Anglo-American Criminal law doctrine proceeds from the principle that a person cannot be found guilty of an offence unless two basic elements are established: the conduct or state of affairs which a particular offence prohibits (actus rea) and the state of mind which a person must have at the time of such conduct or state of affairs (mens rea). Criminal liability and punishment depend, moreover, upon the absence of certain excusing or justifying conditions. Justifications challenge the unlawful character of an act which, on the face of it, violates a criminal prohibition. When a justification-based defence is raised the argument is that, in the circumstances, an act which would normally constitute a criminal offence should be considered right or, at least, legally permissible. Excuses, by contrast, do not deny the unlawfulness of the act. What these defences call in question is the attribution of an apparently unlawful act to the actor. An accused who pleads a valid excuse cannot be held blameworthy and therefore culpable for having brought about the external elements of a criminal offence. Although the distinction between justification and excuse provides a sound basis for understanding the rationale of criminal law defences, attempts at a systematic classification of defences along these lines run up against serious difficulties. These difficulties have much to do with the fact that elements of both justification and excuse often appear to overlap in the moral basis of a legal defence. Many commentators agree that much of the confusion surrounding criminal law doctrine could have been avoided.
had the importance of the distinction been recognised at an earlier stage in the development of Anglo-American law. Nevertheless, relevant distinction in judicial decisions and legislative enactments in recent years manifest a renewed interest in the benefits of this approach to conceptualising problems of criminal responsibility.¹

1 Distinguishing between Justifications and Excuses

Central to the theory of justification and excuse is the distinction between primary or prohibitory norms and norms of attribution. The former impose general duties of conformity with minimum standards of conduct on members of society who are required to guide their conduct accordingly if they are to avoid the sanctions provided when these norms are infringed. These primary or prohibitory norms are complemented or modified by norms of justification which allow for exceptions to the application of the primary norms in prescribed circumstances. For example, the primary norm against committing acts of violence is complemented or modified by the provision which licenses the doing of such acts in self-defence or in defence of another. Justifications operate on the assumption that, when done under the prescribed circumstances, the act in question, harmful though it may be, should be assessed differently than when done under normal circumstances, i.e. under those in which the original prohibitory norm would apply. By contrast with the primary or prohibitory norms, the norms of attribution are specifically addressed to judges and juries as these norms lay down grounds for legally excusing someone who has violated a legal prohibition. Unlike claims of justification, the norms of attribution do not modify the primary norms. Their role is not to guide conduct but to allow for exceptions in ascribing moral blame as a prerequisite for legal culpability. According to professor Fletcher:

¹ See e.g. the decision of the Supreme court of Canada in Perka v. R., 2 S.C.R. 232, 42, C.R. (3D), 112, (1984). As J. Dickson pointed out in that case: "Criminal theory recognizes a distinction between 'justifications' and 'excuses'. A 'justification' challenges the wrongfulness of an action which technically constitutes a crime... In contrast, an 'excuse' concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor." (S.C.R., p. 247, C.R. 128).