (art. 8(2)(b)(xxii)) confirm Ambos' analysis.
[112] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press, 2006), p. 230.
[113] Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 705.
[114] Duff, R.A., Rule-Violations and Wrongdoings, in S. Shute and A.P. Simester (ed.), *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002), pp. 47-74, p. 72.

essential to the wrong that rape constitutes.[115] But according to Duff, this does not mean that the actor should be acquitted if his mistaken belief in the victim's consent was unreasonable.[116]

Both arguments are understandable. Duff and Ambos almost state the obvious, when they hold that lack of consent is specifically what characterises the sexual penetration as rape. This element must form part of the constituent or definitional elements of the offence. The argument Fletcher brings forward in support of his position that the mistaken belief in the victim's consent must be reasonable in order to exculpate the defendant is however convincing in that it shows how the wrong suffered by the victim exists independently from the actor's belief. He argues that the fact that the victim has a right to self-defence, shows that the attack is unlawful, no matter whether the perpetrator believes the victim is consenting. Thus, according to Fletcher, how could a right to self-defence exist if the perpetrator's act was not unlawful because his belief in the victim's consent negates his intention required for the fulfilment of the crime definition of rape?[117] Under his scheme of wrongdoing and attribution and the distinction between justification and excuse, a mistaken belief in the victim's consent cannot be but a putative or mistaken justification. This scheme allows for a just outcome, because it provides us with a theoretical basis to only excuse the defendant if his mistake was reasonable. The argument does seem somewhat artificial, however, when one accepts Duff's argument that the lack of consent is exactly what constitutes the wrong in rape. If this must lead to the conclusion that lack of consent is an element of the crime definition and thus of the required mental element, one can only require a mistake about this element to have been reasonable if one abandons the inexorable logic rule.

In a different context Van Sliedregt points out a difference between the Anglo-American requirement of reasonableness of a mistake and some civil law approaches to this requirement. In Anglo-American law a mistake negating the intent or recklessness (as opposed to negligence) is not required to have been reasonable; some civil law systems always require mistakes to have been reasonable, irrespective of the required mental element.[118] I consider that this reasonableness requirement is based on the objective

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[115] *See also* Ambos, K., "Towards a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*", 28(6) *Cardozo Law Review* (2007), pp. 2647-2673, p. 2661.
[116] Duff, R.A., Rule-Violations and Wrongdoings, in S. Shute and A.P. Simester (ed.), *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002), pp. 47-74, p. 73.
[117] Fletcher, G.P., *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), p. 162.
[118] Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), footnote 402, p. 316.

standard applied in most civil law systems in assessing whether the defendant acted in the required mental state. Because it is practically impossible to determine what the actual state of mind of the defendant was, his conduct is compared to a reasonable person under the same circumstances. The standard is in this sense also normative, but not to the same extent as the negligence standard. It is not an issue of *should have known*, but rather of *must have known*.[119]

Returning to the issue of mistake about consent in rape cases, I conclude by agreeing with Duff, that the reasonableness of a mistake can be taken into account even if the absence of consent is part of the required intent. The objective test brings one closest to knowing what the actual state of mind of the perpetrator was. The issue is whether the evidence justifies the inference that the perpetrators knew or *must have known* the victim was not consenting. In answering this question the reasonableness of his plea of mistake can and must be taken into account. As seen in Chapter 5, this approach is comparable to the inference of knowledge of wrongdoing, often applied in assessing the credibility of a plea of mistake of law.

Moreover, if it cannot be inferred that the defendants had knowledge (must have known) of non-consent, they must be acquitted. This is the inevitable consequence when a mistaken justification concerns an element of the required intent; this mistake can not be assessed on the basis of the normative *should have known* standard.

Mistaken or putative justifications will usually concern elements extrinsic to the required mental element. These are probably the most relevant types of mistake of law in the sphere of international crimes. We encounter this issue again in Chapters 4 and 6.

I return to the discussion of the English approach towards issues of mistake of law, requiring the mistake to negate the fault element required by the crime definition.

As in the American legal debate, to be found amongst British scholars too, there are those who oppose the negate mental element approach and reliance on the legislature to solve the issue of mistake. Ashworth, for example, expresses his dissatisfaction with the provision in the draft criminal code.[120] He calls the provision "traditional, inflexible, and

[119] On the application of such an objective standard in Dutch criminal law see Hullu, J.d., *Materieel Strafrecht* (Deventer: Kluwer, 2006), p. 216-217.
[120] Law Com. No. 177, 1989, cl 21: Ignorance or mistake as to a matter of law does not affect liability to conviction for offence except (a) where so provided, or (b) where it negatives the fault element of the offence.

unsatisfactory: it would prevent the courts from developing a wider defence, and would relegate most of these matters to mitigation of sentence".[121] He continues, that exception b) incorrectly assumes that the legislature has contemplated a uniform approach in using 'knowingly' as part of the definition, and that the use of this term would thus implicate that the legislature provides mistake of law so as to negate the required fault element.[122] The courts' reaction to this issue, whether mistake of law negates 'knowingly', has been far from unanimous. Ashworth holds there "is a need to adopt a clear principle (a duty with circumscribed exceptions) and then to interpret statutory offences in the light of it. The same approach should be adopted where the offence includes a phrase such as 'without lawful excuse' or 'without reasonable excuse'."[123]

The principle that Ashworth proposes is that reasonable mistake of law should exculpate the defendant. He recognizes that every citizen has a duty to know the law. This duty can not be absolute, however, because, Ashworth argues, often there is uncertainty in the ambit of the law and secondly, there is the possibility that the State has not fulfilled its duty to make the law public and knowable.[124] He argues in favour of a general duty to know the law, with the exception that reasonable mistake of law excuses the defendant.[125]

According to Ashworth, this principle would also provide for a just result in reliance cases. The issue would then revolve around the question whether the defendant relied on the advice of the person he reasonably assumed to be the proper authority.[126] Ashworth makes an interesting remark where he states that allowing reasonable reliance to exclude liability in case of mistake of law would "signal the value of citizens checking on the lawfulness of their proposed activities".[127] Thus, contrary to the traditional argument against mistake of law as a defence, that it would encourage ignorance, allowing the defence in reliance cases actually encourages people to seek advice before they undertake action.

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[121] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press, 2006), p. 234-235.
[122] Ibid. , p. 235.
[123] Ibid. , p. 235.
[124] Ibid. , p. 233-234. For the same argument in relation to international criminal law see Boister, N., Reflections on the relationship between the duty to educate in humanitarian law and the absence of a defence of mistake of law in the Rome Statute of the International Criminal Court, in R. Burchill, N.D. White and J. Morris (ed.), *International Conflict and Security Law. Essays in Memory of Hilaire McCoubrey* (Cambridge: University Press, 2005), pp. 32-48.
[125] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press, 2006), p. 234. *See also* Ashworth, A.J., 'Excusable Mistake of Law', *Criminal Law Review* (1974), pp. 652-662, p. 658.
[126] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press, 2006), p. 235-236.
[127] Ibid. , p. 236.

*2.2.3 Conclusion – an ad hoc approach*

Several provisions of the Model Penal Code indicate that the American criminal law system adheres to the principle that ignorance or mistake of law does not excuse.[128] Mistake of law can only be a defence when the mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element. But, as Van Sliedregt describes, "[t]he knowledge element is […] limited to the world of fact. It does [generally, *AvV*] not extent to awareness of legal rules".[129] Courts try in various ways to diminish the sometimes harsh outcomes of this principle by manipulating the distinction between fact and law or interpreting a particular intent as to require actual consciousness of unlawfulness.[130]

The presumption is that anyone who fulfils the definitional requirements of an offence is aware of the wrongful character of his behaviour. Even though the MPC provides otherwise, this presumption seems to be rebuttable, in particular when the behaviour falls under 'regulatory offences' or 'technical crimes', the so-called *mala prohibita* crimes. The regulation in the MPC forces courts to place this rebuttal in the mens rea requirement category. The American legislature therefore complicates the means to arrive at an adequate normative account of culpability by requiring the mistake to negate the mental element.

In British law the basic rule that ignorance or mistake of law is no defence is preserved in the draft criminal code.[131] Here the deference to the legislature is even greater than under the American system since there seems to be no room for reliance cases even where the defendant reasonably relied on the advice of the proper official authority.

Overall the Anglo-American law systems seem for "instrumentalist reasons" to adhere to the maxim *ignorantia legis non excusat*. Therefore, the case law relating to the issue of mistakes about legal norms or about factual issues with legal components never directly assay the issue as a mistake of law.[132] As Fletcher holds, "[t]he question is always framed

[128] §§ 2.02(1), 2.02(9), 2.04 MPC.
[129] Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), p. 232.
[130] *See* Smith, A.T.H., 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *The Anglo-American Law Review* (1985), pp. 3-32, p. 11+13.
[131] Law Com. No. 177, 1989, cl 21.
[132] Fletcher, G.P., *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978), p. 736.

as a matter of discerning whether the mistake negates the required intent or whether the statute defining the offense supports recognition of the mistake as an excuse".[133]

## 2.3 MISTAKE OF LAW IN THE CIVIL LAW SYSTEMS OF GERMANY AND FRANCE

### *2.3.1 Introduction*

This section focuses on the civil law systems of Germany and France. The German doctrine has devoted much attention to the theory of mistake. Since the landmark decision of the *Bundesgerichtshof* of 18 March 1952 mistake of law is recognised as an excuse. The codification of mistake of law as an excuse in 1975 is seen as the perfection of the principle of guilt as an indispensable requirement for criminal responsibility.[134]

The recognition of mistake of law as a ground for excluding criminal responsibility in France is more recent; it came with the introduction of the new *Code Pénal* in 1994. Until then, the French criminal law approach toward mistake of law was very similar to the common law approach, adhering strictly to the principle *ignorantia legis non excusat*. As we will see, where the Germans have based their concept of mistake of law as an excuse on well–considered theories analysing the structure of criminal offences, the French have adopted a provision on mistake of law which is common to such provisions in various continental European countries, without knowing precisely how to characterise mistake of law within their existing system of criminal offences.

### *2.3.2 Germany - Mistake of law is an excuse*

Before the landmark decision of the *Bundesgerichtshof* (Federal Supreme Court) in 1952, the principle *ignorantia legis non excusat* was the basic principle in German criminal law. The German legislator of 1871 had not provided for mistake of law as an excuse, mistake of fact on the other hand led to the negation of the required intent.[135] The German judges and legal theorists ran into the same problems of strict application of the *ignorantia legis* principle as their colleagues in Anglo-American systems.[136] The landmark decision of the *Bundesgerichtshof* of 1952 goes into the disadvantageous implications of absolute

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[133] Ibid. , p. 736.
[134] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 452, § 41.I.1.
[135] Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (München: C.H. Beck'sche Verlagsbuchhandlung, 1994), p. 766.
[136] *See* section 2.2.2 *supra*.

presumption of knowledge of the law and the difference between the two opposing theories developed by scholars at the time.

### *2.3.2.1 Das Recht*

Before discussing the landmark decision, it is necessary to pay attention to the German doctrine on the distinction between *Gesetz* und *Recht*, a paramount feature of German law and other continental legal systems. Fletcher draws attention to linguistic differences between the Anglo-American legal world and the continental legal world. Anglo-American legal systems use one single word, namely *law*, where the continental systems use two words to distinguish between law as enacted by the legislature and law as a body of principles. In German *Gesetz* means law as statutory law and *Recht* means law as principle.[137] There is no English word for *Recht*. *Recht* refers to a concept of higher law, it refers to the notion of "Law as Right, as a set of principles justifiable on their intrinsic rectitude".[138] The concept of *das Recht* is a paramount feature of German law, it is therefore of great importance to understand the distinction between *Gesetz* und *Recht*. Theoretically acts can be in violation of *das Gesetz*, but in conformity with *das Recht*; which means that acts in violation of the law (statute) are not necessarily against *das Recht* (wrongful). Fulfilment of all the elements of a crime as defined does not necessarily mean that the act was *unlawful*, or as Fletcher correctly suggests to translate *rechtswidrig*, *wrongful*.[139] Grounds of justification negate the wrongfulness of the act. The act is against the law, but it is not wrongful. German law requires all criminal acts to be in violation of *das Recht* in order to be punishable. Fletcher compares this feature of German law with constitutional law, as a set of higher principles, in the American system.[140]

### *2.3.2.2 The landmark decision*

The defendant in this case, who is a lawyer, is being prosecuted for the crime of extortion. The defendant agreed to represent Mrs. W. in a criminal case, without having

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[137] Fletcher, G.P. and S. Sheppard, *American Law in a Global Context, The Basics* (Oxford: Oxford University Press, 2005), p. 54-55. Note how in Dutch the defence of mistake of law is called 'rechtsdwaling', meaning mistake about 'das Recht'. And, Enschedé describes how traditionally the Dutch legislature distinguished between 'rechtsdelicten' en 'wetsdelicten', violations of 'das Recht' and violations of the law; these two terms refered to the distinction between crimes malum in se and mala prohibita; Enschedé, C.J., *Beginselen van Strafrecht* (Deventer: Kluwer, 2008), p. 159.
[138] Fletcher, G.P., *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), p. 140.
[139] Fletcher, G.P. and S. Sheppard, *American Law in a Global Context, The Basics* (Oxford: Oxford University Press, 2005), p. 55-56.
[140] Ibid. , p. 55+59.

made a prior agreement about his fee. After the trial proceedings had commenced, the defendant demanded his client Mrs. W. to pay 50 DM. He threatened her that he would no longer represent her if she did not pay instantly. When Mrs. W. paid the required amount the next morning, the defendant forced her to sign a bank note for a fee of 400 DM.[141] The crime with which the defendant was charged is *Nötigung*, § 240 Strafgesetzbuch (StGB – Criminal Code). The relevant sections of the provision read:

*§ 240 Nötigung*
*(1) Wer einen Menschen rechtswidrig mit Gewalt oder durch Drohung mit einem empfindlichen Übel zu einer Handlung, Duldung oder Unterlassung nötigt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.*
*(2) Rechtswidrig ist die Tat, wenn die Anwendung der Gewalt oder die Androhung des Übels zu dem angestrebten Zweck als verwerflich anzusehen ist.*[142]

The *Landgericht* (Court of first instance) convicted the defendant. The defendant's belief that he was entitled to act toward Mrs. W. the way he did, constituted, according to the *Landgericht*, an irrelevant mistake of law.[143] When the case came to the *Bundesgerichtshof*, this Court asked the advice of the *Grossen Senats für Strafsachen* (Great Senate for criminal law matters) on how to answer the following two questions:

> *1.) Gehört bei § 240 StGB zur Schuld nicht nur die Kenntnis der Tatsachen des § 240 Abs 2, sondern auch das Bewusstsein, dass die Tat rechtswidrig ist?* [144]
>
> *2.) Für den Fall der Bejahung der Frage zu 1: Handelt der Täter bei § 240 auch dann schuldhaft, wenn ihm das Bewusstsein der Rechtswidrigkeit (in dem zu 1 bezeichneten Sinne) fehlte, wenn dies aber auf Fahrlässigkeit beruht?* [145]

[141] *Bundesgerichtshof, 18-03-1952* (1952), GSSt 2/ 51 (Lexetius.com/1952,1), § 6.
[142] Translation (AvV): § 240 (1) The person who wrongfully forces someone, by using violence or threatening with a significant evil, to do a certain thing or to accept or undergo something, will be punished with a prison sentence up to 3 years or a fine. (2) The act is wrongful, if the use of violence or the threat with a significant evil, relative to the aim of the actor, should be regarded as reprehensible.
[143] *Bundesgerichtshof, 18-03-1952* (1952), GSSt 2/ 51 (Lexetius.com/1952,1), § 6.
[144] Ibid., § 3. Translation (AvV): 1) Does culpability for the crime of § 240 German Criminal Code require that, besides knowledge of the factual elements of the crime definition in § 240, section 1, the defendant was also conscious of the wrongfulness of his act?
[145] Ibid., § 4. Translation (AvV): 2) If question 1) is answered in the affirmative: is the perpetrator culpable of committing the crime of § 240, even though he lacked consciousness of wrongfulness, when his ignorance was caused by negligence?

The first issue addressed by the Court is the meaning of '*rechtswidrig*' (against *das Recht*, or wrongful) in § 240 StGB section 1. The fact that section 1 refers to the *rechtwidrigkeit* (wrongfulness) of the threat could imply that *Unrechtsbewußtsein* (consciousness of wrongdoing) is an element of the crime definition. The Court rejects this conclusion; *Unrechtsbewußtsein* is not an element of this specific crime definition, and thus of the required mental element, like factual elements are. Rather, it is an element which is common to all criminal offences. The fulfilment of the elements of a crime definition is only punishable if it is also wrongful. The *Bundesgerichtshof* thus states that the term *rechtswirdig* in § 240 StGB section 1 does not state anything more than the obvious, namely that not all acts that fulfil the factual elements of a crime definition are also wrongful:

> *so kommt dem keine andere Bedeutung zu als die eines Hinweises auf den für alle Verbrechenstatbestände geltenden Satz, dass die Verwirklichung des Tatbestandes nicht immer rechtswidrig ist.*[146]

*Rechtswidrigkeit* is not an element of the required intent. When the perpetrator fails to recognize the wrongfulness of his behaviour, this does not mean that he acts without the required intent. The Court points out the difference in this respect between mistake of fact and mistake of law. "Mistake of fact means that the perpetrator did not have the will to fulfil the elements of the crime definition. His intent was not aimed at these factual elements. Because his intent is negated by the factual mistake, he can not be convicted for the intentional offences. If his mistake was negligent, he can only be convicted if there is a crime of negligence that covers his behaviour. Conversely, a mistake of law, a mistake about the *Rechtswirdrigkeit* of ones behaviour, concerns the situation where the perpetrator has fulfilled all the elements of the crime definition. The perpetrator is fully aware of the factual circumstances of his behaviour, but he erroneously believes his behaviour to be lawful." The mistake may have been direct or indirect. In case of direct mistake, the defendant is completely ignorant of the norm in question or ignorant of the legal scope of a norm he is familiar with. An indirect mistake is when the defendant knows the norm in question and its legal scope, but erroneously believes there is a justification for his behaviour in violation of this norm. He may either believe there is a

[146] Ibid., § 7. Translation (AvV): it has not other meaning than to refer to the general rule which applies to all offences, namely that fulfilment of the elements of the crime definition does is not always wrongful.

justification, which in fact is not recognised in law or he may interpret an existing ground for justification erroneously.[147]

The next issue before the Court is whether, if not an element of the crime definition, consciousness of wrongfulness is a requirement for criminal responsibility at all, and if yes, does absence of consciousness always lead to an acquittal or only when the ignorance was unavoidable. The Court cannot turn to the criminal code for an answer, because the code, in § 59, only provides for a provision on mistake of fact.[148]

The Court first describes how the *Reichsgericht* (Federal Court of Justice) in deciding issues of mistake has always applied the Roman law distinction between mistake of law and mistake of fact. "Mistake about a law outside the criminal law was treated the same as mistake of fact, thus § 59 applied. […] Mistakes about criminal laws were considered to be irrelevant."[149] The defendant who fulfils the elements of the crime definition is liable; consciousness of wrongfulness is no requirement for liability.[150]

The Court goes into the criticism on the case law of the *Reichsgericht* expressed by scholars from the very beginning. Because it is logically impossible to distinguish between mistakes about criminal laws and mistakes about laws outside the criminal law, the distinction is arbitrary and leads in cases of unavoidable mistake to punishment of non-culpable perpetrators.[151] After 1945 various appeals courts and the High Court for the British Zone have rejected this case law of the *Reichsgericht*.[152]

The Court explains why it believes the criticism on the approach of the *Reichsgericht* is well-founded:

> *Strafe setzt Schuld voraus. Schuld ist Vorwerfbarkeit. Mit dem Unwerturteil der Schuld wird dem Täter vorgeworfen, dass er sich nicht rechtmässig verhalten, dass er sich für das Unrecht entschieden hat, obwohl er sich rechtmässig verhalten, sich für das Recht hätte entscheiden können. Der innere Grund des Schuldvorwurfes liegt darin, dass der Mensch auf freie, verantwortliche, sittliche Selbstbestimmung angelegt und deshalb befähigt ist, sich für das Recht und gegen das Unrecht zu entscheiden, sein Verhalten nach den Normen des rechtlichen Sollens einzurichten und das rechtlich Verbotene zu vermeiden, sobald er die sittliche Reife erlangt hat und solange die Anlage zur freien sittlichen Selbstbestimmung nicht durch die in § 51 StGB genannten krankhaften Vorgänge vorübergehend gelähmt oder auf Dauer zerstört ist. Voraussetzung dafür, dass der Mensch sich in freier,*

147 Ibid., § 8 (translation AvV).
148 Ibid., § 9.
149 Ibid., § 10 (translation AvV).
150 Ibid., § 11.
151 Ibid., § 13.
152 Ibid., § 13.

> *verantwortlicher, sittlicher Selbstbestimmung für das Recht und gegen das Unrecht entscheidet, ist die Kenntnis von Recht und Unrecht.*[153]

However, the Court contends, not every mistake of law negates the culpability of the defendant. Lack of knowledge is, to a certain extent, repairable. The defendant, as a participant in a legal order, has a duty to ascertain whether his behaviour is in conformity with the law. This duty can not be fulfilled by mere passiveness; it encompasses an active duty to investigate.[154]

> *Hierzu bedarf es der Anspannung des Gewissens, deren Maß sich nach den Umständen des Falles und nach dem Lebens- und Berufskreis des Einzelnen richtet. Wenn er trotz der ihm danach zuzumutenden Anspannung des Gewissens die Einsicht in das Unrechtmässige seines Tuns nicht zu gewinnen vermochte, war der Irrtum unüberwindlich, die Tat für ihn nicht vermeidbar. In diesem Falle kann ein Schuldvorwurf gegen ihn nicht erhoben werden.*[155]

The Court here refers to the so-called *Garantenstellung*, which implies that the amount of knowledge about the law that can be attributed to an individual depends on their position, education and the fields of social life in which they are active. If after using all their mental capacities and inquiring extra information where necessary, they haven't received any indication that the act is wrong, the mistake (that it later turned out to be) was apparently invincible. Only under these circumstances does mistake of law negate the culpability of the defendant.[156]

The Court then turns to the exact scope of the consciousness of wrongfulness that is required for culpability. On the one hand, the defendant is not required to know

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[153] Ibid., § 15. Translation (AvV): "Punishment presupposes guilt. Guilt is blameworthiness. If the defendant is found to be guilty, the defendant is blamed for the fact that he has not behaved lawfully, that he chose to do wrong, although he could have chosen to behave according to *das Recht*. The basis for the culpability reproach is that people are inclined to free, responsible and moral self-determination and are therefore capable to decide for what is Right and against what is Wrong, to behave according to the legal requirements and to avoid doing what is prohibited by law, as soon as he has acquired moral maturity and as long as his capacity of free moral self-determination has not been damaged or disturbed by the in § 51 named diseases. A precondition for the capacity to choose in favour of the Right and against the Wrong is knowledge of Right and Wrong." (See for an explanation of the translation of das Recht with Right, section Das Recht *supra*).

[154] Ibid., § 15.

[155] Ibid., § 15. Translation (AvV): "Hereto it is required that the defendant searches his conscience, to such an extent as required by the factual circumstances of the situation and by the specific circumstances of the defendant's personal and professional life. If he, in spite of having fulfilled the required effort to search one's conscience, lacks understanding of the wrongfulness of his behaviour, the mistake was to him invincible, the act to him unavoidable. In this case he can not be blamed, he is not reproachable."

[156] Ibid., § 15. This leaves unanswered the position of the defendant who has not inquired about the lawfulness of his behaviour because he was completely ignorant in this respect.

the criminal nature of his behaviour, nor the specific legal rule he is violating. On the other, consciousness of the moral reprehensibility of his conduct is not sufficient to establish consciousness of wrongfulness. What is required is that the defendant realises or should realise that he is violating the law.[157]

The Court emphasizes that the case law of the *Reichsgericht* violated a fundamental principle of criminal law, namely the principle *nulla poena sine culpa*, no punishment without guilt. This case law allowed defendants to be punished for intentional crimes even where the defendant's mistake of law was unavoidable and he could thus not be found culpable in this respect.[158] The supporters of the *Reichsgericht's* approach, however, did not fear violation of this principle, because they considered mistake of law in and of itself culpable.[159]

The fact that the criminal law has changed over time from a field of law only regulating crimes *mala in se* to a field of law punishing many kinds of behaviour including acts which have no moral implications, so called *mala prohibita*, makes the presumption that everyone knows the law no longer tenable. What is now lawful or unlawful and therewith the presumption that everyone knows the law is no longer self-evident. The possibility of making mistakes increases, including the possibility of irreproachable mistakes.[160]

"The result of the case law of the *Reichsgericht*, as even the opponents must admit, was actually most of the time satisfying. On the one hand the satisfying outcome of the *Reichsgericht* case law, is exactly the result of the flexibility of the distinction between fact and law, which allows the Court to reach a just decision. It is precisely the flexibility of the borders of these concepts that made it possible for judges to stretch them one way or the other in order to reach a judgement consistent with their sense of justice. On the other hand, however, did this flexibility taint the decisions with an appearance of arbitrariness, which made the decisions unconvincing and subject to heavy criticism."[161]

Because of the drawbacks in the case law of the *Reichsgericht*, the Court sets out to find the best approach, which guarantees the applicability of the principle of guilt. The Court discusses two theories responding to the issue of intentionally committed acts under mistake of law that have been highlighted in legal literature. One theory sees consciousness of wrongfulness as an element of the required intent. Lack of this

[157] Ibid., § 16.
[158] Ibid., § 17.
[159] Ibid., § 18.
[160] Ibid., §§ 19-20.
[161] Ibid., § 22 (translation AvV).

consciousness negates the intent. If the mistake or ignorance was unavoidable the defendant can not be punished. If the mistake was avoidable the defendant can be punished for the negligent form of this crime, that is, if the legislature has provided for such liability.[162] The other theory considers unavoidable mistake of law to be an excuse, leaving unimpeded the finding that the defendant acted intentionally. Consciousness of wrongfulness, or the possibility of this consciousness, is an element of culpability apart from the intent-requirement.[163] "The first theory is referred to as the *Vorsatztheorie* or intention theory, because it regards the consciousness of wrongfulness as an element of the required intent. The advantage of this approach is that it makes the distinction between mistake of fact and mistake of law redundant, because both are treated the same, namely according to § 59 StGB. The main disadvantage of this theory is, according to the Court, the fact that the defendant can only be found to have acted intentionally if, at the moment of action, he realised he was doing something wrongful. This is, however, only seldom the case. Most crimes are committed in a stressed frame of mind. This is especially true for the most serious of crimes. This puts the judge in a difficult position, and in order to be able to convict this defendant, in accordance with his sense of justice, he must adopt a presumption of consciousness, which is, in light of the principle of guilt, unacceptable."[164] The theory forces the courts to adopt a presumption of consciousness because otherwise no one could be convicted. The theory thus provides no effective solution at all. A further disadvantage of this theory is that if the legislature has not provided for the negligent crime, the defendant who committed an act under an avoidable mistake of law cannot be punished.[165]

The result of the second solution, which is referred to as the *Schuldtheorie*, is the same in the case of an unavoidable mistake, the defendant is acquitted. The difference between the two theories however becomes visible if one takes the case of an avoidable or negligent mistake. Under the theory of guilt, this mistake (like the unavoidable mistake) does not impede the finding of intent and (unlike the unavoidable mistake) this mistake does not negate the culpability of the defendant. The avoidable mistake can only be a ground for mitigation of punishment for the intentional crime. This theory allows for a judgement which is more precise in its reproach toward the defendant. The reproach in case of an intentional offence, committed under avoidable mistake of law, concerns

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[162] Ibid., § 26. This can be compared to the 'inexorable logic rule' referred to above, see § 2.2.2.2 *supra.*
[163] Ibid., § 27.
[164] Ibid., § 29 (translation AvV).
[165] Ibid., § 30. As indicated earlier, international criminal law does generally not contain crimes of negligence, see §1.5, § 2.2.2.1, footnote 29 *supra* and §3.3.1 and § 3.2.2, footnote 353 *infra.*

mainly the intention of the actor to commit the wrongful act. In contrast, in the case of a negligent offence, the reproach concerns the fact that the defendant has neglected to take account of his responsibilities ensuing from his conduct in society.[166]

In this landmark decision the Court chose in favour of the *Schuldtheorie*. This theory provides for a result that is congruent with the principle of guilt.[167] It specifies the reproach on the basis of which the defendant is being punished.[168] The Court concludes that § 240 StGB requires the defendant to have had the required knowledge of the factual elements of the crime definition, as to which knowledge of wrongfulness does not attach, and, in addition, that he could and therefore should have been conscious of the fact that with his extortion he was doing wrong.[169]

*2.3.2.3 The codification*

The German legislator followed the preference in doctrine and case law for the *Schuldtheorie*. Since 1975, the German criminal code provides for mistake of law as an excuse. German law distinguishes between *Tatbetsandsirrtum* (§16 StGb) and *Verbotsirrtum* (§17 StGB). It separates the issue of knowledge of the factual circumstances of the crime definition (*Kenntnis der Tatbestandsmerkmale*) from the issue of consciousness of wrongdoing (*Unrechtsbewußtsein*).[170] In German criminal law intent is the normal *mens rea* requirement. Consciousness of wrongdoing is an element of criminal liability but not an element of this *mens rea*.

Section 17 StGB, on mistake of law, provides:

> *Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte. Konnte der Täter den Irrtum vermeiden, so kann die Strafe nach § 49 Abs. 1 gemildert werden.*[171]

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166 Ibid., § 32.
167 Ibid., § 33.
168 Ibid., § 34.
169 Ibid., § 39.
170 Nill-Theobald, C., *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA: zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrarechts* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1998), p. 344. *See also* Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), at § 41. I.2.
171 Translation (The American Series of Foreign Penal Codes, Germany, Volume 28 (1987)): A person who commits an act in the mistaken belief that it is lawful acts without guilt, provided he could not have avoided making the mistake. If he could have avoided it, the punishment may be reduced in accordance with the provisions of § 49(1). (Translation AvV:) If the perpetrator, while committing the prohibited act,

What are the different issues involved in the assessment of mistake of law as an excuse? The first issue is to establish whether there is actually a case of mistake of law. If the defendant has *Unrechtsbewußtsein*, is conscious of the wrongfulness of his act, he made no mistake of law. What does *Unrechtsbewußtsein* mean and how do you establish whether the defendant had *Unrechtsbewußtsein*? The second issue evolves around the different types of mistake of law. As will become apparant, the lack of *Unrechtsbewußtsein* manifests itself in various ways. The third issue then is to assess the legal effect of a mistake of law. This is discussed in respect of the requirement of unavoidability, since the legal effect depends on whether the mistake was in fact avoidable or not.

*1) Unrechtsbewußtsein*

Obviously, if the defendant had *Unrechtsbewußtsein*, that is, was aware of the wrongfulness of his behaviour, he made no mistake of law. The question is when someone has *Unrechtsbewußtsein*. What is the required knowledge? Is this knowledge of the legal prohibition, including all its technicalities? Or is knowledge of moral wrongdoing sufficient to establish the perpetrator acted with *Unrechtsbewußtsein*?

Jescheck and Weigend agree, *Unrechtsbewußtsein* is present when the actor knows he is violating a rule of criminal law, civil law or administrative law.[172] They argue that material knowledge of breaking some legal rule is sufficient; knowledge of the immorality of the act, however, does not constitute the required *Unrechtsbewußtsein*. Knowledge of the moral reprehensibility of the behaviour, however, often does lead to the conclusion that the ignorance or mistake (as to the wrongfulness of the behaviour) was avoidable, because knowledge of immorality gives cause to reconsider the lawfulness of the act.[173]

According to Jescheck and Weigend, the defendant will, most of the time, have a clear and correct perspective on the wrongfulness of his conduct. This is especially true

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did not know he was acting wrongfully, he acted without culpability if the mistake was unavoidable. If the mistake was avoidable, the punishment may be mitigated in accordance with § 49 (1).

[172] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 454, § 41. I.3. *See also* Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 933, Rn. 13. But see, in the context of the Dutch approach to mistake of law, Stolwijk, S.A.M., *Een inleding in het strafrecht in 13 hoofdstukken* (Deventer: Kluwer, 2009) p. 232, § 27 (holding the required knowledge is knowledge of violating (some) criminal law).

[173] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 454, § 41. I.3. *See also* Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 933, Rn. 12.

in case of *mala in se* crimes and acts that are premeditated.[174] Knowledge of the factual elements of the offence should usually warn the defendant about the wrongfulness of his behaviour or at least encourage him to inquire further about the lawfulness of his conduct. This is referred to as the indicative function of the elements of the offence.[175]

Roxin notes, however, that the actor, only rarely actually contemplates the lawfulness of his behaviour. He correctly holds this does not mean, however, that in these instances the *Unrechtsbewußtsein* is not present. That the defendant is at least latently conscious of the wrongfulness of his behaviour may manifest itself in the way the defendant goes about in the execution of the criminal behaviour. For example, if the defendant tries to avoid being caught in the act, his surreptitious attitude might reveal his state of mind concerning any wrongfulness.[176]

With regard to the object of the *Unrechtsbewußtsein*, Roxin argues that the defendant must be specifically aware of the violation of the protected interest for which he is being held criminally liable. You have to be aware of the wrongfulness of the specific elements of the offence.[177] Mistake of law means that you are mistaken about the norm for the violation of which you are being held accountable.[178]

The Bundesgerichtshof has ruled that the perpetrator can not have doubts, i.e. he must be certain about the lawfulness of his behaviour. A defendant in doubt has *Unrechtsbewußtsein*.[179] According to Roxin, the contrary is true, a defendant in doubt is not excluded from the mistake of law excuse per se. He discusses what he calls 'the conditional variant of *Unrechtsbewußtsein*'. Conditional consciousness is assumed when the defendant has doubts. He thinks his behaviour is probably lawful, but he takes into account the possibility that he is acting unlawfully.[180] Roxin explains how case law and a trend in legal literature support the rule: if in doubt, do not act. Roxin argues that this view is only correct when the defendant did have the opportunity to resolve his

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[174] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 454-455, § 41. I.3. *See also* Artz, G., 'The Problem of Mistake of Law', (3) *Brigham Young University Law Review* (1986), pp. 711-732, p. 725.
[175] *See also* Artz, G., 'The Problem of Mistake of Law', (3) *Brigham Young University Law Review* (1986), pp. 711-732, p. 724.
[176] *See* Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 940, Rn. 28.
[177] Ibid. , p. 935, Rn. 16.
[178] Ibid.
[179] *See* Ibid. , p. 941, Rn. 29 (referring to BGH JR 1952, 285).
[180] Ibid. p. 941, Rn. 29.

doubts.[181] There is, however, broad consensus that in the situation where the defendant is in irresolvable doubt, he can only be excused if he had the option to chose between two ways of acting, both of which he considered to possibly be unlawful.[182] The example Roxin gives is "a police officer who doubts whether it is his right or his duty to shoot a fleeing offender in order to prevent him from crossing the border. If he shoots, he risks criminal liability for assault; if he does not shoot, he risks criminal liability for dereliction of duty".[183] Roxin holds that in situations like these the defendant is required, to such an extent as time and circumstances permit, to balance the protected legal interests involved and to calculate the likeliness of either of the options to be wrongful. If the defendant than ultimately made the wrong choice, he can not be blamed, because he could not act other than with conditional consciousness of wrongfulness.[184] Roxin argues this situation should be treated analogous to an unavoidable mistake of law under § 17 StGB.[185] He finds the situation more complicated, however, when, in case of irresolvable doubt, there are no alternatives for the actor, every action might possibly be unlawful. Here too, the case law dictates the doubtful defendant should refrain from acting at all. This is, as Roxin holds, unfair: why should a person who has doubts be treated more severe than the person who does not have any doubts?[186] Roxin holds that both defendants should be treated according to the standard of § 17 StGB; situations of irresolvable doubt should be treated analogous to mistake of law. The main issues in the assessment of his culpability will be whether the defendant thought the act to be lawful, what the conflicting interests were, what the damage of not acting would be to him and what damage acting would cause to others.[187]

*2) Types of mistake of law*

Roxin distinguishes four types of mistake of law: 1) mistake about or ignorance of the norm itself; 2) mistakes about the existence or boundaries of justifications; 3) the wrongful interpretation of an element of the crime definition (*Subsumtionsirrtum*); 4) mistake about the validity of a certain norm.[188] The first type of mistake is not very

[181] Ibid. p. 941, Rn. 30.
[182] Ibid. p. 941, Rn. 31.
[183] Ibid. p. 941, Rn. 31 (translation AvV).
[184] Ibid. p. 942, Rn. 31.
[185] Ibid. p. 942, Rn. 31.
[186] Ibid. p. 942, Rn. 32.
[187] Ibid. p. 942-943, Rn. 33-34.
[188] Ibid. p. 937-940, Rn. 20-26.

common in case of the so called core crimes.[189] International crimes generally belong to this category. The second type, however, is very common to occur even in case of the violation of a core prohibition.[190] The third type of mistake can be either a factual mistake (*Tatbestandsirrtum*), a mistake of law (*Verbotsirrtum*), or an irrelevant mistake about the punishability of the act (*Strafbarkeitsirrtum*). If the defendant does not know the social meaning of a normative element of the crime, this mistake is a factual mistake that will negate the required intent. If however, the defendant, because of a legal misinterpretation of a normative element, thinks his behaviour is allowed, his mistake is a mistake of law. The fourth type, a mistake about the validity of a certain norm, only rarely occurs. Note that only recognized grounds for invalidity can sustain such a mistake of law.[191]

Jescheck and Weigend characterise the distinction between type 1 and type 2 mistakes as direct and indirect mistakes of law. Direct mistake of law is when the defendant has full knowledge of what he is doing but is ignorant of the law he is violating or knows the law but interprets it incorrectly. Indirect mistake of law is when the defendant has full knowledge of the norm he is violating but is convinced that he can rely on a ground of justification. The mistake of law in this case lies either in his wrongful interpretation of the condition of a justification recognized by the legal order, or in his assumption that a justification exists when in fact it does not.[192] The defendant thus makes a *Grenzirrtum* or a *Bestandsirrtum*.[193]

Indirect mistake of law arises when the defendant realises that his conduct violates a certain legal norm, but believes that a ground for justification exists. "The perpetrator fulfils, like in direct mistake of law, the intent requirement of the definitional elements of the offence, but lacks *Unrechtsbewußtsein*. Indirect mistake of law is treated the same as direct mistake of law, both are assessed according to their avoidability."[194]

As noted, indirect mistake of law is the type of mistake of law most relevant in relation to international crimes, which justifies further elaboration of this issue in Chapters 4 and 6.

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[189] Ibid. p. 937, Rn. 21.
[190] Ibid. p. 938, Rn. 22. For this reason, this type of mistake of law will be discussed in depth in Chapters 4 and 6 *infra*.
[191] Ibid. p. 939, §25.
[192] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 456-457, § 41.II.1. *See also Bundesgerichtshof, 18-03-1952* (1952), GSSt 2/ 51 (Lexetius.com/1952,1), § 8.
[193] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 461-462, § 41.III.1.
[194] Ibid. , p. 462, § 41.III.2. (translation AvV).

Another category that will resurface in Chapters 4 and 6 is the third type of mistake of law, the *Subsumtionsirrtum*. This mistake concerns a mistaken interpretation of a normative element of a crime definition. To these elements the *Parallelwertungslehre* applies; the required intent in relation to this element is not legal knowledge or knowledge of wrongdoing (no criminal intent is required), but knowledge of the social significance of the circumstances of the act.[195] Ignorance of this social significance negates, as *Tatbestandsirrtum*, the required intent. A mistake concerning a normative element does not negate the required intent, when the defendant understands the social significance of his act. A *Subsumtionsirrtum* occurs when the mistake concerns the legal definition of the element concerned; this mistake is irrelevant, no legal knowledge is required. If the defendant, on the basis of a *Subsumtionsirrtum*, lacks knowledge of wrongdoing (*Unrechtsbewußtsein*), this constitutes a mistake of law (*Verbotsirrtum*).[196] In exceptional cases the social significance of an element can not be understood without legal knowledge; a mistake in this respect will negate the required intent. Roxin gives the following example of such an exceptional case: if someone is mistaken about the element 'belonging to another', namely he believes the property is his, he does not have the intent required by the offences of theft or destruction of property.[197] However, if the legal or normative element is equal to or constitutes the wrongfulness of the conduct, a mistake will not negate the required intent. If, for example, the crime definition contains the normative element 'wantonly' the defendant who believes his act was not 'wanton' acts with the required intent. His mistake constitutes a mistake of law (*Verbotsirrtum*). If one considers that this mistake is a *Tatbestandsirrtum* instead, the undesired result would be that the wrongfulness of the act would depend on the (mistaken) belief of the perpetrator.[198]

*3) Avoidability*

As is clear from the text of § 17 StGB, German law further distinguishes between avoidable and unavoidable mistake. When a mistake was unavoidable, the defendant can not be blamed for his act and should thus not be punished. The unavoidable mistake negates the culpability. In case of avoidable mistake, however, the defendant is reproachable. According to Jescheck and Weigend the basis for his culpability lies in his

[195] Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 486, Rn. 101.
[196] Ibid. p. 486, Rn. 101.
[197] Ibid. p. 487, Rn. 103.
[198] Ibid. p. 489, Rn. 105.

duties as a citizen in a free and democratic society. They explain that because under the rule of law, "a citizen must be led by the desire to act according to the law, the legal order requires him every time to make an effort to ascertain whether he acts accordingly. This is why, even in cases where the defendant in good faith (subjectively) believes in the lawfulness of his behaviour, he is still blameworthy, when he didn't make a reasonable effort to determine the legal implications of his behaviour."[199]

Roxin disagrees with the recognition of such a social duty. Civil disobedience is not the ground for punishing the intentional criminal act, but the fact that the defendant has ignored someone's interest, or the general interest, in an unacceptable way.[200] The reproach aimed at the defendant who committed an intentional crime under mistake of law is not that he intentionally breached the law, but that he missed the opportunity to know about the law. According to Roxin, the rule of § 17 StGB, that unavoidable mistake excludes culpability, follows directly from the principle of guilt. This is so, because the person who has not had the opportunity to obtain knowledge of the *Unrecht* (wrong), can not be reached by the norm.[201] Roxin argues that this clearly demonstrates that culpability in case of mistake of law exists in the possibility of acquiring knowledge of the wrongfulness, and not, for example, in the violation of an independent duty to search one's conscience or investigate. Not 'neglecting to investigate', but the 'attainability' of knowledge about the norm makes the act culpable.[202] It may be argued that Roxin does not offers a truly different standard than the one promulgated by Jescheck and Weigend; if the norm is objectively attainable you blame the actor for not investigating it.

Roxin further holds that the term used by the legislature, referring to the unavoidability of the mistake, wrongfully suggests that only the absolute inability to know about the wrongfulness of one's behaviour amounts to unavoidability. This suggestion must be wrong because, if absolute inability was required, unavoidable mistake of law would never occur, since the *lex certa* principle (as part of the principle of legality) in art. 103 II Grund Gesetz (GG) guarantees that anyone can in principle know about the law.[203]

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[199] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 457, § 41.II.1. (translation AvV).
[200] Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 930, Rn. 8.
[201] Ibid. p. 944, Rn. 35.
[202] Ibid. p. 944, Rn. 35.
[203] Ibid. p. 945, Rn. 38. See for a discussion of the relation between the principle of legality and the defence of mistake of law the discussion of the German Border Guard cases below and Chapter 3.

With regard to criteria on which the avoidability of the mistake is to be assessed, Jescheck and Weigend contend that the measure should be the same as the one used in determining acts of negligence, so that the same obligation to investigate rests on the defendant. It is important to take as guiding assumption the indicative function of the factual elements of the offence. However, the force of this assumption depends on the crime at hand. Jescheck and Weigend hold that if the act does not only violate a legal norm, but also constitutes a violation of moral values, the mistake is very likely to have been avoidable, because the legal evaluation corresponds to or emanates directly from the moral consciousness. Further, in cases where the act does not show such a close relation to the moral consciousness, there is, according to these authors, a duty to investigate.[204]

Roxin warns that searching one's conscience does not always lead to the proper knowledge to constitute *Unrechtsbewußtsein*. He recognizes that where the behaviour goes against one's conscience this can be an indication that one should conduct further inquires into the lawfulness of the act. However, "most mistakes of law are of such a nature, that searching one's conscience will not help to avoid making it".[205] The proper means to assess the lawfulness of one's conduct are therefore "reflection and inquiries".[206] As Roxin holds, however, a mistake of law by the person who does not apply these means is not necessarily avoidable. The avoidability of the mistake is rather based on three interrelated conditions: a) the actor had an indication of the wrongfulness, he had a reason to investigate; b) the actor has not undertaken any effort in this regard, he has not or insufficiently conducted further inquiries; and c) the mistake is nevertheless only then avoidable when sufficient effort would have provided him with the required knowledge of wrongfulness.[207] With regard to the first condition a), Roxin contends that only in three situations there is reason for the defendant to conduct further inquiries: 1) if he has doubts; 2) if he does not have doubts, but realises he moves in areas where certain sets of rules apply (e.g. traffic or a specific profession); and 3) when the actor knows his conduct causes damage to another individual or the community as a whole.[208] With regard to the second condition b), he contends that advice of a reliable lawyer is

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[204] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 458-459, § 41.II.2.b.
[205] Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 948, Rn. 46.
[206] Ibid. p. 948, Rn. 46 (referring to BGHSt 2, 201 and BGHSt 4, 5).
[207] Ibid. p. 950, Rn. 52. With regard to *c)* (the avoidability can only be established, when further inquiries actually could have provided the defendant the information that his behaviour was unlawful).
[208] Ibid. p. 951, Rn. 51.

sufficient.[209] Also if the proper authority tolerates the behaviour and this tolerance implies the authority regards the behaviour as lawful, no further inquiries are warranted. In this respect Roxin refers to the German Border Guard cases.[210] These are discussed in further detail at the end of this section. Finally, with regard to the third condition c) Roxin argues that "what is decisive is not what a certain lawyer actually said, but what the outcome would have been, on which the actor would have been allowed to rely".[211]

Jescheck and Weigend agree that the avoidability can only be established when further inquiries could actually have provided the defendant the information that his behaviour was wrongful. In case of doubt, they argue, this obligation however becomes more pressing; the defendant cannot simply choose the most advantageous option.[212] "In general one could say that the German courts apply high standards to the duties of the defendant: he must apply all his mental capacities and his moral consciousness to reach the correct judgement."[213]

What remains is to briefly discuss the legal effect of mistake of law. As § 17 StGB stipulates, unavoidable mistake of law negates the defendant's culpability. The defendant must be acquitted. Avoidable mistake of law, on the other hand, may only lead to mitigation of punishment.

It may be thought that Roxin's account of the issues involved in assessing the criminal responsibility of a defendant who committed an intentional act under mistake of law, as described above, is very illuminating. First, one has to establish whether the defendant actually had (latent) *Unrechtsbewußtsein*. Conditional *Unrechtsbewußtsein* should be assessed analogous to a mistake of law. The issue in case of mistake of law is whether the defendant could have avoided his mistake. Here one needs to investigate whether the defendant had indications that his conduct might be unlawful and whether further inquiries (for example consulting a lawyer) could have prevented the mistake. It is helpful here to discuss a recent German case in which the defendants argued that they had acted under mistake of law.

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[209] Ibid. p. 954, Rn. 62.
[210] Ibid. p. 957, Rn. 67.
[211] Ibid. p. 959, Rn. 69 (translation Avv).
[212] Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 459, § 41.II.2.b.
[213] Ibid. , p. 459, § 41.II.2.b (translation AvV).

*2.3.2.4 The German Border Guard Cases*

These cases concern the prosecution, after the reunification of East and West Germany, of East German border guards for the deadly use of firearms in preventing East German citizens to cross the border to West-Germany.[214] The East-German border regulation, more precisely § 27 section 2 of the *Grenzgesetz*, arguably allowed or even required the use of firearms in these situations. The first issue before the West German Courts was therefore whether the prosecution of the border guards violated article 103, section 2 of the Grund Gesetz (Basic Law of the FDR), which prohibits retroactive punishment. Justifications, like provided for in § 27 GG, fall under the protection of the prohibition of retroactive punishment.[215] The BGH (Federal Court of Justice) and the BVerfG (Federal Constitutional Court) both, although on different grounds, came to the conclusion that there was no such violation. In Mauerschützen I the BGH held that the GDR law could be interpreted in such a way that it respected human rights, especially the right to life and the right to freedom of movement. Under this interpretation, which the Court considered to be the correct interpretation, the justification of § 27 section 2 was not applicable, the shooting of the border guard was unlawful under GDR law at the time of action.[216] The Court concluded that the prohibition of retroactive punishment protects valid expectations of citizens; the expectation that a State practice of providing for a justification that violates fundamental human rights will also apply in the future is not a valid expectation, therefore it does not deserve the protection of the prohibition of retroactive punishment, according to the Court.[217] However, as Walther convincingly demonstrated, the Court's reference to and interpretation of international human rights law is highly questionable.[218] First of all, she refers to a procedural problem. Although the GDR had ratified the International Covenant on Civil and Political Rigths of 1966

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[214] See for example: *Mauerschützen I* (1992), BGHSt 39, 1, BGH 5 StR 370/92, 3 November 1992; *Mauerschützen II* (1993), BGHSt 39, 168, BGH 5 StR 418/92, 25 March 1993; *Mauerschützen III* (1995), BGHSt 41, 101, BGH 5 StR 111/94, 20 March 1995; *BVerfGE 95, 96, 24 October 1996* (1996), 2 BvR 1851, 1853, 1875 und 1952/94 (translation in English in *BVerfGE 95, 96, 24 October 1996* (1997), 18 Human Rights Law Journal (1997) No. 1-4, pp. 65-78; *Case of K.-H. W. v. Germany (Application no. 37201/97)* (2001), ECtHR, 22 March 2001

[215] *Mauerschützen I* (1992), BGHSt 39, 1, BGH 5 StR 370/92, 3 November 1992, p. 15-16 (Page numbers in references to the German Border Guard Cases here and below are page numbers of the printed document, since I was unable to verify the official page numbering). For an extensive study of the principle of legality and international crimes see Boot, M., *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes* (Antwerp: Intersentia, 2002).

[216] *Mauerschützen I* (1992), BGHSt 39, 1, BGH 5 StR 370/92, 3 November 1992, p. 9-14.

[217] Ibid. p. 16. *See also* Walther, S., Problems in Blaming and Punishing Individuals for Human Rights Violations: The Example of the Berlin Wall Shootings, in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), pp. 99-112, p. 104.

[218] Walther, S., Problems in Blaming and Punishing Individuals for Human Rights Violations: The Example of the Berlin Wall Shootings, in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), pp. 99-112, p. 104-105.

(ICCPR) in 1974 and it entered into force in 1976, the GDR legislature did not transform it into national law as required by the GDR constitution.[219] Second, Walther argues, the scope of the human rights of protection to life and the right to leave is unclear, especially where protection of these rights conflicts with national security interests.[220] With regard to the right to life she states that it is clear that the use of firearms with the intent to kill is in violation of article 6 ICCPR. "There seems to be no general consensus, however, on the limits of *possibly* deadly use of firearms – that is, the lawful use of firearms where border officials are aware of the possibility of a deadly outcome."[221] As to the right to leave, Walther continues "international law guarantees leave something to be desired as well. The right is embodied in the UDHR 1948, as well as in numerous other human rights treaties, including article 12, clause 2 [ICCPR]. Whether customary international law recognizes the right seems to be widely regarded as nonverifiable." The court "largely passed over the […] thorny definitional problems regarding both the right to the protection of life and the right to leave".[222]

In Mauerschützen II the BGH reaffirmed this human rights approach by holding that the prohibition on retroactive punishment does not prevent the Court from interpreting GDR law in a manner favourable to human rights, even though the State practice deviated from this interpretation.[223]

In Mauerschützen III the BGH also affirmed its standing on the issue: "the border guards have not been let down in their expectations of the continuing applicability of the law; […]. Art. 103(2) GG does not protect the expectation of a continuing state practice in this respect."[224] The Court continues, "if the law or state practice is obviously and in an unacceptable way a violation of internationally protected human rights, the responsible authorities and those who act on their orders, are not protected by the prohibition on retroactive punishment."[225] Hence, in Mauerschützen II and III the BGH reaffirmed that the GDR law in question could and should be interpreted in such a manner as to respect internationally recognized human rights. The responsible authorities, and those acting on their orders who rely on the continuation of

[219] Ibid., pp. 104.
[220] Ibid., pp. 105.
[221] Ibid., pp. 105 (referring in footnote 51 amongst other sources, to the "motorcycle case" (1988), a West German case in which the court found lawful the use of firearms where deadly force was a possible outcome (BGHSt 35, 379)).
[222] Ibid., pp. p. 105.
[223] *Mauerschützen II* (1993), BGHSt 39, 168, BGH 5 StR 418/92, 25 March 1993 p. 10.
[224] *Mauerschützen III* (1995), BGHSt 41, 101, BGH 5 StR 111/94, 20 March 1995 p. 7 (translation AvV).
[225] Ibid. p. 7 (translation AvV).

State practice that was obviously not in accordance this interpretation, deserve no protection from the principle of legality.

The same is stated by the *Bundesverfassungsgericht* (Federal Constitutional Court). This Court also refers to the rule of law basis of the ban on retroactivity:

"The strict ban on retroactivity in Art. 103(2) basic law, […], has its rule-of-law justification in the special situation of trust the penal laws bear when enacted by a democratic legislator bound by fundamental rights. This special position of trust does not apply where the other State, while legislating elements of offences for the area of the gravest criminal wrongs, nonetheless excluded punishability through grounds of justification for partial areas by calling, over and above the written norms, for such wrongs, favouring them and thus gravely disregarding the human rights universally acknowledged in the international legal community. […] In this quite special situation the precept of substantive justice, which also includes respect for the human rights recognized in international law, bars application of such a ground of justification. The strict protection of trust by Art. 103(2) Basic Law must then yield. Otherwise the administration of criminal justice in the Federal Republic would fall into contradiction with its rule-of-law premises."[226]

This case was brought before the ECHR.[227] This Court affirmed the findings of the national courts that there was no violation of the principle of legality. It was not so much concerned as to how the different national courts had approached the issue; the Court only needed to satisfy itself "that the result reached by the German courts was compatible with the Convention, and specifically with Article 7 §1."[228] The state practice to protect the border "at all costs" was flagrantly in violation of the GDR Constitution and legislation and also in breach of international obligations of the GDR under international human rights law.[229] This practice was no law in the sense of article 7 ECHR.[230] The Court concluded that "at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability in GDR law".[231]

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[226] *BVerfGE 95, 96, 24 October 1996* (1996), 2 BvR 1851, 1853, 1875 und 1952/94, p. 21-22; *BVerfGE 95, 96, 24 October 1996* (1997), 18 Human Rights Law Journal (1997) No. 1-4, pp. 65-78, p. 76-77.
[227] Here I will only refer to the appeal of the border guard, not to the appeal of the government officials/political leaders, which appeals were handled by the ECtHR jointly.
[228] *Case of K.-H. W. v. Germany (Application no. 37201/97)* (2001), ECtHR, 22 March 2001 p.27, § 61.
[229] Ibid. p. 28, § 66-67.
[230] Ibid. § 90.
[231] Ibid. § 91.

*2.3.2.4.1 The German Border Guard Cases – The Principle of Legality*

One of the pillars of the principle of legality is the foreseeability of criminal punishment. Where the ECHR deals with the foreseeability of the conviction it conflates the principle of legality and the defence of mistake of law.[232] The Court was convinced that this foreseeability requirement was met; the border policing regime was so obviously an infringement of basic social norms (GDR law and international human rights), that anyone could foresee that following this policy or these orders would lead to criminal punishment. The Court held that "[a]lthough the applicant was not directly responsible for the above State practice, and although the event in issue took place in 1972, and therefore before ratification of the International Covenant, he should have known, as an ordinary citizen, that firing on unarmed persons who were merely trying to leave their country infringed fundamental and human rights, as he could not have been unaware of the legislation of his own country".[233] And, "in the light of all the above considerations, the Court considers that at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights".[234]

As several authors have convincingly argued, it is questionable whether this analysis is correct.[235] The main argument against this finding is that in 1972 the practice of shooting border violators was not manifestly unlawful. Ferdinandusse refers to a case in the US, where the issue whether shooting a border violator was unlawful remained undecided for more than ten years.[236] Pellonpää, in his dissenting opinion to the ECHR case, referred to a 1988 case before the BGH against a West German customs officer who fired in a life-threatening manner at a motorcyclist, who tried to avoid customs control at the border between West Germany and The Netherlands.[237] The customs officer was acquitted, "he was objectively entitled to suspect that the persons fleeing were serious drug offenders or had a comparable reason for fleeing".[238] Although this case concerns quite a different situation (the GDR policy was to give flight prevention

[232] See further the discussion in § 3.3.4 *infra*.
[233] *Case of K.-H. W. v. Germany (Application no. 37201/97)* (2001), ECtHR, 22 March 2001 § 104.
[234] Ibid. § 105.
[235] See e.g. Ferdinandusse, W.N., *Direct Application of International Criminal Law in National Courts* (The Hague: T.M.C. Asser Press, 2006), p. 245-248.
[236] Ibid. p. 247-248.
[237] *BGHSt 35, 379* (1988),
[238] *Case of K.-H. W. v. Germany (Application no. 37201/97)* (2001), ECtHR, 22 March 2001, dissent Pellonpää, p. 50. On this case see also Frowein, J.A., Im Zweifel für den vielleicht tödlichen Schuß?, (ed.), *Festschrift für Peter Schneider zum 70. Geburtstag*: E. Denninger, 1990), pp. 112-121.

precedence over the right to life and in West Germany shooting to kill persons trying to evade border control "has never been officially supported or condoned")[239] Pellonpää holds that "the applicant seems to have acted in accordance with orders emanating from prima facie "constitutionally competent" organs." He therefore finds "it somewhat unreasonable to require that the applicant should have been able to decide a conflict between those orders and other provisions (such as section 17(2) of the Police Act), applying methods used in a State based on the rule of law."[240] On the one hand the Courts (both BVerfG and ECHR) have held that the border guards can not invoke the ban on retroactivity, because that principle presupposes the rule of law. On the other, it expects the border guard to know which orders to follow and which orders to refuse, despite the absence of the rule of law. Somehow there is friction in this reasoning.[241]

Leaving aside the issue of the principle of legality, and proceeding from the finding of the German courts and the ECHR that this principle had not been violated, I will now turn to the next issue before these courts, namely the individual culpability of the border guards.

*2.3.2.4.2 The German Border Guard Cases – Mistake of Law*

In defence the defendant pleaded having acted on superior orders and/or under mistake of law. The findings of the German courts illustrate the relation between these two defences. Under the defence of superior orders, the defendant has no obligation to investigate.[242] When raising superior orders, art. 5 WStG, the soldier does not have a duty to investigate the lawfulness of the order; in case of doubt, which cannot be resolved, he can obey the order.[243] But if the order was manifestly unlawful, the defendant will not be

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[239] Walther, S., Problems in Blaming and Punishing Individuals for Human Rights Violations: The Example of the Berlin Wall Shootings, in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), pp. 99-112, p. 105.

[240] *Case of K.-H. W. v. Germany (Application no. 37201/97)* (2001), ECtHR, 22 March 2001, dissent Pellonpää, p. 48.

[241] In this respect I would like to refer to a distinction made by Kelk. He refers to the constitutional dimension of the principle of legality and to the legal protection dimension of this principle. The first dimension focuses on the primary objective of criminal law, punishment according to the law and the second dimension focuses on the legal position of the defendant. Under the second dimension there will be more room for exclusion of criminal responsibility on the basis of the principle of legality. Kelk, C., *Studieboek Materieel Strafrecht* (Deventer: Kluwer, 2005), p. 98 The discussion by the Courts of the principle of legality seems to have been dominated by the first dimension of this principle, punishment according to the law; the second dimension has remained unexplored.

[242] Under the GDR provision, there was such an obligation; the courts applied the more lenient rule, the FDR provision, art. 5 WStG.

[243] *Mauerschützen II* (1993), BGHSt 39, 168, BGH 5 StR 418/92, 25 March 1993, p. 13.

exculpated if he follows it.[244] The courts found the orders and the border policing regime to be manifestly unlawful; the defence of superior orders was denied. This did not settle the issue of culpability, however, because the determination of the manifest unlawfulness of the order does not preclude the possibility of the defendant having acted under a mistake of law, without *Unrechtsbewußtsein*; the defendant can perceive his action as lawful, even though the order was manifestly unlawful. The courts, however, indicated that where the order or policy is manifestly unlawful, often the purported mistake of law will have been avoidable.[245]

Hence, ultimately the culpability of the defendants depended on the avoidability of their mistake. Could they foresee the inapplicability of § 27 II Grensgesetz and therewith the wrongfulness of their behaviour? As it turned out the Court was very strict in the amount of effort it demanded of the border guards. They were not allowed to rely on the East-German officials, who were the "pillars of the system of *Unrecht*".[246] The Court instead investigated whether the people of Eastern Germany at the time approved of their behaviour.[247] This deviation from the basic rule, that reliance on official authority is sufficient, is according to Roxin, a dubious erosion of § 17(1) and leads to a further expansion of criminal responsibility.[248] How can one ask of these subordinates to know the (international) wrongfulness of their border policing regime, while they were deliberately kept in the dark?[249]

Roxin and Arnold et al. argue, reasonably it might be thought, that the unlawfulness of orders was probably less manifest to the defendants than the Courts assumed.[250] The BVerfG admitted that "reservations as to the recognizability of the breach of the criminal law beyond all doubt might arise from the circumstance that the GDR State leadership equipped the ground of justification supposed to cover the behaviour of the border soldiers with the authority of the State, and so conveyed it to the soldiers. It is not then a matter of course that the average soldier could be clear beyond doubt as to the proper boundary of punishable conduct, and it would be untenable under the principle of guilt

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[244] See further § 2.4.2 *infra*.
[245] *Mauerschützen II* (1993), BGHSt 39, 168, BGH 5 StR 418/92, 25 March 1993, p 13-14 and *BVerfGE 95, 96, 24 October 1996* (1997), 18 Human Rights Law Journal (1997) No. 1-4, pp. 65-78, p. 72.
[246] Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 957, § 67.
[247] *Mauerschützen II* (1993), BGHSt 39, 168, BGH 5 StR 418/92, 25 March 1993, p. 13.
[248] Roxin, C., *Strafrecht Allgemeiner teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre* (Munchen: C.H. Beck, 2006), p. 957-958, §§ 67-68.
[249] *See also* Ibid. p. 958, § 68.
[250] Ibid. p. 958, § 68; Arnold, J., N. Karsten, et al., 'The German Border Guard Cases before the European Court of Human Rights', 11(1) *European Journal of Crime, Criminal Law and Criminal Justice* (2003), pp. 67-92, p. 87-90.

to establish the obviousness of the breach of the criminal law to soldiers solely with the – objective – presence of a severe infringement of human rights; for then it would have to be shown in more detail why the individual soldier, having regard to his education, indoctrination and other circumstances was in a position to recognize the breach of the criminal law beyond doubt".[251] The BVerfG held that the lower courts did not "discuss the facts and circumstances from this viewpoint in the initial proceedings".[252] The Court held, however, that the lower courts addressed the issue of guilt in the proper way by establishing that the killing of an unarmed fugitive was a manifest "infringement of proportionality and the elementary ban on killing [that] must have been perceptible and obvious immediately even to an indoctrinated person".[253]

The Court (being a Constitutional Court) could only perform a marginal test, which it concluded by determining that the lower court had correctly assessed the individual's personal guilt.[254] Nill-Theobald seems to reconcile herself with the conclusion of manifest illegality; she summarizes the arguments that support this finding: "it must have been obvious that a state does not have the right to have a person, who only wants to travel from one side of Berlin to the other, shot in order to prevent this border violation. [Another argument is that] the availability of the order to shoot was denied in public and the fact that in case of visiting high foreign officials the border guards were not allowed to shoot, except in case of risk of flight and self-defence."[255] The last argument she mentions concerns the fact that soldiers involved were relocated to other divisions and there was a general secrecy policy applicable to shooting incidents.[256]

Whalter has criticized the BGH for "failing to scrutinize more closely the nature of the actual orders and the defendant's ability to recognize them as wrong".[257] In my opinion, the lower courts on the basis of the facts and circumstances summarized by the BVerfG referred to above, could have, and indeed therefore should have, reached the opposite conclusion, i.e., that the individual border guards could not have foreseen the illegality of their acts and could not have avoided their mistake. The guards acted on orders emanating from state authority, they were deliberately kept in the dark about the

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[251] *BVerfGE 95, 96, 24 October 1996* (1997), 18 Human Rights Law Journal (1997) No. 1-4, pp. 65-78, p. 78.
[252] Ibid. p. 78.
[253] Ibid. p. 78.
[254] Ibid. p. 78.
[255] Nill-Theobald, C., *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA: zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrarechts* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1998), p. 130 (translation AvV).
[256] Ibid. p. 130.
[257] Walther, S., Problems in Blaming and Punishing Individuals for Human Rights Violations: The Example of the Berlin Wall Shootings, in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), pp. 99-112, p. 107.

wrongfulness of these order and they were formally commended when they had prevented the flight of GDR citizens by the fatal use of firearms.[258] It can therefore, at least, be seriously doubted as to whether the border guards could have avoided their mistake of law. If there is doubt on an issue of culpability, under the fundamental criminal law principle of guilt, this doubt should be resolved in favour of the defendant. That is the only course consistent with the criminal law standard of culpability.

Walther also criticized the BGH in Mauerschützen I for not considering the GDR criminal law doctrine with regard to mistake of law more seriously. This doctrine treated mistake of law as a lack of intent. As seen earlier in this chapter, and as Walther emphasizes, lack of intent is a much stronger defence than lack of consciousness of wrongdoing, because in case of lack of intent, the unavoidability or reasonableness of the mistake is irrelevant. Even an avoidable or unreasonable mistake as to the infringement of basic social norms will exclude intent in this sense. According to Walther, it is to be regretted that the court very briefly dismissed the applicability of it.[259] This is especially so because the East German law seems more lenient in this respect. On the other hand, as argued before, the (West) German rule on mistake of law in principle delivers outcomes in congruence with the principle of guilt and should therefore be preferred over a rule that allows even unreasonable mistakes to be exculpatory.

*2.3.2.5 Conclusion*

Generally the fulfilment of the elements of a crime definition leads to consciousness of the unlawfulness (*Unrechtsbewußtsein*). The wrongfulness of the act and the culpability of the defendant are presumed when the crime definition is fulfilled. The defendant can rebut this presumption by bringing forward issues of justification or excuse. Consciousness of unlawfulness is generally not an element of the crime definition. *Unrechtsbewußtsein* is not a part of the *mens rea* in the sense that it has expressly to be proven in every case, or that lack of it leads to absence of intent.[260] However, the fact that someone is unaware of the wrongful nature of his behaviour may indicate that he is not to blame for having committed the wrongful act. If you do not realise that your act is

[258] *BVerfGE 95, 96, 24 October 1996* (1997), 18 Human Rights Law Journal (1997) No. 1-4, pp. 65-78, p. 66, 67

[259] Walther, S., Problems in Blaming and Punishing Individuals for Human Rights Violations: The Example of the Berlin Wall Shootings, in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), pp. 99-112, p. 107; *Mauerschützen I* (1992), BGHSt 39, 1, BGH 5 StR 370/92, 3 November 1992, p. 19-20.

[260] *See also* Jescheck, H.H. and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin: Duncker & Humblot GmbH, 1996), p. 456.

unlawful, criminal sanction is not a factor you can weigh in your decision to commit the act or not. The "perpetrator who does not realize that his conduct fulfils the elements of a crime, has not been warned, and thus, has no reason to investigate the lawfulness (or wrongfulness) of his actions".[261] This explains why *Unrechtsbewußtsein* is an element of criminal responsibility, although not of the required *mens rea*. The *Bundesgerichtshof* and the German legislature chose in favour of the *Schuldtheorie*, because this theory more accurately defines and specifies the reproach directed towards the defendant. In case of an avoidable mistake of law the culpability of the defendant lies not only in the fact that he has fulfilled the elements of a certain crime definition but also, and more specifically, in the fact that he could have chosen for the Right instead of the Wrong, since he could have avoided his mistake of law. But even if a system 'on paper' has found a principled solution to the complex issue of (non)attribution and mistake of law, the wish to vent the general public's indignation over an outrageous state practice may hamper applying this doctrine faithfully in individual criminal cases.

### *2.3.3 France – Mistake of law is a ground for excluding criminal responsibility*

The French approach can be characterised as taking a middle position between the Anglo-American approach and the German approach. The French legal system is a civil law system, but the French system shows more resemblance to common law systems than to civil law systems like that of Germany in that it knows a twofold structure of offences, distinguishing between actus reus (*l'élément matériel*) and mens rea (*l'élément intellectuel*).[262] The text of the provision on mistake of law, however, does resemble the German provision. This provision is a novelty of the Code Pénal of 1994.
In the new provision, article 122-3 Code Pénal, the legislator provides for mistake of law as a ground for excluding criminal responsibility. The provision reads:

*N'est pas pénalement responsable la personne qui justifie avoir cru, par une erreur sur le droit qu'elle n'était pas en mesure d'éviter, pouvoir légitimement accomplir l'acte.*[263]

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[261] Artz, G., 'The Problem of Mistake of Law', (3) *Brigham Young University Law Review* (1986), pp. 711-732, p. 724.
[262] *See* Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 379-405 and 406-464. *See also*, Fletcher, G.P., *The Grammar of Criminal Law. American, Comparative, and International, Volume one: Foundations* (New York: Oxford University Press, 2007), p. 44-45.
[263] Translation (The American Series of Foreign Penal Codes): "A person is not criminally responsible if that person proves that, because of an error of law, he or she was not in a position to avoid believing that

French textbooks still emphasize that *ignorantia legis non excusat* is the basic rule. They cannot ignore the new provision, but they seem to wish to avoid discussing mistake of law in any other way than as a rare and limited exception to the still valid basic rule. An example is Pradel, who in his chapter on mistake of law, devotes most of his attention to the old adage *ignorantia legis non excusat*. He describes how the French case law reminds over and again that mistake of law is neither a justification nor an excuse and how mistake of law simply has no influence on the culpability of the defendant.[264] The principle is based on a presumption that everyone knows the law. Pradel describes the justification for this presumption as follows. Social order necessitates this presumption, for if everyone would be allowed to argue mistake of law this would lead to the most serious social disturbances. The presumption is an indispensable fiction in the exercise of repressive law.[265] Moreover, he continues, "from the perspective of the social contract theory, this rule is the counterpart of the principle of legality. If every person has the right to be left alone (by state authority) as long as his behaviour is in accordance with the law, the citizen as a counter duty must make sure he acts in conformity with the law, and if he neglects to do so he commits a wrong towards the society": mistake of law is culpable in and of itself.[266] Pradel acknowledges that these arguments are not completely convincing. The presumption of knowledge of the law may be unjust with regard to certain persons, for example foreigners, and laws are nowadays so numerous and complex that one can hardly require citizens to have full and perfect knowledge of all these rules.[267] Pradel then continues, however, to discuss how wide the scope of the *ignorantia legis non excusat* principle is: it applies to foreigners as well as to nationals, to misdemeanours as well as to crimes, to mistakes about non-criminal laws and criminal law.[268] A distinction between mistakes about laws outside penal law and mistakes about penal law, sometimes applied by the lower courts, has always been rejected by the French

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he or she was able legally to perform the act", *The American Series of Foreign Penal Codes, France*, vol. 31 Translation (by Elliott): "A person is not criminally responsible who can justify having believed he or she could legitimately accomplish the act in question, as a result of an unavoidable mistake of law.", Elliott, C., 'The French Law of Intent and its Influence on the Development of International Criminal Law', 11 *Criminal Law Forum* (2000), pp. 35-46, p. 37. (Note how both sources give a different translation for '*justifie'*: 'proves' and 'can justify').

[264] Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 456-457, §495.

[265] Ibid. , p. 457, §496.

[266] Ibid. (translation AvV).

[267] Ibid.

[268] Ibid. , p. 457-458, §497. *See also* Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 619-620, §674-1.

Supreme Court.[269] Pradel concurs with the court's numerous and firm decisions on the point.[270]

Pradel, Desportes and Le Gunehec point out how, traditionally, the presumption of knowledge was absolute, meaning that it was irrefutable, and how the case law was in consequence very strict.[271] According to this case law a mistake of law could never negate the culpability of a voluntarily committed act. Even where there was uncertainty as to the laws ambit or where the mistake of law had been truly unavoidable, the result was the same, mistake of law was irrelevant. Pradel refers to how in the legal debate this case law met with much criticism. He admits that the principle *ignorantia legis non excusat* can lead to very unreasonable and unjust results, and that it seems to be nothing more than a fiction that is hard to defend. He indicates how the French legislature has adopted a provision from foreign countries like in Belgium, Germany and Italy, where unavoidable mistake of law is a ground for acquittal.[272]

#### *2.3.3.1 The provision*

The provision, 122-3 Code Pénal, provides for a ground for excluding criminal responsibility in case of an unavoidible mistake of law. Desportes and Le Gunehec distil three cumulative conditions for exculpation from this provision: first, the defendant must have made a mistake of law; second, the mistake (or ignorance) must have been unavoidable; and third, the defendant was certain about the lawfulness of his act (he can have no doubts).[273] This last requirement is not to be found in the provision, however. The authors seem to base this requirement on a principle that we also encountered in the

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[269] Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 458, §497. *See also* Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 620, §674-1.
[270] Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 458, §497.
[271] Ibid. , p. 458-459, §498 and Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 621, §676 (Holding that the presumption has always been absolute: «qu'une erreur de droit ne saurait faire disparaître, quelle que soit la cause dont elle découle, la culpabilité d'une acte volontairement accompli » [that the mistake of law can not negate the culpability of a voluntary committed act] (Crim. 10 juillet 1903, D., 1903, I, 490 ; 16 mars 1972, B., no. 110), que « l'ignorance alléguée du caractère punissable du fait délictueux ne saurait être une cause de justification » [mistake about the criminal nature of the unlawful act is not a justification] (Crim. 24 juillet 1974, B., no. 267), ou que « l'erreur de droit n'est ni un fait justificatif, ni une excuse, l'ignorance alléguée étant sans influence sur l'intention coupable » [that mistake of law is not a justification, nor an excuse, the alleged ignorance is of no relevance to the culpability] (Crim. 2 mars 1976, B., no. 78). My efforts to gain access to the aforementioned case law have failed; I was therefore unable to consult these cases and must rely on the account of French authors.
[272] Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 459, §498.
[273] Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 622+635, §§677+688+689. *See also* § 2.3.3.2 *infra*.

previous section on Germany, adhered to by some authors: i.e., in case of doubt, do not act.[274]

Pradel argues the text of article 122-3 CP is very strict. The unavoidable mistake concerns two exceptional situations, firstly where the information supplied by the government is false, or secondly where official publication is lacking.[275] In these situations the mistake was unavoidable when the following three cumulative requirements are met: 1) the defendant, finding himself in doubt, has sought to clarify his understanding by consulting an authorised person or authority and didn't act only on the basis of his own assumptions; 2) this authorised person or authority has given false information; and 3) the defendant believed he was given correct information and had no reason to question the correctness of it.[276] Note that the situation where the defendant, because he was completely ignorant of the (potential) wrongfulness of his act, did not inquire about it is not included in this interpretation of article 122-3. Note also how the requirements correspond with the American approach to mistake of law in 'reliance cases'. It appears that Pradel is referring to the former French approach to the issue of mistake of law, without scrutinizing the new provision, which provides for a more general and principled solution, requiring an assessment of the perpetrator's culpability. The problem is probably that the French system, like the Anglo-American system, does not separate the issue of wrongdoing from culpability. As stated, in their literature the French scholars distinguish between 'l'élément matériel' (*actus reus*) and 'l'élément moral' (*mens rea*).[277] The French do not make the distinction between wrongdoing and attribution.[278] In the French system of criminal offences, consciousness of wrongfulness is part of the *mens rea*, (unavoidable) mistake of law negates the required intent.[279] The

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[274] *See* §2.3.2.3, 1) *supra.*

[275] Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 459, §499. These situations are mentioned in the parliamentary debates that preceded the passing of the new Code. Desportes does not regard these examples as limited, *see* Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 627, §684. *But see to the contrary* Elliott, C., 'The French Law of Intent and its Influence on the Development of International Criminal Law', 11 *Criminal Law Forum* (2000), pp. 35-46, p. 37.

[276] Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 459, §499.

[277] Fletcher, G.P., *The Grammar of Criminal Law. American, Comparative, and International, Volume one: Foundations* (New York: Oxford University Press, 2007), p. 44-45.

[278] See for a discussion of this distinction § 3.2.2 *infra.*

[279] Elliott, C., 'The French Law of Intent and its Influence on the Development of International Criminal Law', 11 *Criminal Law Forum* (2000), pp. 35-46, p. 36 (describing the element of awareness as part of the general intent: "The concept of awareness simply requires the accused to be aware that he or she is breaking the law" and describing the effect of certain defences: "Only in exceptional situations will an accused who has carried out the *actus reus* of an offence be found not to have a general intent" at p. 37). *See also* Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 417-418 (§§470-471) + 625 (§683); and Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), p. 234.

new provision in the Code Pénal is, however, like the continental European provisions, modelled after and based on a distinction between wrongdoing and culpability.

This explains why French lawyers have difficulties classifying mistake of law.[280] On the one hand, the new provision requires the mistake to have been unavoidable. On the other, using a twofold structure of offences, lacking any distinction between wrongdoing and attribution, they are forced to place the consciousness of unlawfulness requirement into the intent required by the crime definition. These two 'assignments' are irreconcilable, because the concept of intent does not allow for an 'opportunity to know', which is part of the unavoidability requirement. The concept of intent refers to 'knew or must have known' and the concept of avoidability or culpability to 'should have known'.

The confusion, brought about by applying a provision based on a threefold structure of offences in a civil law system based on a twofold structure of offences, also becomes visible in the requirement in French criminal law that the defendant must prove all issues concerning defences.[281] In case of mistake of law, for example, the defendant must prove his mistake of law, the unavoidability of the mistake and his belief in the lawfulness of his behaviour.[282] Placing the burden of proving defences on the defendant violates the fundamental principle of presumption of innocence. According to Delmas-Marty, however, the position that French law places the burden of proving justifications and excuses on the defendant is nowadays disputed.[283]

### *2.3.3.2 Avoidable mistake*

Desportes and Le Gunehec discuss the issue of avoidability more fundamentally. They raise the issue of an abstract or a concrete assessment of the avoidability of the mistake. An abstract assessment compares the actor to the reasonable person in the same situation (*le bon père de famille*). A concrete assessment takes into account the personal circumstances of the defendant, his capacities, education etcetera. Desportes and Le Gunehec express their hope that the judges would take a middle position. They point out that a purely concrete analysis would harm the repressive function of criminal law. According to the authors, two arguments support a more abstract analysis: first, the

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[280] Fletcher, G.P., *The Grammar of Criminal Law. American, Comparative, and International, Volume one: Foundations* (New York: Oxford University Press, 2007), p. 45.
[281] Ibid. , p. 45.
[282] See Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 460-461, §499 and Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 622, §677-1.
[283] Delmas-Marty, M. and J.R. Spencer (ed.), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002), p. 597.

concept of mistake of law does not exclude everyone's obligation to inquire about the legal implications of his acts and second, this obligation is especially strong if the behaviour constitutes a violation of a fundamental rule like, for example, a rule concerning personal integrity. The level of abstractness or concreteness of the assessment should depend on the type of crime involved.[284]

Desportes and Le Gunehec point out how unlikely it is for a defendant to be successful in a mistake of law defence, when the crime he committed is a so called crime *malum in se*. In these cases, where the crime not only violates a legal rule, but also a moral norm, the mistake will almost always have been avoidable.[285] According to Desportes and Le Gunehec the mistake (either about the lawfulness of the act or the applicability of a justification) must have been complete, that is to say, the perpetrator should be absolutely sure about the lawfulness of his act, he can have no doubts.[286]

According to Desportes and Le Gunehec, under the new provision, article 122-3, the old case law on the issue of uncertainty about the correct interpretation of a particular law remains valid. "The result in these cases must be, that because the case law is uncertain, the defendant surely could have doubted the lawfulness of his act, he in any case could not have been sure about its lawfulness, so mistake of law cannot hold."[287] It seems wholly unacceptable to attribute uncertainty of law to the defendant. These situations particularly merit an analysis of the avoidability of the mistake; in case of uncertainty of the law, unavoidable mistake of law will be more plausible.[288]

At the moment there is still very little case law. The lower courts remain divided.[289] The Supreme Court is still very strict; so far it has held that every mistake of law argued before it was avoidable.[290] The new provision is hesitantly welcomed by French scholars. Desportes and Le Gunehec conclude their section on mistake of law remarking that it is still to be awaited what the real effects of article 122-3 will be, how often it will be

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[284] Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 633, §687.
[285] Ibid. , p. 626-627, §683-2.
[286] Ibid. , p. 635, §§688+689. *See also* § 2.3.3.1 *supra*. As indicated, Roxin argues, to the contrary, that doubts do not per se exclude the defence of mistake of law, see § 2.3.2.3., 1) *supra*.
[287] Ibid. , p. 635, §689 (translation Avv).
[288] See also the discussion of the principle of legality and the issue of whether the requirement of avoidability is absolute in § 2.3.2.3, 3) *supra* and § 3.3.4 *infra*.
[289] Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 460, §499. Again, I need to follow legal literature in their assessment of the case law since my efforts to gain access to French case law were unsuccessful.
[290] Ibid. Desportes and Le Gunehec note there is one example of a successful plea of unavoidable mistake of law (Crim. 24 Nov. 1998). However, they argue, the fact that the case has remained unpublished demonstrates its insignificance, *see* Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 618, §673-2.

applied, if at all. At its first introduction, the provision was announced as a 'bomb'. Now, Desportes and Le Gunehec predict, "it may well be only a piece of wet fireworks, nothing to be very afraid of, in fact something that will prevent unjust results", which they welcome as a fortunate change.[291]

*2.3.3.3 Conclusion*

Although the French provision on mistake of law is very similar to the provision in the German Criminal Code, its implications may be more similar to those of the Model Penal Code provision. The reason for this is that the French penal system can be characterised as a so-called twofold system, a system that in its literature "primarily [relies] on the distinction between *actus reus* and *mens rea* as [its] principle of organisation".[292]

The overall impression generated by the French approach towards mistake of law is that, although the legislature has provided for a provision of mistake of law as a ground for excluding criminal responsibility, the general trend, in legal literature and case law, remains that mistake of law should be treated with suspicion. As we saw with regard to the Anglo-American system, the twofold system seems to induce a general reluctance to accept a defence on the basis of mistake of law.

The French system does, however, seem receptive towards the distinction between justification and excuse. An indication for this proposition can be found in Desportes' and Le Gunehec's reference to mistake of law as a *subjective* ground for excluding criminal responsibility. They discuss the issue of responsibility of co-perpetrators in case one of them successfully argued mistake of law. The authors refer to the possibility of still convicting the co-perpetrators, because mistake of law is a *subjective* ground for excluding criminal responsibility. They note, however, that mistake of law is not a purely subjective ground for excluding criminal responsibility, like, for example, insanity, because it also has an objective aspect to it (in the (absolute) assessment of the avoidability of the mistake).[293] The distinction made between objective and subjective grounds for excluding criminal responsibility may suggest that the French criminal law is on its way to accepting the distinction between wrongdoing and attribution.

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[291] Desportes, F. and F. Le Gunehec, *Le nouveau droit pénal. Tome 1, Droit pénal général* (Paris: Economica, 2000), p. 692 (translation AvV).
[292] Fletcher, G.P., *The Grammar of Criminal Law. American, Comparative, and International, Volume one: Foundations* (New York: Oxford University Press, 2007), p. 44-45. For a further discussion see Chapter 3 *infra*.
[293] Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 637, §691.

Nevertheless, the issue of how a normative assessment can be applied to a mistake that negates the required intent remains unresolved.

## 2.4 SUPERIOR ORDERS

This section discusses the provisions on the defence of superior orders in the legal systems of the USA, the UK, Germany and France.[294] All of these systems require, for a successful plea of superior orders, the defendant to have been unaware of the unlawful nature of the order. Hence, the defence of superior orders requires the subordinate to have acted under a mistake of law, which makes discussion of this defence relevant to this study of the scope of mistake of law. Superior orders are often invoked in criminal proceedings against defendants charged with international crimes. In this section the discussion is limited to the relevant domestic provisions on superior orders; I will return to these provisions in Chapters 4 and 5, in which the international provisions and (inter)national case law on superior orders will be addressed.

### *2.4.1 USA and UK*

The first edition of Oppenheim's International Law of 1906 states the applicable principle is the *respondeat superior* principle. Only the superior is responsible for the acts committed under his command. The same is stated in the 1914 edition of the British Manual of Military Law and the US Rules of Land Warfare (up until 1940), which was based on the British Manual.[295] When Lauterpacht edited his first edition of Oppenheim's International Law, he confirmed this standing. In his editions of 1940 and 1944, however, Lauterpacht radically changed his opinion. The relevant provision changed to: a subordinate is only obliged to follow lawful orders, if he follows an unlawful order he is responsible for the crimes he thereafter committed; a manifestly unlawful order can not excuse the subordinate.[296] The British and American Field Manuals changed

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[294] For an elaborate overview of the history of the defence of superior orders, see Lippman, M.R., 'Humanitarian Law: The Development and Scope of the Superior Orders Defense ', (20) *Penn State International Law Review* (2001), pp. 153-251.
[295] Green, L.C., 'Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility', 175 *Military Law Review* (2003), pp. 309-384, p. 325.
[296] Ibid. p. 326. *See also* Lippman, M.R., 'Humanitarian Law: The Development and Scope of the Superior Orders Defense ', (20) *Penn State International Law Review* (2001), pp. 153-251, p. 159+174; *see also* Solis, G.D., 'Obedience of Orders and the Law of War: Judicial Application in American Forums', 15 *American University International Law Review* (1999), pp. 481-525, p. 494+507.

accordingly.[297] The tremendous scale on which the atrocities of the second World War were committed by subordinates and the idea that all these crimes would go unpunished if the subordinate was allowed to argue 'Befehl ist Befehl', brought about this radical change in the rules on superior orders.

§ 627 of the British Manual of Military Law (1958) reads:

Obedience to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing war crimes but may be considered in mitigation of punishment.[298]

Superior orders can only be a ground for mitigation of punishment. Ormerod notes that "there is a cogent argument that the serviceman should have a defence if he did not know that the order was illegal and it was not so manifestly illegal that he ought to have known it."[299] There are however no English authorities on the point.[300]

The United States Field Manual, the Law of Land Warfare (FM 27-10 (1956)), paragraph 509 reads:

*Defense of Superior Orders* a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment. b. In considering the question of whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the order received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to

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[297] Green, L.C., 'Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility', 175 *Military Law Review* (2003), pp. 309-384, p. 327.

[298] *See also* Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), p. 333; and Green, L.C., 'Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility', 175 *Military Law Review* (2003), pp. 309-384, p. 334. Professor Gill pointed out to me there is an updated text on superior orders in *The Manual of the Law of Armed Conflict* (Oxford: UK Ministry of Defence, Oxford University Press, 2004). Section 16.47 still seems to contain the rule that superior orders do not in themselves provide a defence to war crime charges, but this section now also refers to art. 33 ICC Statute, noting that the Rome Statute moved away from a total denial of the defence. In the commercial edition of this thesis I will incorporate and give a comment on this provision.

[299] Ormerod, D.C., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 2008), p. 357.

[300] Ibid. , p. 358.

orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.

Hence, under this provision, the defendant can invoke superior orders when he did not know, and could not reasonably have been expected to know, that the act ordered to be carried out was unlawful. In case of war crimes, however, superior orders may only mitigate the punishment.

Another relevant US provision is § 916(d) of the Rules for Courts Martial:

R.C.M. 916 (d) *Obedience to orders.* It is a defence to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful. **Discussion**. […] An act performed pursuant to a lawful order is justified. […] An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful.[301]

§ 2.10 MPC applies a more lenient rule, requiring actual knowledge:

§ 2.10 MPC It is an affirmative defense that the actor, in engaging in the conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services that he does not know to be unlawful.[302]

Robinson favours the MPC approach, providing for the defense unless the defendant *knows* that the order is unlawful. Ignorance or mistake, even if unreasonable or in the case of a manifestly unlawful order, exculpates. This purely subjective standard is justified, according to Robinson, to apply in some cases of mistake as to superior orders.[303] "Specifically, if an order is unlawful because it demands unjustified conduct and if that order precludes the independent exercise of judgment as to the unjustified aspect of the conduct commanded, then the compulsion inherent in military orders and the general societal need for deference to military orders, compels an especially broad mistake excuse when such an unlawful military order is mistakenly obeyed."[304]

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[301] *See also* Nill-Theobald, C., *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA: zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrarechts* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1998), p. 141-142.
[302] *See also* Ibid. p. 143-144; and Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), p. 332.
[303] Robinson, P.H., *Criminal Law Defenses* (St. Paul, Minnesota: West Publishing Co., 1984), p. 423-426, § 185(b).
[304] Ibid. p. 421, § 185(a).

To summarise, under US military law there is duty to obey lawful orders, obeying an unlawful order does not constitute a defence, "unless the subordinate did not know and could not reasonably have been expected to know that the act ordered was unlawful".[305] The order, even if manifestly unlawful, can always be a ground for mitigation of punishment.[306]

### *2.4.2. Germany and France*

According to § 5 WStG a soldier is criminally liable for committing a(n international) crime in obedience to superior orders if he has actual knowledge of the unlawfulness of the order or if the order was manifestly unlawful.[307] "With this provision the German legislator has adopted a rule of conditional liability, which is determined by an objective (manifest illegality) and a subjective (positive knowledge) criterion."[308] The fact that a mistake of law is a constituent component to a successful plea of superior orders, could imply that art. 17 StGB (*Verbottsirrtum*) is applicable; the mistake must have been avoidable in order to exculpate. Nill-Theobald strongly opposes this theory. She holds that article 5(I) WStG explicitly rejects the principle of avoidability, and thus a duty to investigate, as laid down in the general part of the Criminal Code. The rule on superior orders takes account of, and priority to, the duty to obey as a fundamental characteristic of military hierarchy.[309] Where under § 17 StGB the defendant in doubt must try to resolve his doubts, under the rule of § 5 WStG the doubting soldier should obey, because the fact that he has doubts means that the order is not *manifestly* unlawful.[310] The applicable German provisions (§ 11(II) SG and § 5 WStG) do stand for a rejection of the duty of blind obedience which § 47 MStGB provided for.[311]

The recent *Völkerstrafgesetzbuch* of 26 June 2002, provides in accordance with the provision in the ICC Statute, which it implements, for a rule similar to that of § 5(I)

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[305] *See also* Green, L.C., 'Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility', 175 *Military Law Review* (2003), pp. 309-384, p. 334; Nill-Theobald, C., *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA: zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrarechts* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1998), p. 142; Sliedregt, E.v., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), p. 317.

[306] *See also* Green, L.C., 'Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility', 175 *Military Law Review* (2003), pp. 309-384, p. 334.

[307] § 5(I) WStG.

[308] Nill-Theobald, C., *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA: zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrarechts* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1998), p. 116.

[309] Ibid. p. 118.

[310] Ibid. p. 121.

[311] Case law applying this provision will be discussed in Chapter 5 *infra*.

WStG, except that the application of this provision is limited to the war crimes enumerated in articles 8 through 14. Genocide and crimes against humanity are excluded from the scope of this defence.[312]

Article 122-4 of the French Code Pénal (CP) provides also for a conditional liability rule. The subordinate is not responsible unless the order was manifestly unlawful.[313] Desportes notes that in case of a manifestly unlawful order other defences are theoretically still possible, but in practice the defence of mistake of law is excluded, because a mistake about a manifestly unlawful order will almost always turn out to have been avoidable.[314] In case of war crimes, violations of international law, the defence of superior orders is however categorically excluded; it may only be a mitigating factor.[315] The same applies, according to article 213-4 CP in case of crimes against humanity.[316] Pradel also refers to a decree concerning military discipline of 28 July 1975 which provides that "a subordinate should not obey an order to commit a manifestly unlawful act or an act in violation of international customs of war and international conventions".[317] Hence, even in case of a non-manifestly unlawful order, the defence does not apply when the subordinate violated international law. If the subordinate does not obey an order because he mistakenly believes it to be illegal, he may be punished for disobedience.[318] Hence, in case of an unlawful act, not manifestly so, and not amounting to an international crime, the subordinate should obey.

According to Pradel and Desportes, the legislator has, by excluding the defence of superior orders in case of war crimes and crimes against humanity, correctly followed the IMT Nuremberg precedent; the fact of a superior order can only mitigate the punishment.[319] Here, not even the manifest illegality rule applies; unless all international crimes can be considered to be manifestly unlawful. The inaccuracy of this hypothesis will be discussed in chapters 4 and 6.

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312 See § 3 VStGB. On a discussion of the provision in the ICC Statute see Chapter 4 *infra*.
313 "*N'est pas pénalement responsible la personne qui accomplit un acte commandé par l áutorité légitimie, sauf sic et act est manifestement illegal*."
314 Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 668, § 725.
315 Pradel, Desportes and Le Gunehec refer to '*l'ordannace du 28 août 1944*', Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 300, § 315; andDesportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 667, § 724.
316 *See also* Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 301, § 315 and Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007), p. 667-668, § 724
317 Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 301, § 315.
318 Art. 8 Decree of 28 July 1975, Ibid. , p. 301, § 315.
319 Desportes, F. and F. Le Gunehec, *Droit pénal général* (Paris: Economica, 2007) p. 667, § 724; Pradel, J., *Manuel de droit pénal général* (Paris: Cujas, 2006), p. 300-301, § 315.

### *2.4.3 Conclusion*

The British Manual of Military Law excludes the defence of superior orders in case of war crimes; the superior order may only serve as a ground for mitigation of punishment. Under the relevant US provision a reasonable mistake of law as to the lawfulness of a superior order will lead to an acquittal. In case of a manifestly unlawful order the defendant can not be excused; his sentence may still be mitigated. The standard of manifestly unlawful is most likely to be the standard of a reasonable person, meaning the reasonable soldier in the same circumstances as the defendant.[320]

The German provisions provide also for a conditional liability rule; the subordinate is not responsible for the crimes he committed in obeying superior orders, unless he knew the orders to be unlawful or they were manifestly so. The defence is however, in accordance with the ICC Statute, excluded in case of crimes against humanity and genocide. Under French law, superior orders are in the case of international crimes, including war crimes, only a ground for mitigation of punishment.

To conclude it should be remarked that where a system recognizes both mistake of law and superior orders as complete defences, the requirements for the latter defence are more favourable to the defendant; a subordinate is not required to ascertain the lawfulness of the superior order he receives. In case of doubt, the order can not said to have been manifestly unlawful and the subordinate should obey.

## 2.5 CONCLUSION – COMPARATIVE ANALYSIS

The Anglo-American courts have tried to mitigate the drawbacks of the *ignorantia legis non excusat* rule by manipulating the distinction between fact and law; mistakes about laws "collateral" to penal law are considered to be mistakes of fact, which negate the required intent. American Courts have interpreted particular mental elements, like wilfully and knowingly, to require knowledge of the law. The American legislature has provided for a defence of mistake of law where the law has not been published or where the defendant

[320] Green, L.C., 'Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility', 175 *Military Law Review* (2003), pp. 309-384, p. 316.

relied on an authoritative interpretation of the law, that was later determined to be invalid.

Although the MPC provides otherwise, the presumption that everyone knows that law, seems to be rebuttable. The twofold structure of offences places this rebuttal within the required mental element. This seriously complicates the means by which to arrive at an adequate normative account of culpability when the required mental element is 'intent'. Placing the issue of mistake within the mental element of intent leaves no room for requiring the mistake to have been reasonable in order to exculpate any specific act.

Germany has chosen in favour of the *Schuldtheorie*, that is, consciousness of unlawfulness being a separate element of criminal responsibility. The *Unrechtsbewußtsein* is not an element that is related to the intent required by the crime definition, it is an element of culpability. Culpability, according to the principle of guilt an unassailable requirement for punishment, is required in addition to the fulfilment of the elements of the crime definition.

A threefold structure of offences allows for differentiation according to the unavoidability of the mistake. Such a structure is based on the distinction between justifications and excuses, between wrongdoing and attribution, and between decision rules and conduct rules. These distinctions, some of which have been illustrated previously in this chapter, will be the subject of Chapter 3. Further theorizing on the issue of mistake of law in the national context will help us analyse the proper place of this defence in international criminal law in Chapter 4.

The national systems under investigation that allow a defence of mistake of law, provide for a more lenient rule when the defendant made his mistake in obeying superior orders. Where the system does not recognize mistake of law as a defence, the same applies to superior orders, this is no defence and can only lead to mitigation of punishment. Whether or not superior orders should indeed be a separate defence to liability for international crimes is discussed in Chapter 4.