Problems of ‘Subjective Imputation’ in Domestic and International Criminal Law

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Abstract
It is often said that domestic doctrines and concepts must not be imported indiscriminately into international criminal law. The maxim as such is certainly correct but what exactly are the differences between domestic and international criminal law, e.g. in the area of general principles regarding mens rea? Which particularities exist in the attribution of macro-delinquency in comparison to ‘ordinary’ crime? This essay identifies three classical problems concerning subjective elements of crime where some of these particularities exist. The investigation does not, however, exclude the possibility that international criminal law may learn from domestic criminal law doctrines.

1. Introduction
It is an interesting question what particularities exist in the area of subjective imputation of macro-criminal conduct compared to ordinary criminality. My impression so far is that these particularities are only a few and mainly related to the problems of participation. The following observations address three problems of mens rea which represent classical controversies in domestic criminal law that resurface in international criminal law. Two of them are linked to the ‘macro’ quality, whereas the third concerns a characteristic of international criminal law although not the ‘macro’ dimension. A remark on terminology may be added here: Strictly speaking, there is no ‘subjective imputation’ because all imputation, by its very nature, is objective. Subjective or mental elements are relevant only as indicators of the objective degree of a person’s law-abidingness or lack thereof.

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2. The Nether Regions of Intent

Most if not all domestic criminal laws distinguish at least two forms of ‘guilt’ or culpability, subjective or interior elements of a criminal offence.¹ These forms correspond to gradations of blameworthiness and punishment. Usually, conscious wrongdoing, in particular acting on purpose, is punished more severely than unconscious wrongdoing which in many cases is not punishable at all.

It is no surprise that such gradations of criminal liability correspond largely to naïve models of attribution as practised in everyday life and reconstructed in attribution theory. Both legal and naïve attribution rest on a folk model of the mind, a naïve psychology which explains human action ‘as a piece of behaviour caused by an epistemic state and a desiderative state’² and is, by the way, strikingly similar to models developed in philosophical theories of action like the ‘desire-belief-model’ which is, in turn, a descendant of Aristotle’s practical syllogism.³ Hence, the different forms of legal and naïve attribution of responsibility represent the possible combinations of different epistemic states (knowledge, foresight, awareness, ignorance, etc.) and desiderative states (intention, purpose, indifference, etc.). This basic structure of attribution seems to be (nearly) universal. Details, however, vary and these variations now lead us to the legal problems.

In any legal order that knows two or more culpability terms the need arises to find criteria to distinguish these terms or, to put it differently, to define the culpability terms precisely in order to keep them apart in practice. In many legal orders, this has proven exceedingly difficult for a variety of reasons: Culpability terms are often borrowed from ordinary language or have an equivalent in ordinary usage and this usage is often vague.⁴ The terms are


² L. Ferguson, Common Sense (Routledge, 1989), at 164–165.

³ Cf. Stuckenberg, supra note 1, at 168–189 with ample references.

⁴ See e.g. G. Williams, Textbook of Criminal Law (2nd edn., Stevens and Sons, 1983), at 73: ‘...doubts still remain about the legal meaning of the mens rea words. It is lamentable that, after more than a thousand years of continuous legal development, English law should still lack clear and consistent definitions of words expressing its basic concepts:’; idem, ‘Oblique Intentions’, 46 Cambridge Law Journal (1989) 417, at 417. The same is true in other legal orders, e.g. in the federal criminal law of the United States where 78 different culpability terms were counted.
vague because the reference is vague. Many culpability terms seemingly refer to mental states or what folk and legal psychologies take for mental states and like to reify. The most notorious example is one of the most confused and confusing concepts in any type of normative discourse: the will. In Alasdair MacIntyre’s words: ‘We are haunted by the ghosts of dead concepts… One such dead concept is the concept of the will…’ And indeed, we should get rid of naive notions of the ‘will’ as some occult power or property as soon as possible, and this is possible. Another reason is that the critical inquiry why which ‘state of mind’ should be relevant for criminal law purposes and how, is often completely left out; instead, it is asked what intent ‘really is’ as if it were a thing or concept a priori that could simply be discovered. Sometimes, it might even seem as if Aristotle and Thomas Aquinas were among the last thinkers who gave reasons for the attributional relevance of mental states. Mental states as such are plain facts and legally irrelevant. It is a normative decision made by the law, for legal purposes, and pursuant to legal principles what kind of responsibility is attached to these states.

While the concept of ‘purpose’ or animus, which points to the direct or main effects of a deliberate action, is fairly easy to grasp — even small children know to defend themselves with ‘I didn’t mean it’ — and largely beyond dispute, the most serious definitional problems concern the side effects of an action and the requisite delimitation of the notion of intent or intention to the bottom, that is, where the nether regions of intent end and where the respective lesser form of culpability begins, regardless of whether there is a bipartite division of culpability like dolus and culpa in the Roman law tradition of Continental Europe or a tripartite division like intent, recklessness and negligence in the English tradition. This delimitation is of paramount importance for a defendant because it determines whether certain behaviour is punishable at all or which sentencing range is applicable. These delimitations have two dimensions, substantive and procedural: The substantive dimension is the value judgment which ‘state of mind’ should be legally assimilated to, i.e. merit the same level of punishment as the ideal type of intent, i.e. purpose. The procedural dimension concerns the fact that mental states — what intent is supposed to be — are notoriously difficult to prove if defendant denies that he meant to

5 On reference to mental states such as intent see Stuckenberg, supra note 1, at 68–150.
7 For an overview of the concept of ‘will’ in criminal law and modern interpretations see Stuckenberg, supra note 1, at 211–282.
do harm, or in the words of an old English yearbook: ‘The intent of a man shall not be tried, for the Devil himself knoweth not the intent of man.’\textsuperscript{10} This is of course an exaggeration because lawyers have long known, long before Wittgenstein,\textsuperscript{11} that intent may be found in the behaviour itself, in Latin: \textit{dolus ex re}, because some actions cannot be explained but as purposive. But many dubious cases remain, and in order to solve these, one can either resort to procedural devices which facilitate proof like presumptions which erect objective standards like the former English rule that ‘a man is presumed to intend the natural consequences of his acts’\textsuperscript{12} or the substantive notion of intent can be stretched to cover the procedurally dubious cases of equal blameworthiness.

Since ancient Roman criminal law confined \textit{dolus} to \textit{animus} or purpose in the narrowest sense, and since the medieval jurists understood \textit{dolus} as \textit{voluntas vitium} or faulty will, and \textit{culpa} as \textit{intelectus vitium} or faulty knowledge and since the great Bartolus declared that ‘in poenis corporalibus lata culpa non aequiparatur dolo, sed mitius punitur’ (with regard to corporal punishment, grave fault must not be equated with intent),\textsuperscript{13} it ensued that only he who could be proven to have killed on purpose had to suffer the ordinary, corporal punishment, here the death penalty. Continental jurists have tried for centuries to amend or circumvent this unsatisfactory state of the law, first by the so-called \textit{doctrina Bartoli} and later by the concept of \textit{dolus indirectus} which fell out of favour in the 19th century, when the ‘will’ necessary for \textit{dolus} was misunderstood as a psychological entity,\textsuperscript{14} and was replaced by \textit{praeter}-intentional offences and the surviving \textit{dolus eventualis}, a term that the German 18th century jurist Johann Samuel Friedrich von Böhmer\textsuperscript{15} coined and used interchangeably for \textit{dolus indirectus}. German criminal law scholars orchestrated a huge and fierce controversy over the ‘true’ concept of \textit{dolus/Vorsatz} which lasted for decades from the end of the 19th until the early 20th century\textsuperscript{16} and ended without a winner because of general fatigue. Today, many theorists including myself regard this past debate as entirely misconceived. In any event, what is left today is a mild controversy over \textit{dolus eventualis} without real practical significance. Other countries have borrowed the term and even legally defined it; France knows the name \textit{dol éventuel} but treats it as a form of


\textsuperscript{11} L. Wittgenstein, \textit{Philosophische Untersuchungen} (Werkausgabe Band I, 9th edn., Suhrkamp, 1993), § 244 et seq., 293, 580.


\textsuperscript{13} Bartolus, D.n. de legem Corne. de sica. l. in lege (D. 48, 8, 7); also Baldus, Inst. de susp. tut. § susp. (Inst. 1, 26, 6); for further references see Stuckenberg, \textit{supra} note 1, at 534–542.

\textsuperscript{14} For a summary of this development see Stuckenberg, \textit{supra} note 1, at 532–576.

\textsuperscript{15} J.S.F. Böhmer, \textit{Observationes selectae} (Franciscus Varrentrapp, 1759), at 4–6.

\textsuperscript{16} Cf. only R. von Hippel, \textit{Die Grenze von Vorsatz und Fahrlässigkeit} (Hirzel, 1903), at 1–150; K. Engisch, \textit{Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht} (Liebmann, 1930), at 126 et seq.
still others, in particular Carl Stooss in his draft for the Swiss criminal code.\textsuperscript{18} have tried to evade this controversy altogether by the creation of offences of deliberate endangerment\textsuperscript{19} which, however, tend to carry lighter sanctions.

Customary international criminal law has the advantage that it does not have to carry the doctrinal burdens of past centuries and the disadvantage that it is almost impossible to ascertain rules on mental elements at all in accordance with Article 38 of the ICJ Statute. The Nuremberg legacy indicated that, in general, intent was necessary and negligence was insufficient. Most if not all national laws are probably in agreement that purpose and knowledge in the sense of practical certainty that a prohibited result will occur satisfy an intent requirement. The jurisprudence of the ad hoc tribunals evidences the procedural need for some lesser form of intent, and the courts have declared, often on the basis of rather poor comparative work, that something like dolus eventualis or recklessness is a sufficient culpability element for many crimes under international law.\textsuperscript{20} A brief comparative survey would already show that, as details vary greatly, the only general principle common to national laws on this issue might be that the conscious creation of substantial risks triggers some kind of criminal responsibility. This might be enough, however, for international criminal law purposes because Article 38(1)(c) ICJ Statute refers to ‘principles’ only and not to ‘rules’. Such common principles have to be adapted to the particularities of the international law context anyway so that, for instance, any national differences of sentencing levels can be neglected here because international crimes lack fixed sentencing ranges.\textsuperscript{21} In addition, it seems more reasonable to determine the details of the required mental state — the degree of risk to be aware of etc. — with regard to the particular crime under international law than to deduce it from some very abstract general concept of intent. This is what, for example, the Appeals Chamber in Blaškic did when it held that the mens rea for ordering a crime requires awareness of a higher likelihood of risk and a volitional element because, under a lower standard, ‘any military commander who issues an order would be criminally

\textsuperscript{17} Pradel, supra note 1, at 116; S. Plawski, Étude des principes fondamentaux du droit international pénal (Librairie générale de droit et de jurisprudence, 1972), at 161; B. Bouloc, Droit pénal général (22nd edn., Dalloz, 2011), no. 283; F. Desportes and F. Le Guehec, Droit pénal général (16th edn., Economica, 2009), no. 483.

\textsuperscript{18} C. Stooss, Schweizerisches Strafgesetzbuch, Vorentwurf mit Motiven im Auftrage des schweizerischen Bundesrates (Georg, 1894), note to Art. 58 (Lebensgefährdung), at 150–151; idem, ‘Dolus eventualis und Gefährdung’, 15 Zeitschrift für die gesamte Strafrechtswissenschaft (1895) 199 et seq.

\textsuperscript{19} See also the mise en danger délibéré in Art. 121-3(2) of the new French Code pénal.

\textsuperscript{20} See e.g. Judgment, Kayishema and Ruzindana (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 146; Judgment, Musema (ICTR-96-13-T), Trial Chamber, 27 January 2000, § 215; Stakic (IT-97-24-T), Trial Chamber, 31 July 2003, §§ 587, 642; Judgment, Blaškic (IT-95-14-A), Appeals Chamber, 29 July 2004, § 42.

responsible, because there is always a possibility that violations could occur.”

It is contended here that even the use of specific national terms like *dolus eventualis* or recklessness which are clearly not universally agreed should be avoided; it is sufficient to define the ingredients of the requisite mental state in functional terms.

This leads us to the Rome Statute where the situation is obviously different because here we have a statutory text, the misshapen Article 30 which has a number of flaws, one of which is that the definition of the mental element is far too narrow and too rigid. As just mentioned, the practice of other courts has shown that there are substantive as well as procedural reasons why the awareness of a substantial risk of committing a particular international crime may and should be deemed a sufficient degree of blameworthiness to pass the threshold of international criminal justice.

This is not the place to enter the debate on how Article 30 might be cured and if the ‘unless otherwise provided’-proviso offers relief. However, a comment is in order on one feature of this debate which appears peculiar if not bizarre — and retrograde, too. After the Pre-Trial Chamber’s Decision on the Confirmation of Charges in *Lubanga* 2007, subsequent monographs and articles have reiterated the tripartition of *dolus directus* in the first degree, second degree and *dolus eventualis* as if it were some higher truth or universally accepted doctrine — it clearly is neither. From the perspective of a German criminal lawyer, this startling international career of domestic terms might seem flattering, but it is not. On the contrary, it is rather embarrassing because these terms do not deserve that much attention. Why? It should be noted that these terms are not even *communs opinio doctorum* in Germany but the invention of one scholar, Edmund Mezger, formerly an ardent Nazi whose textbooks were very popular after the war. For some mysterious reason, his terms have spread into all classrooms today but it is questionable that they are superior to others. Mezger equated what he called in German ‘*mittelbarer Vorsatz*’ (indirect intention) with ‘*dolus directus* in the second degree’ which seems not very plausible to me. Looking into the major German textbooks before 1980,
each author prefers other terms and either notes, criticizes or ignores the Mezgerian triplet.  

The main objection is more fundamental, namely that a debate on a problem of international criminal law follows the wrong path when it is structured according to such terms of national origin. The second objection is that any approach steeped in conceptualism or, worse, conceptual realism is equally misguided. The question is not what dolus or dolus eventualis ‘is’ because these terms denote different concepts in different legal contexts at different times as Professor Weigend has clearly pointed out in his comment on the Lubanga decision. It is one of the merits of the Rome Statute that it consciously avoids the use of national terminology. The construction of the Statute should do likewise and should, if reasonably possible, use neutral descriptive terms — well known from the functional approach in comparative law — and not step backwards and talk about somebody’s domestic dolus eventualis.

Furthermore, talking about concepts referring to ‘mental states’ is retrograde because it does not address the real issues. The real issues are not whether conscious risk-taking forms part of dolus or not, or can be attributed to somebody’s will or not, but whether acting despite the awareness of a small, medium-sized or substantial risk that a certain prohibited result will occur, or willful blindness thereof, deserve punishment for a particular crime under international law. This is a normative decision about blameworthiness and not a question what dolus ‘is’. From a nominalist stance, ‘dolus’ is just a name, a label for everything that is punished like ‘dolus’, an insight that medieval jurists already practiced when they punished him who was aware of a substantial risk of death ac si animum occidendi habuisset (as if he had intent to kill), and him qui non vult scire, habetur pro sciente (who did not want to know the consequences of his acts was regarded as if he had known them), a mental state and culpable absence of that mental state may be equally blameworthy. Purpose and awareness are not necessarily more blameworthy than reckless disregard which does not even take into consideration the effects one’s action might have on other people.

International criminal law theory, whether dealing with customary law or the Rome Statute, should therefore, in the interest of intellectual candour and methodological progress, address the critical value judgments openly and not


30 Baldus, IV C. mandati l. mandat: idem, V C. de incestis nuptiis l. qui contra, n. 1; for further references see W. Engelmann, Die Schuldlehre der Postglossatoren und ihre Fortentwicklung (Duncker and Humblot, 1895), at 80–81; Stuckenber, supra note 1, at 538–542.

31 But see Ambos, supra note 23, at 278.
hide them in a maze of confused terms and get caught in the traps of conceptualism. This is a lesson that can be learned from domestic laws.

3. The Special Case of Dolus Specialis

The second point is a further illustration of the first: The debate about the nature of dolus specialis, dol spécial, specific intent, notably the genocidal ‘intent to destroy’, whether it means purpose only or knowledge as well, has proven unsatisfactory so far because it was largely caught in sterile conceptualism and, except for a few writers, neglected functional analysis.

In domestic criminal laws, many core offences like theft or fraud feature a dolus specialis. It varies greatly which gradation of intent is required. In German law, for example, many offences contain an ulterior intent formulated as ‘Absicht’ but a literal interpretation is often inconclusive if the norm dates from the 19th century when the Criminal Code came into force.\(^{32}\) The term ‘Absicht’ entered German legal terminology in the 18th century as a translation of dolus in whatever gradation.\(^{33}\) In the 19th century, many writers like Binding treated ‘Absicht’ and ‘Vorsatz’/dolus as synonyms\(^ {34}\) so that the current narrow technical meaning of ‘Absicht’ as ‘purpose’ is the result of a relatively recent development which began in the late 19th century. Hence, further criteria are needed in order to construe what a particular specific intent means, notably the function of that specific intent in the normative scheme of the particular offence. There are several possibilities:

- The specific intent could represent a negative label of the perpetrator’s motive — motives are merely further or ulterior intentions, abstract descriptions of actions\(^ {35}\) — in order to mark the baseness of his attitude or character which increases his blameworthiness.

- Secondly, the specific intent might serve to shift the moment of consummation of the crime to an earlier time so that the specific intent crime is, in essence, an attempt.\(^ {36}\) Depending on the respective legal order whether an attempt can be committed with any gradation of intent or only with purpose, the dolus specialis should be construed accordingly.

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34 Binding, supra note 32, at 1151–1158, 1175.  
36 Binding, supra note 32, at 1166–1167.
Thirdly, the specific intent could have the function to characterize the type of wrong in relation to a certain criminal plan. That plan need not become a reality, so that here we have the same inchoate structure where the consummation is antedated to a situation of mere endangerment of the protected interest. Theft, for instance, as an offence against property is in many legal orders already consummated with the taking of an object belonging to another and characterized by the author's plan to keep it for himself. In the commission of such crimes, division of labour can lead to a dissociation of acting and planning: one author plans and the other acts and may be indifferent towards the other's plan although he is aware of it. The fact that not each co-author is personally motivated by the plan does not alter the legal character of the jointly committed offence if each of the co-authors knows the plan and acts in accordance with it. In sum, if such a crime is committed collectively, knowledge of the plan, even in the form of dolus eventualis, is both necessary and sufficient.

In international criminal law, a literal interpretation of the Genocide Convention is inconclusive as well: The terms *intent to destroy*, *intention de détruire*, *intención de destruir*, *намерение уничтожить* are rather vague and not restricted to 'purpose', and the *travaux préparatoires* provide no guidance. The Trial Chamber in *Akayesu* believed that dolus specialis in domestic legal orders refers exclusively to purpose which is incorrect as just seen. Another reason given by the ad hoc tribunals for their view that awareness of the intent to commit genocide on the part of others is not sufficient is that: 'Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent.'

With all due respect, this is a *non sequitur* and probably circular as well. There may be a strong intuition that purposive causation of harm represents the highest degree of blameworthiness but that is, upon reflection, a wrong intuition, especially in the macro-delinquency context. In light of the insights of domestic law, one could try to rescue this so-called 'purpose-based interpretation' if the genocidal purpose is understood as a clue necessary to demonstrate the perpetrator's depraved character. The specific wrong of genocide would then consist in the particular baseness and dangerousness of the perpetrator's attitude. This seems implausible in view of Hannah Arendt's observation of the 'banality of evil'.

41 For the relevance of motives see P. Behrens, 'Genocide and the Question of Motives', 10 *JICJ* (2012) 501–523.
the — usually collective — enterprise to produce a special kind of large-scale harm, then the genocidal intent is nothing else than the plan that animates this enterprise so that, as many authors, notably Hans Vest, have advocated, knowledge of the common plan must be deemed sufficient for liability as a perpetrator. The purpose-based interpretation, however, confuses the collective aim and the individual aim.

4. The Mistaken Law on Mistake of Law

National laws differ in the ways they conceptualize and regulate the ignorance of illegality. The traditional and most widely spread approach can be traced back to the Roman law distinction of *error facti* and *error iuris*, mistake of fact and mistake of law. Although superficially plausible, this distinction, if put to the test, has proven inadequate for criminal law purposes because, e.g., errors of criminal law and ignorance of private law etc. are to be treated differently, and ‘facts’ are never relevant as brute facts but only in a legal qualification. In some legal orders, it has been replaced by the distinction of ignorance of definitional elements and ignorance of the norms prohibiting the conduct in question. These errors are located on different levels of the legal syllogism: ignorance of the prohibition concerns the major premise, error of offence elements — whether factual or legal — affects the minor premise.

There is no unanimity among domestic laws how to treat mistakes of law or prohibition. The Latin *brocardica error iuris nocet* and *iuris ignorantia non excusat* give a false impression. In ancient Rome as well as in Continental European common law, the *ius commune* which was in force until the early 19th century, there were never legal rules providing that mistake of criminal law is irrelevant. There was a *regula iuris* of that type but *regulae iuris*


44 See Stuckenberg, supra note 1, at 542–544.

45 See e.g. §§ 16, 17 German Strafgesetzbuch: Art. 14(3) Spanish Código penal.

46 For ample references see W. Engelmann, Irrtum und Schuld nach der italienischen Lehre und Praxis des Mittelalters (Stilke, 1922), at 114 et seq., 367 et seq., 273 et seq., 304 et seq., 323 et seq.; Stuckenberg, supra note 1, at 543–555.

47 D. 22, 6, 9 and reg. iur. XIII in VI.
were not legal norms but very brief summaries of the law, and indeed, it was true, that, in practice, *error iuris criminalis* mostly did not exonerate. *Ius commune* as well as Canon law have developed a very rich and subtly differentiated case law that can be summed up like this: Any proven error, of whatever type, excuses from *dolus* and thus from corporal punishment unless the error is manifestly frivolous. If the error is culpable, it will be punished but not corporally. Error of criminal law was usually either not provable or it was culpable if the law in question was easy to know, because it corresponded to the teachings of the church or the *naturalis ratio*, or the persons were, due to their position, expected to know the law. Ignorance of laws that were difficult to know or obscure excused always. Certain groups of people, like children, women, farmers and soldiers were not expected to know the law — with soldiers it is somewhat different today. These sophisticated distinctions were abolished on the European Continent during the codification of the national criminal laws in the 19th century and replaced by indiscriminating provisions that declared mistakes of criminal law irrelevant, whether honest or not. The reasons put forward for these strikingly parallel legal developments are manifold and often styled in a remarkably authoritarian manner, citing public policy reasons and wildly exaggerated fears like this:

‘...if ignorance of law were a ground of exemption, the administration of justice would be arrested. For, in almost every case, ignorance of law would be alleged.’ Even as late as 1945, Kelsen would write: ‘That ignorance of law does not exempt from obligation is a principle which prevails in all legal orders and which must prevail, since, otherwise it would be almost impossible to apply the legal order.’

In the second half of the 20th century, national laws gradually began to recover from such excesses, also in the traditionally more restrictive common law world, and to realize that, in a modern world with innumerable rules of positive law which often are complicated and far removed from the everyday life rules of community ethic, it is simply impossible for everybody to know all the law nor is this necessary. Because modern law is man-made and subject to change, modern states can tolerate exonerations for mistake of law without having to fear a loss of authority, in so far as such mistakes are not wanton.

And, above all, a liberal and principled criminal law *must* exonerate if a mistake is unavoidable because it would be manifestly unjust — and a violation


49 See supra note 46.

50 See Stuckenberg, supra note 1. at 476–481. One of the earliest examples is § 3 of the Austrian *Strafgesetz über Verbrechen* (Penal Law on Crimes) of 1803 which provides that 'nobody is excused for ignorance of the present law because the wrongs described therein are unmistakable'.


53 Cf. only Jakobs, supra note 37, at 483, 545–550.
of the principle of guilt — to punish a person for the failure to do something they were unable to do.\textsuperscript{54} Criminal law punishes unwillingness to obey the law, not inability to do so because \textit{ultra posse nemo obligatur}.

There is a growing international tendency to recognize (honest, reasonable, unavoidable) mistake of criminal law as a defence, at least in principle.\textsuperscript{55} International criminal law should not fall behind this development. Deplorably, the Rome Statute did make a step backwards when it broadly excluded mistake of prohibition as a ground for excluding criminal responsibility in Article 32(2)(1). To be sure, honest errors about the illegality of genocide, crimes against humanity, and aggression are unthinkable. But it is absolutely imaginable that a soldier may honestly err about the precise content of one of the numerous and sometimes very intricate and constantly evolving rules of the laws of war. Therefore, I agree with those writers\textsuperscript{56} who recommend recognizing mistake of prohibition with regard to war crimes.

5. Conclusion

Three problem areas of international \textit{mens rea} have been surveyed and in all three, international criminal law can learn something to its profit from domestic criminal law doctrine: (1) Regarding the precise definition of criminal intent, in particular the question whether intent encompasses mere foresight of the possibility of a harmful result or not, resort to domestic concepts like \textit{dolus eventualis} or \textit{recklessness} is unhelpful and prone to misunderstandings. It seems preferable to determine the details of the required mental state in functional terms (e.g. the degree of risk to be aware of etc.) instead of domestic terminology and in relation to the particular crime under international law instead of deducing it from some very abstract general concept of intent. (2) Instances of specific intent like the ‘intent to destroy’ required for genocide

\textsuperscript{54} Cf. Stuckenberg, \textit{supra} note 1, at 482–484.

\textsuperscript{55} Pradel, \textit{supra} note 1, at 158; compare the recognition of mistake of law or mistake of prohibition after 1945 in Germany (§ 17 \textit{Strafgesetzbuch}), Austria (§ 9 \textit{Strafgesetzbuch}), Switzerland (Art. 21 \textit{Schweizerisches Strafgesetzbuch}), France (Art. 122-3 \textit{Code pénal}), Spain (Art. 14 \textit{Código penal}), and Italy (Art. 5 of the Italian \textit{Codice penale} which provided that ‘nobody can invoke ignorance of the criminal law as an excuse’ was declared unconstitutional by the \textit{Corte costituzionale}, judgment no. 364 of 24 March 1988, as far as inevitable ignorance is concerned); see also Sieber and Cornils, \textit{supra} note 1, and Heller and Dubber, \textit{supra} note 1.

should be subjected to a functional analysis in order to determine which gradation of intent (purpose, knowledge/foresight) fits best the normative scheme of the offence in question. (3) Recognizing mistake of (criminal) law as a defence is inescapable in a system of criminal law founded on the principle of individual guilt, i.e. the principle that persons may only be punished for individually avoidable wrongdoing. This insight is spreading in domestic laws, even where mistake of law had before been deemed irrelevant on authoritarian grounds or out of fear of creating an all too easy excuse. International criminal law should not fall behind in this development and recognize honest mistake of law where applicable, for instance in relation to war crimes.