
It is well established that the principle *actus non facit reum nisi mens sit rea*, derived from the main legal systems of the world, also applies to the material part of international criminal law:

The mere accomplishment of *objective* elements of a crime does not ensue liability unless the perpetrator displays the necessary *subjective* element which must predominantly amount to intent and knowledge.1 If a defendant argues that he did not dispose of the required *mens rea*, he may raise the defense of mistake. Thus, the doctrine of mistake governs the reverse side of *mens rea* and the implications of its purported deficiencies.

A mistake may be of a factual nature, take the soldier who, due to his being short of sight, takes fleeing civilians as attacking enemy combatants and opens fire on them. But the mistake may also consist in a wrong legal judgment, exemplified in the situation that a soldier is incapable of conceiving the right meaning of the red crescent on a building and attacks it, or insofar as the perpetrator thinks that it is perfectly legal to enlist child soldiers in an army.2

In her doctoral thesis, the Dutch scholar Annemieke van Verseveld sheds light on this second category, commonly referred to as mistake of law, and its current handling in international criminal law. One core question provides the base for her study: Can a mistake of law exculpate the perpetrator of an international crime? (p. 2)

In defining the scope of mistake of law, Van Verseveld correctly distinguishes different types of relevant mistakes: A mistake of law might derive from ignorance of a norm, from a mistake about the scope of the norm, about an element of the crime definition, or the existence of grounds for justifications. All these imaginable types of errors result in the perpetrator’s mistake about the substantive wrongfulness of his act.

As to the consequences of the mistake, the author preliminarily postulates two divergent options: In the case of mistakes relating to the crime definition, any mistake, may it even have been avoidable or, in other terms, unreasonable, exculpates, since such a mistake would negate the required intent. On the contrary, all other mistakes of law, which do not apply to the material elements of the crime definition, only ensue an acquittal if the perpetrator cannot be fairly blamed for having made this mistake, i.e. when the mistake was unavoidable or reasonable. This latter category of blameworthiness reveals that Van Verseveld is inclined not

---

1 Cf Art. 30 ICC-Statute. One explicit exception stipulating a negligence threshold is contained in the doctrine of superior liability (cf. Art. 28 ICC-Statute).

2 For this particular mistake claim cf Prosecutor vs Lubanga, Decision on the confirmation of charges, ICC-01/04-01/06, 29 January 2007, paras. 294-316.
to adhere to the rule of *ignorantia legis neminem excusat* (ignorance of law is no excuse), stemming from Roman Law and still being upheld in Common law. Van Verseveld proceeds to illustrate how the *ignorantia legis* mantra has survived the centuries and is continuously present in American and English legal doctrine. In American penal law, she identifies some undertakings to avoid unjust results of the rule, which consist of incorporating a requirement of “knowledge of unlawfulness” into a crime definition (p. 13): Since the Model Penal Code contains the rule that all mistakes of law are valid defenses if they negate the mental element of the crime definition (MPC § 2.04(1)a), in these exceptional circumstances, a lack of knowledge of unlawfulness might result in an acquittal. Verseveld detects that this practice is very common in cases of *mala prohibita*, whereas in cases of *mala in se*, the *ignorantia legis* rule prevails. However, she criticizes that the practice is rather instrumentalist and arbitrary, and, most importantly, does not at all involve a normative judgment about the defendant’s personal culpability for his mistake (p. 17). The same approach, even more rigid, shapes the English doctrine.

Unsatisfied with the common law results, Van Verseveld resorts to the Civil law system of Germany: She extensively (pp. 27-33) portrays the famous 1952 judgment of the German Supreme Court, which ruled that awareness of unlawfulness constituted a sovereign element of the crime, dislocated from *mens rea*, and rather attached to the culpability of the perpetrator. A mistaken belief of unlawfulness, in German law, results in an acquittal if it was unavoidable. The author consecutively demonstrates her in-depth knowledge of delicate dogmatic questions of German criminal law, such as the “layman’s parallel evaluation” test for the establishment of *mens rea*, concurring mistakes of subsumption (*Subsumtionsirrtümer*) and the criteria for delineating avoidability from unavoidability. The section finishes with a summary of the highly disputed judgments in the border guard cases (pp. 40-47), where German courts eventually held that a mistake of law as to the killing of fleeing citizens had been avoidable, notwithstanding the former German Democratic Republic’s law explicitly encouraging and justifying such killings.

Delving into the core part of her book, the mistake of law-regime in international criminal law, Van Verseveld has to acknowledge that the German approach, her obvious preference, with its criterion of “knowledge of unlawfulness” directly bearing on culpability, is not reflected in the current *mens rea* and mistake regime of the International Criminal Court (p. 81). The Rome Statute of the ICC contains a specific mistake regulation in its Art. 32, a novelty which cannot be found in the UN ad hoc-tribunals’ statutes. However, this regulation, as the author contends, displays striking similarities with the Model Penal Code’s provision and its adherence to the *ignorantia legis* rule: Art 32 stipulates that a mistake of law excludes liability only when it negates the mental element required for the crime, leaving all other mistakes irrelevant. Van Verseveld argues that the complex character of international crimes, with their abundant references to extrinsic international law, humanitarian law, property law and principles of military necessity, warrants