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The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute

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1. Introduction: general principles in international criminal law

The search for general principles for transnational criminal justice is, in the end, a search for universally accepted or at least acceptable rules which allow for a fair and efficient handling of transnational criminal cases.[1] For achieving this aim, it is necessary to overcome the limits of the respective national perspectives and to concentrate on common values which may serve as guidance in all transnational cases regardless of where and in which jurisdiction they are tried. In this respect, it seems only natural to look for inspiration from international criminal law *stricto sensu* (ICL) which 'encompasses all norms that establish, exclude or otherwise regulate responsibility for crimes under international law.'[2] Since ICL assumes universal validity it cannot be based on one legal tradition alone[3] but must rather be consistent with the fundamental legal principles shared by the majority of nations. The need to enhance coherence between international and national criminal justice systems is reflected in Article 21(1) of the Statute of the International Criminal Court (ICC Statute) which establishes a three-tiered system of legal sources: The Court applies, in the first place, its own written law, in the second place, applicable treaties and the principles and rules of international law, and then in the third place, *general principles of law derived from national laws of legal systems of the world*. In other words, ICL derives its legitimacy from its adherence to universally recognized rules. It is thus a valuable source not only for developing transnational general principles but also for concretising their scope and content. The principle of personal guilt as a basic prerequisite for criminal liability, for example, is as such generally recognized in most societies. Its exact meaning, however, is less clear. This holds true in particular for the question of whether or not personal guilt presupposes (at least a potential) knowledge of the criminal prohibition. Can a person committing a crime be blamed for his[4] conduct if he honestly but wrongfully believes that he is acting within the limits of the law? In other words, is the general principle of personal guilt limited by a duty to know the law? These questions are particularly relevant in international and transnational cases, because in both

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1 In more detail S. Gless & J. Vervaele, 'Law Should Govern: Aspiring General Principles for Transnational Criminal Justice', 2013 *Utrecht Law Review* 9, no. 4, pp. 1-10.

2 G. Werle, *Principles of International Criminal Law,* 2009, marginal note (hereinafter: mn.) 83; in more detail on the characteristics of international criminal law *stricto sensu* see note 118 et seq. and accompanying text, infra.

3 K. Ambos, 'Remarks on the General Part of International Criminal Law', 2006 *Journal of International Criminal Justice* 4, no. 4, pp. 661-662; in general on the importance of the comparative law approach in ICL see the instructive discussion by M. Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Law', 2003 *Journal of International Criminal Justice* 1, no. 1, pp. 13-25.

4 The use of the male form (he/him/his) is to be understood as gender-neutral.

instances, the perpetrator may be faced with the demands of a legal order with which he is not familiar. In this article, I would like to explore the relationship between the concept of guilt and the handling of mistakes of law under the ICC Statute as a possible model for transnational justice. After some preliminary considerations of the principle of guilt (Section 2) I will give an overview on the ICC's rules on *mens rea* and mistakes (Section 3) and subsequently discuss whether these rules have to be modified in the light of a comparative analysis (Section 4.1) or the maxims of fairness and justice (Section 4.2)

2. The principle of personal guilt: some preliminary considerations

The principle of personal guilt (*nulla poena sine culpa*) is closely linked to the *mens rea* requirement. As a rule, modern criminal law assumes that causation of harm alone is not sufficient to establish criminal responsibility. Rather, in order to be blameworthy the defendant must have acted with a kind of guilty mind, i.e., criminal liability requires some sort of mental element.[5] This basic idea was already expressed in the Latin maxim *actus non facit reum nisi mens sit rea* – an act does not make a person guilty of a crime, unless the person's mind is also guilty.[6] However, this fundamental principle does not apply without exceptions. Some jurisdictions, among them the USA,[7] England & Wales,[8] France,[9] and Denmark,[10] provide for some form of strict liability, which allows attaching criminal responsibility to a person without having to prove that he was at fault. The European Court of Human Rights (ECtHR) accepts such limitations on the presumption of innocence[11] as long as they are confined 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[12] Given that international criminal tribunals are mandated with the task of prosecuting 'the most serious crimes of concern to the international community as a whole'[13] and the corresponding severity of the criminal charges, it would be disproportional[14] and thus incompatible with the rights of the accused to introduce a form of strict liability in international criminal law.[15] In line with these considerations, the International Criminal Tribunal for the former Yugoslavia (ICTY) qualified the *nulla poena sine culpa* principle as a 'basic assumption', 'the foundation of criminal responsibility',[16] and 'a general principle of law'.[17] According to the International Military Tribunal of Nuremberg (IMT), the principle of personal guilt fulfils two fundamental functions: (1) to avoid mass punishments, i.e., to individualize guilt

5 *Prosecutor v Delalić,* Judgement, Case No. IT-96-21-T, T. Ch. II, 16 November 1998, Para. 425; D.K. Piragoff & D. Robinson, 'Article 30', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* 2008, mn. 4; J. Pradel, *Droit pénal comparé,* 2008, mn. 64; G. Werle, *Principles of International Criminal Law,* 2009, mn. 391; R. Cryer, 'General Principles of Liability', in R. Cryer et al. (eds.), *An Introduction to International Criminal Law and Procedure*, 2010, p. 384; cf. also M. Hörster, *Die strict liability des englischen Strafrechts,* 2009, pp. 5-6; W.R. LaFave, *Criminal Law*, 2010, § 5.1.

6 A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, p. 890; D.K. Piragoff & D. Robinson, 'Article 30', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* 2008, mn. 5; M. Hörster, *Die strict liability des englischen Strafrechts,* 2009, p. 5.

7 W.R. LaFave, *Criminal Law*, 2010, § 5.5.

8 D. Ormerod, *Smith and Hogan's Criminal Law,* 2011, pp. 155 et seq.; M. Hörster, *Die strict liability des englischen Strafrechts,* 2009, pp. 44 et seq.

9 J. Pradel, *Droit pénal comparé,* 2008, mn. 80; cf. also *Salabiaku v France*, [1988] ECHR (Ser. A.), p. 379; *Pham Hoang v France*, [1992] ECHR (Ser. A.), p. 23.

10 Case C-326/88, *Anklagemyndighedengegen Hansen & Soen I/S*, [1990] ECR I-2911, Para. 18.

11 As to the interrelation between the principle of personal guilt and the presumption of innocence M. Hörster, *Die strict liability des englischen Strafrechts,* 2009, pp. 115-116; D. Ormerod, *Smith and Hogan's Criminal Law,* 2011, pp. 159-161; Gless & Vervaele, supra note 1; more reluctant, however, A. Ashworth, 'Four Threats to the Presumption of Innocence', 2006 *International Journal of Evidence & Proof,* Vol. 10, pp. 252-253, whose reasoning is, however, based on a purely procedural understanding of the presumption of innocence.

12 *Salabiaku v France*, [1988] ECHR (Ser. A.), p. 378, Para. 28; *Pham Hoang v France*, [1992] ECHR (Ser. A.), p. 23, Para. 33; cf. also the detailed case law analysis by M. Hörster, *Die strict liability des englischen Strafrechts,* 2009, pp. 116-123.

13 Art. 5 (1) of the Rome Statute for the International Criminal Court (ICC Statute), A/CONF.183/9, adopted on 17 July 1998 and entered into force on 1 July 2002.

14 As to the proportionality requirement in the context of strict liability offences see Case C-326/88, *Anklagemyndighedengegen Hansen & Soen I/S*, [1990] ECR I-2911, Para. 19.

15 Cf. A. Ashworth, 'Four Threats to the Presumption of Innocence', 2006 *International Journal of Evidence & Proof,* Vol. 10, p. 253 ('it is wrong to convict people of serious offences without proof of culpability (…) It is (…) an argument about the proper preconditions of criminal liability'); also W.R. LaFave, *Criminal Law*, 2010, § 5.5 (pp. 288-289): 'Usually (…) the statutory crime-without fault carries a relatively light penalty – generally of the misdemeanor variety.'; A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, p. 903.

16 *Prosecutor v Tadic,* Judgement, Case No. IT-94-1-A, A. Ch., 15 July 1999, Para. 186.

17 *Prosecutor v Delalić,* Judgement, Case No. IT-96-21-T, T. Ch. II, 16 November 1998, Para. 424.

and responsibility,[18] (2) 'to ensure that innocent persons will not be punished',[19] i.e. to safeguard and to complement the presumption of innocence.[20] Despite its general acceptance as a basic prerequisite for international criminal liability[21] and its fundamental importance for the legitimacy of a criminal conviction, the concrete meaning and content of the principle of personal guilt is less clear. Understood in a narrow sense, guilt refers solely to the psychological relation between the actor and the act. To this effect, guilt is equivalent to 'the particular mental state provided for in the definition of the offense' as for example purpose, knowledge and recklessness.[22] This aspect of the *nullum crimen sine culpa* principle was stressed by the U.S. Nuremberg Military Tribunal, concerned with the subsequent proceedings following World War II, which stated that 'the evidence must establish action (…) with *knowledge* of the essential elements of the crime'.[23] In a broader, more comprehensive sense, however, guilt also has a normative dimension which requires a moral blameworthiness on the part of the actor which goes beyond mere knowledge and intention.[24] As I will try to show in the following, the question if and under which circumstances a mistaken legal evaluation relieves the perpetrator from criminal responsibility depends largely on one's (narrow or broad) understanding of the principle of personal guilt.

3. Mental element and mistake in the ICC Statute – General rules

According to Article 30(1) ICC Statute, the defendant is 'criminally responsible and liable for punishment (…) only if the material elements [of the crime] are committed with intent and knowledge.' Thus, the mental element consists of a volitional component (intent) and a cognitive component (knowledge).[25] This approach is specified further in the following sections, which define these two *mens rea* components by reference to three different objects: conduct, consequence, and circumstances.[26] The defendant must act with intent with regard to the conduct he engages in, with knowledge in relation to the relevant circumstances, and with intent *and* knowledge in relation to the consequences, i.e., the results of the conduct.[27] Article 30 is complemented by Article 32 ICC Statute, which deals with mistakes of fact and

18 Cf. also *Prosecutor v Tadic,* Judgement, Case No. IT-94-1-A, A. Ch., 15 July 1999, Para. 186; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 94.

19 *Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, 1 October 1946, p. 469.

20 In more detail on the relationship between guilt and innocence see G.P. Fletcher, *The Grammar of Criminal Law – American, Comparative, and International. Volume I: Foundations,* 2007, pp. 301-303.

21 See in more detail K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, pp. 93 et seq.

22 D. Husak, '"Broad" Culpability and the Retributivist Dream', 2012 *Ohio State Journal of Criminal Law* 9, no. 2, p. 456; cf. also G.P. Fletcher, *The Grammar of Criminal Law – American, Comparative, and International. Volume I: Foundations,* 2007, pp. 307 et seq.; S.H. Kadish et al., *Criminal Law and its Process – Cases and Materials,* 2007, p. 213; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 94; A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, p. 903.

23 *U.S. v Krauch and Others* (*Farben* case), Judgment, 29 July 1948, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. 8/2,* 1997, p. 1153 (emphasis added).

24 A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, pp. 903-904; S.H. Kadish et al., *Criminal Law and its Process – Cases and Materials,* 2007, p. 213; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 94; in detail G.P. Fletcher, *The Grammar of Criminal Law – American, Comparative, and International. Volume I: Foundations,* 2007, pp. 319 et seq.; D. Husak, '"Broad" Culpability and the Retributivist Dream', 2012 *Ohio State Journal of Criminal Law* 9, no. 2, pp. 449 et seq.; see also L. Alexander, 'Culpability', in J. Deigh & D. Dolinko (eds.), *Philosophy of Criminal Law*, 2011, p. 237 ('Culpability is (...) a function of the actor's capacity to access and assess moral reasons and the quality of his deliberative circumstances.').

25 In detail K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, pp. 266 et seq.; cf. also A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, p. 907; K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts,* 2004, p. 761; M.E. Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective', 2008 *Criminal Law Forum* 19, no. 3-4, p. 479; M.E. Badar, *The Concept of mens rea in International Criminal Law – the case for a unified approach*, 2013, p. 387; G. Werle, *Principles of International Criminal Law,* 2009, mn. 401; W. A. Schabas, *The International Criminal Court,* 2010, p. 475; E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, p. 46.

26 *Prosecutor v Lubanga,* Judgement, Doc. No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, Para. 1007; K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of Legal Issues', 2012 *International Criminal Law Review* 12, no. 2, p. 148.

27 Cf. in more detail K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts,* 2004, pp. 764-772; also R.S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', 2001 *Criminal Law Forum* 12, no. 3, pp. 305-306; M.E. Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective', 2008 *Criminal Law Forum* 19, no. 3-4, pp. 474-476; G. Werle, *Principles of International Criminal Law,* 2009, mn. 402; E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, p. 46; H. Satzger, *International*

mistakes of law. Although the traditional distinction between these two kinds of mistakes is upheld, they are treated equally in that both are regarded as relevant only if they negate the mental element required by the respective crime. It is not so much the nature of the mistake (as one of fact or law) but its effect (the negation of the required mental element) that counts.[28] The concept of mistake is therefore closely linked to that of *mens rea* as defined in Article 30 ICC Statute.[29]

If the defendant – due to an incorrect legal assessment of a given situation – honestly but wrongfully believes that his conduct does not constitute an international crime, the crucial question is if and under which circumstances such a mistake results in a lack of knowledge as required by Article 30 ICC Statute. If 'knowledge' was to include consciousness of the legal wrong, then mistakes of law would generally negate the required mental element and provide a full defence.[30] This was, for example, the approach of the so-called *Vorsatztheorie* (theory of intent)[31] prevailing in Germany at the beginning of the 20th century. According to this theory, a defendant may only be convicted of an intentional crime if he knew that he was committing a wrong. Otherwise, he could only be held responsible for negligence, if applicable.[32] This approach, however, proved to be unsatisfactory and in particular misled the courts to develop a presumption of consciousness.[33] Since a landmark decision of the German Federal Court of Justice (*Bundesgerichtshof*),[34] German criminal law therefore follows the *Schuldtheorie* (theory of guilt).[35] Consciousness of the legal wrong has since then no longer been regarded as part of the intent. Rather, unavoidable mistakes of law are said to exclude the defendant's culpability, which means that he cannot be blamed for having fulfilled the elements of an offence.[36] In modern common law, as well, the *mens rea* requirement is understood in a narrow sense as referring to legal and not moral guilt.[37] Awareness

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and European Criminal Law, 2012, § 13 mn. 23 and *Prosecutor v Lubanga,* Judgement, Doc. No. ICC-01/04-01/06-2842, T. Ch.I, 14 March 2012, Para. 1007.

28 Cf. also R.S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', 2001 *Criminal Law Forum* 12, no. 3, pp. 308, 311; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 370; G. Werle, *Principles of International Criminal Law,* 2009, mn. 569; I. Bantekas, 'Defences in International Criminal Law', in D. McGoldrick et al. (eds.), *The Permanent International Criminal Court – Legal and Policy Issues*, 2004, p. 281.

29 Cf. also H.-H. Jescheck, 'The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute', 2004 *Journal of International Criminal Justice* 2, no. 1, p. 47; G. Werle, *Principles of International Criminal Law,* 2009, mn. 569 ('no independent significance' of Article 32 ICC Statute); E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, pp. 281-282; O. Triffterer, 'Article 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* 2008, mn. 11-2.

30 K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 370; cf. also E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, p. 284.

31 Translation according to G. Arzt, 'The Problem of Mistake of Law', 1986 *Brigham Young University Law Review*, no. 3, p. 715.

32 See in more detail C. Roxin, *Strafrecht AllgemeinerTeil – Band 1, Grundlagen, Der Aufbau der Verbrechenslehre*, 2006, § 7 mn. 44; also H.-H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts – Allgemeiner Teil*, 1996, pp. 452-453; G. Arzt, 'The Problem of Mistake of Law', 1986 *Brigham Young University Law Review*, no. 3, pp. 715-716.

33 Cf. for example the decision of the German Supreme Court for the British Zone (*Oberster Gerichtshof für die Britische Zone* – OGHBrZ) OGHSt 1, 67 (69) and the critical analysis by K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts,* 2004, pp. 173-175.

34 German Federal Court of Justice, BGHSt 2, 194; in more detail A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, pp. 27-33, who also provides for an English translation of the relevant parts of the decision.

35 Cf. H.-H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts – Allgemeiner Teil*, 1996, p. 452; C. Roxin, *Strafrecht Allgemeiner Teil – Band 1, Grundlagen, Der Aufbau der Verbrechenslehre,* 2006, § 7 mn. 46.

36 Cf. the differentiation between mistakes of fact and mistakes of law in the German Criminal Code (*Strafgesetzbuch*):
'Section 16 – Mistake of fact
(1) Whosoever at the time of the commission of the offence is unaware of a fact which is a statutory element of the offence shall be deemed to lack intention. Any liability for negligence remains unaffected.
Section 17 – Mistake of law
If at the time of the commission of the offence the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the sentence may be mitigated pursuant to section 49 (1).'
Translation by M. Bohlander, *The German Criminal Code – A Modern English Translation,* 2008, p. 41. The original text reads as follows:
'*§ 16 - Irrtum über Tatumstände*
(1) Wer bei Begehung der Tat einen Umstand nicht kennt, der zum gesetzlichen Tatbestand gehört, handelt nicht vorsätzlich. Die Strafbarkeit wegen fahrlässiger Begehung bleibt unberührt.
§ 17 - Verbotsirrtum
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.'

37 D. Ormerod, *Smith and Hogan's Criminal Law*, 2011, p. 105; J. Herring, *Criminal Law – Text, Cases, and Materials*, 2010, p. 136; cf. also K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, p. 370; E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, p. 217.

of the criminality of the conduct is not required.[38] In particular, § 2.02(9) of the Model Penal Code on culpability as to the illegality of conduct provides that

> '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.'

In other words, 'knowledge of the law defining the offense is not itself an element of the offense'.[39]

Turning back to the ICC Statute, Article 30 requires that the *material elements* of the crime are committed with intent and knowledge and thus ties the mental element to the *actus reus*, i.e., the objective elements of the crimes as laid down in Articles 6 to 8*bis* ICC Statute.[40] Accordingly, knowledge is defined as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events', which clearly refers to the factual and not the legal situation.[41] Article 30 ICC Statute only requires a certain 'psychological relation between the actor and act',[42] but not culpability in a broad and more comprehensive sense.[43] In line with the already mentioned national approaches, the ICC Statute's understanding of 'knowledge' does not, in principle, include consciousness of the legal wrong.[44] Consequently, mistakes of law leave, as a rule, the mental element intact and are therefore – according to Article 32 ICC Statute – irrelevant for criminal responsibility.[45] Imagine, for example, that a soldier shoots at a person who he believes to be an enemy combatant, but who is in fact a civilian. Due to his unawareness of the victim's civilian status, he does not realize in a *factual* sense that he is shooting at a protected person and thus does not fulfil the mental element required by Article 8(2)(a)(i) ICC Statute. If the soldier, to the contrary, shoots at a civilian with full awareness of the factual situation, but erroneously believes that the law of armed conflict allows him to do so, he nevertheless knows that he is shooting at a civilian. His mistake of law does not affect his *mens rea* and thus does not relieve him from criminal responsibility.[46] The situation might be different if the mistake concerns a normative element of the offence, which requires legal evaluation.[47] Article 8(2)(b)(vii) ICC Statute, for example, penalises the improper use of certain distinctive emblems. The requirement of an *improper* use constitutes a circumstance in terms of Article 30(3) ICC Statute, which means that the defendant must be aware of the prohibited

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38 A.P. Simester et al., *Simester and Sulllivan's Criminal Law – Theory and Doctrine*, 2010, p. 125.

39 S. Vogeley, 'The Mistake of Law Defense in International Criminal Law', in S. Yee (ed.), *International Crime and Punishment*, 2003, p. 94. In a similar vein *Prosecutor v Jović*, Judgement, Case Nos. IT-95-14 & 14/2-R77-A, A. Ch., 15 March 2007, Para. 27; *Prosecutor v Brima et al.*, Judgement, Case No. SCSL-2004-16-A, A. Ch., 22 February 2008, Para. 296; A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 11.

40 Cf. in more detail D.K. Piragoff & D. Robinson, 'Article 30', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* 2008, mn. 6; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, pp. 270 et seq.

41 A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 83.

42 K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 370; cf. also A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, pp. 903-904.

43 A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I*, 2002, pp. 903-904; cf. also H.-H. Jescheck, 'The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute', 2004 *Journal of International Criminal Justice* 2, no. 1, p. 47.

44 A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 85; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, p. 370; in the same vein H.-H. Jescheck, 'The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute', 2004 *Journal of International Criminal Justice* 2, no. 1, p. 47.

45 M. Scaliotti, 'Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility', 2002 *International Criminal Law Review* 2, no. 1, p. 12; A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, pp. 89-90; A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I*, 2002, p. 943; O. Triffterer, 'Article 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 15; cf. also *Prosecutor v Brima et al.*, Judgement, Case No. SCSL-2004-16-A, A. Ch., 22 February 2008, Para. 296: 'Furthermore, it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers.'; *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, Doc. No.ICC-01/04-01/06-803, P.-T. Ch. I, 29 January 2001, Para. 304 ('the scope of a mistake of law within the meaning of Article 32(2) is relatively limited').

46 Example based on K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, pp. 370-371; cf. also K.J. Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute', 2008 *Journal of International Criminal Justice* 6, no. 3 pp. 420-421; G. Werle, *Principles of International Criminal Law,* 2009, mn. 573.

47 O. Triffterer, 'Article 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 21; G. Werle, *Principles of International Criminal Law,* 2009, mn. 573; H. Satzger, *International and European Criminal Law*, 2012, § 13 mn. 41.

nature of the respective use.[48] If he, to the contrary, wrongfully assumes that he has complied with all relevant laws and regulations, his mistake of law negates the required mental element. This is implicitly confirmed by the elements of crimes according to which the perpetrator must know of the prohibited nature of the use of UN signs. With regard to all other distinctive emblems the Elements of Crimes adopt a 'should have known standard'[49] and thus at least[50] relieve the defendant from criminal responsibility if his ignorance was unavoidable or reasonable.

This does not mean, however, that every mistake of law concerning normative elements necessarily negates the required *mens rea*. The general introduction to the final version of the ICC's Elements of Crimes states that '[w]ith respect to mental elements associated with elements involving value judgement (…) it is not necessary that the perpetrator personally completed a particular value judgement (…).'[51] In doing so, the delegates clearly wanted to minimise or even exclude the possibility of a relevant mistake of law with regard to normative elements.[52] In a similar vein, the *Lubanga* Pre-Trial Chamber held that 'the defence of mistake of law can succeed (...) only if Thomas Lubanga Dyilo was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning)'.[53] If, however, awareness of the social relevance (layman's parallel evaluation test / *Parallelwertung in der Laiensphäre*) is sufficient,[54] it is not necessary that the perpetrator comprehends the relevant legal definition, as long as he – from his layman's perspective – perceives the social significance of the normative element.[55] The scope of relevant mistakes of law is thus very limited. Despite the fact that Article 32 ICC Statute provides for, at first glance, an equal treatment of mistakes of fact and mistakes of law,[56] its reference to the *mens rea* requirement excludes, to a large extent, the latter as a valid defence.

4. Putting the ICC's approach to the test

The ICC's rules on mistake of law seem to be clear and straightforward: ignorance of the law is not a valid defence, unless it negates – by way of exception – the actor's *mens rea*. If this is not the case, it is deemed irrelevant whether or not the actor's misconception was reasonable or unavoidable.[57] Article 32(2)(cl. 2) ICC Statute is thus based on a narrow understanding of the principle of personal guilt which focuses exclusively on the perpetrator's psychological state, thereby neglecting the normative

48 M. Cottier, 'Article 8', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 78; cf. also G. Werle, *Principles of International Criminal Law*, 2009, mn. 1233.

49 In more detail on this differential treatment M. Cottier, 'Article 8', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 78.; G. Werle, *Principles of International Criminal Law,* 2009, mn. 1233; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, 2003, p. 196.

50 As to the contested question whether the elements may deviate from the subjective standard set out by Art. 30 ICC Statute, cf. M. Kelt & H. von Hebel, 'General Principles of Criminal Law and the Elements of Crimes', in R.S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, 2001, pp. 29-30; D.K. Piragoff & D. Robinson, 'Article 30', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 14; O. Triffterer, 'Can the "Elements of Crimes" narrow or broaden responsibility for criminal behavior defined in the Rome Statute?', in C. Stahn & G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, 2009, pp. 381-400.

51 No. 4 General Introduction of the Elements of Crimes, ICC-ASP/1/3(part II-B), adopted and entered into force on 9 September 2002.

52 Critically see K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, p. 373; for a broader application of Article 32(2) ICC Statute also T. Weigend, 'Intent, Mistake of Law, and Co-Perpetration in the Lubanga Decision on Confirmation of Charges', 2008 *Journal of International Criminal Justice,* Vol. 6, p. 476 and K.J. Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute', 2008 *Journal of International Criminal Justice* 6, no. 3, pp. 423-442 who introduce a new category of so-called mistakes of legal element.

53 *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, Doc. No. ICC-01/04-01/06-803, P.-T. Ch. I, 29 January 2001, Para. 305; critical of this is T. Weigend, 'Intent, Mistake of Law, and Co-Perpetration in the Lubanga Decision on Confirmation of Charges', 2008 *Journal of International Criminal Justice* 6, no. 3 p. 476; concurring is M.E. Badar, *The Concept of mens rea in International Criminal Law – the case for a unified approach*, 2013, p. 415.

54 In this vein also O. Triffterer, 'Article 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 22-23; G. Werle, *Principles of International Criminal Law*, 2009, mn. 579; H. Satzger, *International and European Criminal Law*, 2012, § 13 mn. 41; critically K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 373.

55 O. Triffterer, 'Article 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 24; H. Satzger, *International and European Criminal Law*, 2012, § 13 mn. 41.

56 Cf. note 28 and accompanying text, supra.

57 G. Werle, *Principles of International Criminal Law*, 2009, mn. 578; cf. also E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, p. 284.

component of blameworthiness.[58] However, it seems questionable whether this approach has a sound basis in comparative law and/or assists the Court in the proper and fair administration of justice.

4.1. A brief comparative analysis

As was already pointed out in Section 1, Article 21(1) ICC Statute allows the Court to apply *general principles of law derived from national laws of legal systems of the world*. Although these principles are designed merely as a subsidiary source of law,[59] their role is not limited to closing legal gaps. Rather, comparative law analysis may also be a useful tool for interpreting imprecise legal rules and enhancing legal reasoning.[60] Moreover, they may even serve as a countercheck to the correct and meaningful application of the ICC's statutory rules. In line with the inductive-comparative approach outlined by Gless and Vervaele,[61] I will therefore try to give a brief overview of the treatment of mistakes of law in some national and international jurisdictions.

With its very limited recognition of mistakes of law as a valid defence, Article 32(2)(cl. 2) ICC Statute adopts, in principle, the old Roman rule *error iuris nocet* or *ignorantia iuris neminem excusat* – ignorance of the law is no excuse.[62] This restrictive approach according to which mistakes of law do not relieve a person from criminal responsibility is still valid in many common law jurisdictions.[63] As was pointed out by the U.S. Supreme Court in *Cheek v United States*

> 'The general rule that ignorance of the law is no defence to criminal prosecution is deeply rooted in the American legal system (...) Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common law rule has been applied by the Court in numerous cases construing criminal statutes.'[64]

Likewise, Section 19 of the Canadian Criminal Code stipulates that '[i]gnorance of the law by a person who commits an offence is not an excuse for committing that offence'. Similar provisions can be found in the Criminal Code of India[65] and in the Australian Criminal Code Act 1995.[66] Right from the start, international criminal tribunals have adhered to the traditional common law approach to mistakes of law.[67] Already in the proceedings against *Flick et al.*, the U.S. Nuremberg Military Tribunal held that ignorance of the law 'will not excuse guilt but may mitigate punishment'.[68] According to the settled

58 A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I*, 2002, p. 906.

59 In more detail on Art. 30 ICC Statute see K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, pp. 73 et seq.

60 F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, 2008, p. 190; K. Ambos, 'The first Confirmation Decision of the International Criminal Court: Prosecutor v. Thomas Lubanga Dyilo', in L. Kotsalis et al. (eds.), *Essays in Honour of Argyrios Karras*, 2010, p. 989.

61 Gless & Vervaele, supra note 1.

62 A. Cassese, *International Criminal Law*, 2008, p. 294; T. Weigend, 'Zur Frage eines "internationalen" Allgemeinen Teils', in B. Schünemann et al. (eds.), *Festschrift für Claus Roxin*, 2001, p. 1392; A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 83; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 370; cf. also E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, p. 285; for a different view cf. Y. Dinstein, 'Defences', in G.K. McDonald & O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts, Vol. I., Commentary,* 2000, p. 377.

63 D. Ormerod, *Smith and Hogan's Criminal Law*, 2011, pp. 336-338; J. Herring, *Criminal Law – Text, Cases, and Materials,* 2010, p. 699; P.H. Robinson, 'United States', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 584; C. Safferling, *Vorsatz und Schuld*, 2008, pp. 379-380; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, pp. 336-367; A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 10; cf. also A. Ashworth, *Principles of Criminal Law*, 2009, p. 219.

64 *Cheek v United States*, 498 US 192, 199 (1991).

65 Art. 79 Indian Criminal Code: 'Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.'

66 Section 9.3(1) of the Australian Criminal Code Act 1995: 'A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.'

67 A. Eser, '"Defences" in War Crime Trials', in Y. Dinstein (ed.), *War Crimes in International Law*, 1996, p. 267.

68 *U.S. v Flick and Others* (*Flick* case), Judgement, 22 December 1947, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. 6,* 1997, p. 1208; confirmed in *U.S. v Krupp and Others* (*Krupp* case), Judgement, 31 July 1948, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. 9/2,* 1997, p. 1378.

case law of the ICTY – which had to deal with alleged mistakes of law predominantly in the context of contempt proceedings – 'a person's misunderstanding of the law does not, in itself, excuse a violation of it'.[69] The Special Court for Sierra Leone (SCSL) even seems to generally exclude mistakes of law as a valid defence in international criminal law.[70] Article 32(2)(cl. 2) ICC Statute with its very limited recognition of mistakes of law seems to fit in perfectly in the previous common law-oriented international jurisprudence.

One must, however, not ignore that many jurisdictions recognize mistakes of law as a discrete defence which may under certain circumstances exclude the actor's criminal responsibility altogether. In contrast to the traditional common law approach, these jurisdictions do not treat consciousness of the legal wrong (merely) in the context of *mens rea*[71] but as a prerequisite for the actor's personal blameworthiness.[72] In this regard, the most significant example might be that of Italy. Article 5 of the Italian Criminal Code stipulates that 'no one can rely on his ignorance of the law in order to be excused'.[73] Despite the fact that this provision clearly corresponds to the strict *ignorantia iuris neminem excusat* rule, the Italian Constitutional Court held in 1988 that its verbatim application would unduly infringe upon the principle of personal guilt. In order to avoid unjust results, the Court therefore ordered that Article 5 of the Italian Criminal Code must not be applied if the mistake of law was unavoidable.[74] Similarly, many other jurisdictions – like Germany,[75] Austria,[76] Switzerland,[77] France,[78] Spain,[79] Sweden,[80] Poland,[81] Turkey,[82] Israel,[83] Korea,[84] and China[85] – also relieve the actor from criminal responsibility if he cannot be blamed for his ignorance of the law, i.e., if his mistake of law was unavoidable or reasonable.

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69 *Prosecutor v Florence Hartmann*, Judgement on Allegations of Contempt, Case No. IT-02-54-R77.5, Specially Appointed Chamber, 14 September 2009, Para. 65; cf. also *Prosecutor v Jović*, Judgement, Case Nos. IT-95-14 & IT-95-14/2-R77, T. Ch. III, Para. 21; *Prosecutor v Jović*, Judgement, Case Nos. IT-95-14 &14/2-R77-A, A. Ch., 15 March 2007, Para. 27; *Prosecutor v Haxhiu*, Judgement on Allegations of Contempt, Case No.T-04-84-R77.5, T. Ch. I, 24 July 2008, Para. 29.

70 *Prosecutor v Brima et al.,* Judgement, Case No. SCSL-04-16-T, T. Ch. II, 20 June 2007, Para. 732; *Prosecutor v Brima et al.*, Judgement, Case No. SCSL-2004-16-A, A. Ch., 22 February 2008, Para. 296.

71 On the so-called *Vorsatztheorie* cf. note 31 and accompanying text, supra.

72 K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, p. 368.

73 Translation according to K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, p. 368 with fn. 635. The original text reads as follows: '*Art. 5 Ignoranza della legge penale – Nessuno può invocare a propria scusa l'ignoranza della legge penale*'.

74 Corte Costituzionale, Sentenza 364/1988, 24 March 1988.

75 Cf. § 17 German Criminal Code as quoted supra, note 36.

76 § 9 Austrian Criminal Code: 'If – due to a mistake of law – the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if he cannot be blamed for his ignorance.'
Translation by the author. The original text reads: '*Wer das Unrecht der Tat wegen eines Rechtsirrtums nicht erkennt, handelt nicht schuldhaft, wenn ihm der Irrtum nicht vorzuwerfen ist.*'

77 Art. 21 of the Swiss Criminal Code: 'Any person who is not and cannot be aware that, by carrying out an act, he is acting unlawfully, does not commit an offence. If the error was avoidable, the court shall reduce the sentence.'
English translation according to <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf>. The original text provides: '*Wer bei Begehung der Tat nicht weiss und nicht wissen kann, dass er sich rechtswidrig verhält, handelt nicht schuldhaft. War der Irrtum vermeidbar, so mildert das Gericht die Strafe.*'

78 Art. 122-3 of the French Criminal Code: 'A person is not criminally liable who establishes that he believed he could legitimately perform the action because of a mistake of law that he was not in a position to avoid.'
English translation according to <http://legislationline.org/documents/section/criminal-codes>.The original text reads as follows: '*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.*'

79 Art. 14(1) of the Spanish Criminal Code: 'An unavoidable mistake concerning an element of the crime excludes criminal responsibility.'
Translation by the author. The original text provides: '*El error invencible sobre un hecho constitutivo de la infracción penal excluye la responsabilidad criminal.*'

80 K. Cornils, 'Gründe für den Ausschluss der Strafbarkeit – Schweden', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, pp. 472-428.

81 E. Weigend, 'Gründe für den Ausschluss der Strafbarkeit – Polen', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, pp. 346-347.

82 S. Tellenbach, 'Gründe für den Ausschluss der Strafbarkeit – Türkei', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, pp. 530-531.

83 I. Kugler, 'Israel', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 378.

84 M. Son, 'Gründe für den Ausschluss der Strafbarkeit – Korea', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, pp. 242-243.

85 T. Richter & Y. Zhao, 'Gründe für den Ausschluss der Strafbarkeit – China', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, pp. 29-30.

In a nutshell, the strict *error iuris nocet* rule is in many national jurisdictions regarded as inconsistent with the principle of personal guilt (in a broad sense). The importance of this finding – and its consequences for the legitimacy of the ICC's approach – are increased by the fact that even in common law systems there is a tendency towards a more flexible treatment of mistakes of law. Most notably, § 2.04(3) of the Model Penal Code provides that

> '(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.'

These two exceptions from the *error iuris nocet* rule – non-publication of the law and reliance upon an official statement – are two typical cases in which the actor cannot be blamed for his ignorance of the law. In legal practice, courts sometimes pick up on the *rationale* of § 2.04(3) Model Penal Code,[86] or interpret a requirement of knowledge of unlawfulness into the offence definition, so that a mistake of law indeed negates the required *mens rea*.[87] Even in common law systems the *error iuris nocet* rule does not seem to be as uncontested as it used to be.[88]

4.2. Considerations of fairness and justice

Having found that Article 32(2)(cl. 2) ICC Statute has no solid basis in comparative law, the question arises whether it – nevertheless – allows for a fair and efficient handling of (international) cases.[89] As was pointed out by the U.S. Supreme Court, the *error iuris nocet* rule is based on the assumption 'that

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86 Cf. A. Ashworth, *Principles of Criminal Law*, 2009, p. 219; S.H. Kadish et al., *Criminal Law and its Process – Cases and Materials,* 2007, pp. 279 et seq.; M. Lippman, *Contemporary Criminal Law – Concepts, Cases, and Controversies*, 2010, p. 308; J. Herring, *Criminal Law – Text, Cases, and Materials,* 2010, p. 700; K. Roach, 'Canada', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 117; S. Reza, 'Egypt', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 192; S. Summers, 'Gründe für den Ausschluss der Strafbarkeit – Schottland', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, p. 382; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, p. 367. As to the similar discussion / developments in other countries see S. Tellenbach, 'Iran', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 334; J.O. Haley, 'Japan', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, pp. 405-406; S.C. Thaman, 'Russia', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 428; A.B. Kouassi, 'Gründe für den Ausschluss der Strafbarkeit – Côte d'Ivoire', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, pp. 62-65.

87 Cf. for example *Cheek v United States*, 498 US 192, 200 (1991); for further references see the detailed case law analysis by A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, pp. 10 et seq.; also J. Herring, *Criminal Law – Text, Cases, and Materials,* 2010, p. 700; S.H. Kadish et al., *Criminal Law and its Process – Cases and Materials,* 2007, pp. 277 et seq.; K. Roach, 'Canada', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 117.

88 For the United Kingdom see A.J. Ashworth, 'United Kingdom', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 543; for Scotland see S. Summers, 'Gründe für den Ausschluss der Strafbarkeit – Schottland', in U. Sieber & K. Cornils (eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung, Allgemeiner Teil, Teilband 5, Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung*, 2010, p. 382; for the United States of America see P.H. Robinson, 'United States', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, pp. 583, 584 (reliance on an official misstatement of law and a mistake due to the unavailability of a law as exceptions to the *ignorance of the law is no excuse* rule); S.H. Kadish et al., *Criminal Law and its Process – Cases and Materials,* 2007, pp. 273 et seq.; M.D. Dubber & M.G. Kelmann, *American Criminal Law: Cases, Statutes, and Comments,* 2009, pp. 353 et seq.; for Australia see S. Bronitt, 'Australia'. in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 70 ('The proposition that ignorance or mistake of law is no excuse is deceptive in its simplicity because there are many other defences that permit mistaken beliefs in the legality of the defendant's actions to excuse wrongdoing. These defences include the claim of right, due diligence, and lawful excuse.'); for Canada see K. Roach, 'Canada', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 117 ('mistaken belief in a legal entitlement to property as a valid defence to theft, arson, or mischief of property / officially induced error as a an exception to the principle that ignorance of the law is not an excuse.'); for Egypt see S. Reza, 'Egypt', in K.J. Heller & M.D. Dubber, *The Handbook of Comparative Criminal Law*, 2011, p. 192.

89 This corresponds roughly to the teleological-deductive approach outlined by Gless & Vervaele, supra note 1.

the law is definite and knowable'.[90] However, one must be well aware that the 'ignorance of the law is no excuse' dogma was created at a time when, in principle, only the '*mala in se*' (acts wrong in themselves or inherently wrong) were criminalized. In these times, everybody could indeed be presumed to know the law. Nowadays, the '*mala prohibita*'[91] principle is more widespread, i.e., the prohibition of acts which are wrong only because they are prohibited by law. In today's societies with their complex and fragmented regimes of criminal law, nobody can reasonably be expected to know all offences, let alone their mostly highly normative elements.[92] This was even recognized by the U.S. Supreme Court which held that the 'proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed' on him.[93] If the presumption of knowledge of the law is, however, 'a fiction bordering on the absurd'[94] and an absolute duty to know the law is impossible to fulfil, then the *error iuris* rule loses its legitimacy.[95] It would be unfair to convict a person who – for understandable reasons – was unaware that he was committing a wrong and thus cannot be blamed for his ignorance. In this vein, the Nuremberg Military Tribunals, although categorically excluding mistake of law as a valid defence, already admitted that

> 'The rule that every man is presumed to know the law necessarily carries with it as a corollary the proposition that some persons may be found guilty of a crime who do not know the law and consequently that they may have imputed to them criminal intent in cases of which they have no realization of the wrongfulness of the act, much less an actual intent to commit the crime.'[96]

One may wonder, however, if the *error iuris nocet* rule can still reasonably be applied in *international* criminal law. At first glance, it seems obvious that everyone should be aware that he is committing a legal wrong when he fulfils the *actus reus* of one of 'the worst crimes known to humanity'.[97] Although it is true that no one can reasonably claim that he did not know that the systematic slaughter of innocent civilians is a criminal act, war crimes provisions – in particular their complex interplay with the often rather imprecise rules of international humanitarian law – are a lot more difficult to assess.[98] Imagine, for example, a soldier who kills a peacekeeper in the mistaken belief that peacekeepers are combatants and thus legitimate military targets. Or to make the case more complex: The soldier knows that peacekeepers are, as a rule, protected persons but assumes in full awareness of the relevant factual circumstances that the peacekeeper in front of him has lost his protective status because his unit has directly taken part in the hostilities.[99] Later, he is told by a criminal court that the peacekeeping mission has acted within the limits

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90 *Cheek v United States*, 498 US 192, 199 (1991); cf. also A. Cassese, *International Criminal Law*, 2008, pp. 294-295; S.H. Kadish et al., *Criminal Law and its Process – Cases and Materials,* 2007, p. 272; W. LaFave, *Criminal Law*, 2010, § 5.6(d); M. Lippman, *Contemporary Criminal Law – Concepts, Cases, and Controversies*, 2010, p. 308.

91 In more detail on the distinction between '*mala in se*' and '*mala prohibita*' see K. Ambos, 'Nulla poena sine lege in International Criminal Law', in R. Haveman & O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, 2006, pp. 21-22.

92 D.M. Kahan, 'Ignorance of Law *is* an Excuse – but only for the Virtuous', 1997-1998 *Michigan Law Review* 96, no. 1, pp. 129-130; D. Ormerod, *Smith and Hogan's Criminal Law,* 2011, p. 337; A. Ashworth, *Principles of Criminal Law*, 2009, pp. 220-222; W. LaFave, *Criminal Law*, 2010, § 5.6(d); K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 375; K. Ambos & S. Bock, 'Commentary', in A. Klip & G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, *Vol. 30*: *The International Criminal Court*, 2013, pp. 239-240.

93 *Cheek v United States*, 498 US 192, 199-200 (1991).

94 K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 375; cf. also W. LaFave, *Criminal Law*, 2010, § 5.6(d).

95 In a similar vein D.M. Kahan, 'Ignorance of Law *is* an Excuse – but only for the Virtuous', 1997-1998 *Michigan Law Review* 96, no. 1, p. 134.

96 *U.S. v Krupp and Others* (*Krupp* case), Judgement, 31 July 1948, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. 9/2*, 1997, p. 1378.

97 Cf. H. Satzger, *International and European Criminal Law*, 2012, § 13 mn. 41; A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 83.

98 T. Weigend, 'Zur Frage eines "internationalen" Allgemeinen Teils', in B. Schünemann et al. (eds.), *Festschrift für Claus Roxin,* 2001, p. 1392; S. Gless, *Internationales Strafrecht*, 2011, mn. 735; W.A. Schabas, *An Introduction to the International Criminal Court,* 2011, pp. 242-243; E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, pp. 285-286; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2013, p. 375; in a similar vein A. Cassese, *International Criminal Law,* 2008, pp. 296-298; this is also acknowledged by H. Satzger, *International and European Criminal Law*, 2012, § 13 mn. 41; cf. also the critical remarks on the *error iuris* rule in *U.S. v Krupp and Others* (*Krupp* case), Judgement, 31 July 1948, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. 9/2,* 1997, p. 1378.

99 Attacks against peacekeepers only constitute a war crime as long as the peacekeepers are entitled to the protection given to civilians under the international law of armed conflict. This means that they lose their protective status when they take a direct part in hostilities

of its right to self-defence so that the attacked peacekeeper was still 'entitled to the protection given to civilians (…) under the international law of armed conflict' (Article 8(2)(b)(iii) ICC Statute).[100] Arguably, the erroneous application of international humanitarian law does not negate the soldier's intent to attack personnel involved in a peacekeeping mission in terms of Article 8(2)(b)(iii) ICC Statute, because he nevertheless perceived the social significance of the relevant facts and legal norms.[101] This is confirmed by the Elements of Crimes according to which it is sufficient that the perpetrator was aware of the *factual* circumstances that established the protective status. In other words, a correct legal assessment of the situation is not required.[102] Despite the fact that the soldier's mistake of law leaves his *mens rea* intact, it seems highly questionable if he really can be blamed for his incorrect legal assessment. This holds all the more true since the realities of the battlefield often require quick decisions – leaving no room for complex and time-consuming legal analysis.

Another point made in favour of the *error iuris* rule is the avoidance of evidentiary problems. It is argued that it would be virtually impossible for the prosecution to disprove the plea of a mistake of law.[103] This argument is not persuasive, however. First, it seems highly questionable if evidentiary problems should ever outweigh basic considerations of justice and fairness. Second, this argument applies all the same to mistakes of fact. In the end, only the defendant knows whether or not he has indeed confused the killed civilian with a soldier etc. Nevertheless, the exonerating effect of factual misconceptions is unanimously accepted. Moreover, the alternative to the *error iuris nocet* rule is not (necessarily) an unconditional recognition of every mistake of law as a valid defence. Rather, only a reasonable or unavoidable mistake should relieve the defendant from criminal responsibility.[104] This brings in a more objective component, which should enable courts to deal in an appropriate manner with unfounded and unjustified pleas.

Last but not least, it is suspected that it would 'conflict with the principle of legality to treat a defendant in a criminal case as if the law were as the defendant thought it to be.'[105] The answer to this argument lies in the differentiation between justifications and excuses. While both are equal in that they function as full defences, they have completely different social implications. Justifications render an act lawful, whereas excuses only negate the personal blameworthiness of the actor.[106] As was explained elaborately by George P. Fletcher: 'Decisions on justifying circumstances modify the applicable legal norm. Decisions on excuses, in contrast, leave the norm intact, but irreversibly modify the factual background of succeeding claims of excuse.'[107] Mistakes of law can only serve as an excuse: The soldier who attacks a peacekeeping mission in the erroneous belief that it has lost its protective status[108] acts unlawfully. If, however, he could not fairly be expected to realize that he is breaking humanitarian law, he does not deserve punishment. An acquittal based on such an unavoidable mistake of law leaves the (criminal) prohibition of attacking peacekeeping missions intact and even confirms its validity by stressing the unlawfulness of the conduct in question. The judgement does not indicate that the defendant was not bound by the criminal law, but

in terms of Art. 51(3) of AP I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977).

100 As to the complex interplay between direct participation and the right to self-defence of peacekeeping missions cf. only G. Werle, *Principles of International Criminal Law*, 2009, mn. 1303 and M. Cottier, 'Article 8', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, mn. 49-55 who concludes at mn. 55: that 'without clearer standards it will be difficult to determine under what circumstances the entitlement to the protection as civilians exists, or ceases to exist.'

101 As to this standard cf. note 53 and accompanying text, supra.

102 Certainly, the Elements of Crimes are not binding on the Court but shall merely assist it in the interpretation and application of the ICC Statute (Art. 9(3) ICC Statute). Legally speaking, the Chambers are therefore free to interpret an unlawfulness requirement into the objective offence definition, in particular into the element 'entitled to the protection given to civilians (…) under the international law of armed conflict'.

103 W. LaFave, *Criminal Law*, 2010, § 5.6(d); M. Lippman, *Contemporary Criminal Law – Concepts, Cases, and Controversies*, 2010, p. 308.

104 Cf. the comparative overview at notes 72 et seq. and accompanying text, supra.

105 W. LaFave, *Criminal Law*, 2010, § 5.6(d); M. Lippman, *Contemporary Criminal Law – Concepts, Cases, and Controversies*, 2010, p. 308; A. Cassese, *International Criminal Law*, 2008, p. 295.

106 In more detail on this differentiation K. Greenawalt, 'The Perplexing Borders of Justification and Excuse', 1984 *Columbia Law Review* 84, pp. 1897-1927; G.P. Fletcher, *Rethinking Criminal Law,* 2000, pp. 759 et seq.; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, pp. 304-307.

107 G.P. Fletcher, *Rethinking Criminal Law,* 2000, p. 812.

108 Cf. also note 99 and accompanying text, supra.

only that he cannot be blamed for having violated it. Such a statement does not seem to infringe upon the principle of legality.[109] In sum, there are no compelling reasons to uphold the strict *error iuris nocet* rule.[110]

4.3. Conclusion

In comparison with many national legal systems, the ICC's attitude towards mistakes of law is very restrictive and inflexible. Arguably, the principle of personal guilt requires more than a mere psychological relation between the actor and the act as established by Article 30 ICC Statute. Rather, it also comprises a component of moral blameworthiness or culpability. To convict a person who was not able to realize that he was committing a wrong is incompatible with this broader understanding of the *nulla crimen sine culpa* principle.[111]

5. In particular: mistakes concerning the jurisdiction of the Court

Article 32(2)(cl. 2) ICC Statute is complemented by a special provision on mistakes concerning the jurisdiction of the Court, according to which 'a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility' (Article 32(2)(cl. 1) ICC Statute). Thus, ignorance of the ICC's competencies is never a defence,[112] i.e., a plea by the defendant that he did not expect to be prosecuted at the *international* level will be dismissed. This provision already became crucial during the very first confirmation of charges. Faced with a war crime charge based on Article 8(2)(b)(xxvi) and (e)(vii) ICC Statute, Thomas Lubanga Dyilo argued in his defence 'that neither Uganda nor the DRC brought to the knowledge of the inhabitants of Ituri the fact that the Rome Statute had been ratified and that conscripting and enlisting child soldiers entailed criminal responsibility'.[113] In doing so, he claimed a mistake of law[114] due to the ignorance of the international criminal prohibition of the relevant conduct. The Pre-Trial Chamber dismissed this plea with a brief reference to Article 32(2)(cl. 1) ICC Statute,[115] but indicated also that the judges were not persuaded that Lubanga indeed erred in law.[116] Given the clear and unequivocal approach of the ICC Statute towards mistakes concerning the jurisdiction of the Court, this decision was indeed predictable. Here again, however, the question arises whether Article 32(2)(cl. 1) ICC Statute is also unduly strict. Most noteworthy, even common law jurisdictions tend to admit mistakes of law as a defence if the statute defining the offence 'has not been published or otherwise reasonably made available prior to the conduct alleged'.[117] Although this seems to be exactly the point made by Lubanga, one must,

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109 In the same vein A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, pp. 75-76.

110 Cf. also the instructive analysis by D.M. Kahan, 'Ignorance of Law *is* an Excuse – but only for the Virtuous', 1997-1998 *Michigan Law Review* 96, no. 1, pp. 127-154.

111 A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, p. 945; T. Weigend, 'Zur Frage eines "internationalen" Allgemeinen Teils', in B. Schünemann et al. (eds.), *Festschrift für Claus Roxin,* 2001, p. 1393; G. Werle, *Principles of International Criminal Law,* 2009, mn. 578; H. Satzger, *International and European Criminal Law*, 2012, § 13 mn. 42; cf. also K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 375-376; E. van Sliedregt, *Individual Criminal Responsibility in International Law*, 2012, pp. 285-286.

112 Cf. also O. Triffterer, 'Article 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* 2008, mn. 32; cf. also G. Werle, *Principles of International Criminal Law,* 2009, mn. 577.

113 *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, Doc. No. ICC-01/04-01/06-803, P.-T. Ch. I, 29 January 2001, Para. 296.

114 Originally, the Defence argued that the conviction of Lubanga would violate the principle of legality. As to this incorrect application of Art. 22 ICC Statute cf. T. Weigend, 'Intent, Mistake of Law, and Co-Perpetration in the Lubanga Decision on Confirmation of Charges', 2008 *Journal of International Criminal Justice* 6, no. 3, p. 474; K. Ambos, 'The first Confirmation Decision of the International Criminal Court: Prosecutor v. Thomas Lubanga Dyilo', in L. Kotsalis et al. (eds.), *Essays in Honour of Argyrios Karras*, 2010, pp. 996-997.

115 *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, Doc. No. ICC-01/04-01/06-803, P.-T. Ch. I, 29 January 2001, Para. 305.

116 *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, Doc. No. ICC-01/04-01/06-803, P.-T. Ch. I, 29 January 2001, Para. 306.

117 § 2.04(3) of the Model Penal Code; cf. also notes 86 et seq. and accompanying text, supra.
A similar provision can be found in Section 9.4 of the Canadian Criminal Act:
'(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.
(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:
(a) the subordinate legislation is expressly to the contrary effect; or
(b) at the time of the conduct, the subordinate legislation:
(i) has not been made available to the public (by means of the Register under the *Legislative Instruments Act 2003* or otherwise); and

nevertheless, take into account that information about the ICC and the status of ratifications are made available also by the ICC itself, by the UN and by numerous human rights organisations. Thus – and this is an important difference with regard to national legislation – inaction on the part of the state does not necessarily preclude the defendant from access to international law. More important, however, are the particularities of international core crimes. The individual criminal liability for genocide, crimes against humanity and war crimes can be deduced directly from international (customary) law,[118] which finally means that these offences are punishable regardless of whether they have been incorporated into national law[119] and may be prosecuted by *any* state on the basis of universal jurisdiction.[120] The norms prohibiting and penalizing the commission of core crimes are universally valid and apply to everyone throughout the world. A mistake concerning *exclusively* the jurisdiction of the ICC does not therefore affect the defendant's consciousness of the legal wrong. Rather, he knows that he may be held responsible but does not take into account the possibility of an international prosecution. As knowledge about the Court's jurisdiction is not an essential element of the crimes, and mistakes concerning *solely* jurisdictional matters have no impact on the culpability or blameworthiness of the defendant, it seems convincing to me to deny them any exculpatory effect.[121]

6. Conclusion and outlook: towards a more flexible treatment of mistakes of law

Apart from the special provision on mistakes concerning the jurisdiction of the Court, Article 32(2) ICC Statute is too restrictive and does not give due regard to the personal blameworthiness of the actor. Thus, the question arises how the Statute can be reconciled with the fundamental principle of personal guilt. To complement the Statute by introducing a new defence of reasonable or unavoidable mistakes of law[122] is theoretically possible, but given the complex and highly political nature of the amendment process, is hardly a realistic option. A simpler solution would be to interpret an unlawfulness requirement in the objective offence definition, so that a mistake of law would *per definitionem* negate the required *mens rea*. This would, however, ultimately mean putting mistakes of fact and law on an equal footing – a result which is clearly incompatible with the spirit of Articles 30, 32 ICC Statute[123] and their explicit distinction between the two kinds of mistakes.[124]

A way out of this dilemma is offered by Article 21(1)(c) ICC Statute. As was shown above,[125] many jurisdictions regard the (potential)[126] consciousness of the legal wrong as a basic prerequisite for criminal responsibility and excuse the actor if he cannot be blamed for his ignorance of the law. Thus, it seems possible for the ICC Judges to develop, by way of recourse to 'general principles of law derived (...) from national laws of legal systems of the world' (Article 21(1)(c) ICC Statute), a discrete[127] defence

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(ii) has not otherwise been made available to persons likely to be affected by it in such a way that the person would have become aware of its contents by exercising due diligence.'

118 G. Werle, *Principles of International Criminal Law,* 2009, mn. 84; A. Cassese, *International Criminal Law,* 2008, p. 11.

119 G. Werle, *Principles of International Criminal Law,* 2009, mn. 84.

120 A. Cassese, *International Criminal Law,* 2008, p. 11; cf. also R. Cryer, 'Jurisdiction', in R. Cryer et al. (eds.), *An Introduction to International Criminal Law and Procedure*, 2010, p. 51.

121 In the same vein K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 371; O. Triffterer, 'Article 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* 2008, mn. 32.

122 H.-H. Jescheck, 'The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute', 2004 *Journal of International Criminal Justice* 2, no. 2, p. 47 suggests the inclusion of the following provision in the ICC Statute: 'A mistake of law is a ground for excluding criminal responsibility if it negates knowledge of the unlawfulness of the act, the factual situation of which is known. Such mistake is ground for mitigation of punishment, if the author should have known the unlawfulness of the act'. A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 97 argues for the inclusion of the following article: 'If it is concluded that the defendant acted in the mistaken belief that his conduct was lawful, or that he was mistaken about a fact extrinsic to the required mental element, and if this mistake was unavoidable, the defendant shall not be convicted in respect of such a wrongful act.'; cf. also the several suggestions made by K.J. Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute', 2008 *Journal of International Criminal Justice* 6, no. 3, pp. 444-445.

123 Cf. note 44 and accompanying text, supra.

124 Cf. also K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, p. 370.

125 Cf. notes 72 et seq. and accompanying text, supra.

126 In more detail see C. Roxin, *Strafrecht Allgemeiner Teil – Band 1, Grundlagen, Der Aufbau der Verbrechenslehre,* 2006, § 21 mn. 29-34.

127 This is overlooked by A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 87, who criticizes that 'applying an unavoidability test on top of the 'negate mental element-requirement' leads to an even more unjustifiable limitation of the scope of mistake of law'.

of reasonable or unavoidable mistake.[128] This would allow finding just and appropriate solutions on a case-by-case basis, which take into account the personal blameworthiness of the actor and respect the principle of personal guilt. Such a flexible treatment of mistakes of law would also and in particular be appropriate for transnational justice. ¶

128 K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part,* 2013, pp. 375-376; in a similar vein A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I,* 2002, pp. 945-946; H. Satzger, *International and European Criminal Law*, 2012, § 13 mn. 42; critically A. van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes*, 2012, p. 87.