

TOWARD A UNIVERSAL SYSTEM OF CRIME:
COMMENTS ON GEORGE FLETCHER'S *GRAMMAR
OF CRIMINAL LAW*

*Kai Ambos**

INTRODUCTION

Maybe the most ambitious project of comparative criminal law research these days is the elaboration of a universal structure or concept of crime (*Verbrechenslehre*, *teoría del delito*, *teoría del reato*), that is, the rules, structure or system according to which we decide that a certain person deserves punishment for a certain conduct. Given the practice and case law of international criminal tribunals, the question of a universal structure is especially relevant in the field of international criminal law (hereinafter "ICL"); one may even infer a structure of crime from this practice. However, it would be fatal to ignore the centuries' long efforts of national doctrine to develop a consistent *Verbrechenslehre*. Indeed, a universal system must be developed from or, at least, on the basis of the national systems and doctrines, i.e., it requires a comparative, conceptual approach just as employed by George Fletcher in *Grammar* and his earlier works. Such an approach, as any serious work on comparative law, requires a mastery of more than one's native language and this is another field where George Fletcher is well ahead of us all. In any case, given the importance of language in the understanding of criminal law doctrine,¹ it is indispensable to at least read the language employed in the system one sets out to study. Still, while it is clear that a universal grammar of criminal law can make a valuable contribution to the creation of a universal system of crime it seems equally clear that the answers to the hard or fine questions cannot be found on a purely conceptual level. Some of these hard questions will be treated in the following sections without, however, pretending to offer any definitive answers.

* Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the University of Göttingen, Germany; Head Dept. of Foreign and International Criminal Law; Judge State Court (*Landgericht*) Göttingen.

¹ See Francisco Muñoz-Conde, "Rethinking" the Universal Structure of Criminal Law, 39 TULSA L. REV. 941, 943 (2004).

I. THE NATURE OF CRIME AND THE QUESTION OF “THE SYSTEM”

From a European Continental (in particular Austrian, German, Italian, Portuguese, Spanish, Swiss) perspective, the need for a system is almost evident for the following reasons:²

- Complete and “economic” solution of cases;
- Rational and equal application of the law;
- Simplification and better manageability of the law;³
- Guidance to further development of the law (e.g., development of necessity as a written justification out of a supra-legal cause of justification); and
- Better identification of value judgments built in the system.

In sum, the “system,” on the one hand, provides for a structure which contains all the relevant elements necessary for the judgement that someone acted contrary to the law and must be blamed for it. On the other hand, the elements of the system constitute or refer to general doctrines and as such belong to the general part,⁴ more exactly to the questions related to individual responsibility and defences; as such, the system evolves dynamically and integrates the results of the doctrinal developments of centuries. Clearly, there are inherent dangers to a systematic approach or to systematic thinking in general, namely that one overlooks the particularities of the specific case or draws conclusions which from a policy view are not desirable;⁵ yet, these dangers do not mean that systematic thinking as a whole must be

² For a convincing explanation see the fundamental work of BERND SCHÜNEMANN, EINFÜHRUNG IN DAS STRAFRECHTLICHE SYSTEMDENKEN, in GRUNDFRAGEN DES MODERNEN STRAFRECHTSSYSTEMS, 1 *et seq.* (B. Schünemann ed., 1983); *see also* CLAUDIUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL § 7 *mn.* 37 *et seq.* (4th ed. 2006); WOLFGANG NAUCKE, EINFÜHRUNG IN DAS STRAFRECHT § 7 *mn.* 1 *et seq.* (10th ed. 2002). From an Italian perspective, see MASSIMO DONINI, VERBRECHENSLEHRE 42-43 (2005) (the original is *TEORIA DEL REATO* 1999). From a Spanish perspective, see Enrique Gimbernat, *Hat die Strafrechtsdogmatik eine Zukunft?*, 82 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 405 (1970) [hereinafter ZStW].

³ In a similar vein, see Muñoz-Conde, *supra* note 1, at 941, arguing that a “minimum of systematic elaboration is necessary . . . in order to reduce the complexity and facilitate” the mastery of the system.

⁴ Anglo-American doctrine increasingly takes note of the general part. *See generally* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART (Stephen Shute & A.P. Simester eds., 2002) [hereinafter CRIMINAL LAW THEORY]. Within that volume, note especially Douglas N. Husak, *Limitations on Criminalization and the General Part of Criminal Law*, in CRIMINAL LAW THEORY, *supra*, at 13 (arguing convincingly that such limitations can and should be derived from general part doctrines). From a Continental perspective there is, however, not much news in this paper; it is especially common ground on the Continent “to locate these doctrines in the general part” *Id.* at 45.

⁵ *Cf.* ROXIN, *supra* note 2, § 7 *mn.* 43 *et seq.* For concerns regarding “the tendency to inappropriate or exaggerated systematization” and in favour of a “more pluralistic conception of the general part,” see Nicola Lacey, *Philosophy, History and Criminal Law Theory*, 1 BUFF. CRIM. L. REV. 295, 322 (1998).

abolished and replaced by a pure casuistic approach or by an approach, originally called by Fletcher “flat legal thinking”⁶ and now revived—somewhat confusingly—as the “holistic” approach.⁷

The only criminal law theory which, as far as I can see, claims to draw logical conclusions from a theoretical assumption is the finalist school of thinking. Finalist thinking, above all represented by the German scholar Hans Welzel,⁸ necessarily leads to a tripartite system of crime distinguishing between the subjective side of the act as part of the *Tatbestand*, objective and subjective wrongfulness (*Rechtswidrigkeit*) and culpability (*Schuld*) in a normative sense. This approach rests on or presupposes an act requirement as the starting point for criminal responsibility or—more precisely—criminal attribution.⁹ More importantly, in the finalist view¹⁰ this human act is not only a mere naturalistic causal occurrence in the external world but determined by a certain purpose or objective derived from the internal sphere of the agent.¹¹ In other words, a human act is not only an objective cause for a given effect or result but it determines the result achieved and, as such, possesses a mental element, i.e., the wish, desire, purpose, etc., that the

⁶ George Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985), reprinted in JUSTIFICATION AND EXCUSE 67 (Albin Eser & George P. Fletcher eds., 1988); see also Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in JUSTIFICATION AND EXCUSE, *supra*, at 23, which compares the common law concept of crime to a “one-story bungalow with two main entrances in the form of ‘actus reus’ and ‘mens rea’ and many exits constituting (equally ranked) defences” while the German concept is like a “multi-story house in which one must, in order to reach full punishability, ascend floor by floor to reach the highest level.”

⁷ See GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL (forthcoming 2007) (manuscript at 85, on file with the Cardozo Law Review) [hereinafter GRAMMAR MANUSCRIPT]; Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523 (2007).

⁸ Cf. Hans Welzel, *Studien zum System des Strafrechts*, 58 ZStW 491, 505 *et seq.* (1939) [hereinafter Welzel, *Studien*]; HANS WELZEL, DAS NEUE BILD DES STRAFRECHTSSYSTEMS 4 (4th ed. 1961) [hereinafter WELZEL, DAS NEUE BILD]; HANS WELZEL DAS DEUTSCHE STRAFRECHT 33 *et seq.* (11th ed. 1969) [hereinafter WELZEL, STRAFRECHT].

⁹ So, I would not agree with Douglas Husak’s fundamental criticism of the act requirement. See DOUGLAS HUSAK, PHILOSOPHY OF CRIMINAL LAW 83 *et seq.* (1987); Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437 (2007). In fact, I would argue that action cannot be replaced by control (as argued in PHILOSOPHY, *op. cit.*, 97 *et seq.*), but that control precedes action or, in other words, that action presupposes control. For a less convincing critique, see also A.P. Simester, *On the So-Called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403, 407 *et seq.* (1998). On the lack of voluntariness as negating the *actus reus* convincingly, see Finkelstein, *Involuntary Crimes, Voluntarily Committed*, in CRIMINAL LAW THEORY, *supra* note 4, at 148.

¹⁰ For a recent account on the importance of the final theory of the act for the development of criminal law doctrine, see Enrique Bacigalupo, *Die Diskussion über die finale Handlungslehre im Strafrecht*, in FESTSCHRIFT [commemorative publication, hereinafter FS] Eser (J. Arnold et al. eds., 2005); José Cerezo Mir, *Ontologismus und Normativismus im Finalismus der fünfziger Jahre*, in FS, *supra*, Eser 101, at 104 (2005).

¹¹ WELZEL, DAS NEUE BILD, *supra* note 8, at 4 *et seq.*

causal act produces a certain result. In this sense, the finalist act is “seeing” while the pure causal act is “blind”.¹² If one understands the finalist approach as purely volitional—in the sense of Welzel’s famous proverb that the “will is the backbone of the act”¹³—it may be compared to the common law intention in its core sense. As Ashworth puts it: “The core of intention is surely aim, objective, or purpose.”¹⁴

The “subjectification” of the human act entails the consequence that the legal elements of the offence in the sense of the *Tatbestand* cannot be fully understood or captured without taking into account the subjective, internal side of the conduct. In fact, the intent in the sense of *Vorsatz* is part of the final will to realize the act (*finaler Verwirklichungswille*); indeed, it is the final will with respect to the legal elements of the offence.¹⁵ Thus, the *Vorsatz* becomes part of the *Tatbestand*¹⁶ and the (neo)classical bipartite or twofold structure of crime, distinguishing between wrong (*Unrecht*) and culpability (*Schuld*)—still dominant in the common law countries—must be replaced by a threefold or tripartite structure distinguishing between the objective and subjective elements of the offence (*actus reus*/descriptive *mens rea* = *Tatbestandsmäßigkeit*), wrongfulness (*Rechtswidrigkeit*) and culpability (*Schuld*).¹⁷ The change brought about by the finalist approach can be easily identified if one compares the classical structure based on a causal, naturalistic understanding of the act (v. Liszt, Binding, Binding, end of nineteenth century) and the (post-) finalist structure:

¹² WELZEL, STRAFRECHT, *supra* note 8, at 33.

¹³ *Id.* at 34, (“das kausale Geschehen lenkende Wille das Rückgrat der finalen Handlung”).

¹⁴ ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 175 (5th ed. 2006).

¹⁵ WELZEL, DAS NEUE BILD, *supra* note 8, at 8 (“Vorsatz” as “Unterfall des finalen Verwirklichungswillens . . . in bezug auf Tatumstände eines gesetzlichen Tatbestandes.”)

¹⁶ *See, e.g.*, Welzel, *Studien*, *supra* note 8, at 519, (“Der Vorsatz als Moment finaler Zwecktätigkeit gehört zum Unrechtstatbestand”); *see also id.* at 522 (regarding the objective-subjective structure of the “Unrechtstatbestand”).

¹⁷ *See also* Eser, *supra* note 6, at 61 *et seq.* From an Italian perspective, *see* DONINI, *supra* note 2, at 47-48, 58 showing that while the doctrine opts for a tripartite structure on the basis of the German model, the twofold structure corresponds to the tradition of the nineteenth century and is still applied by the tribunals.

Table 1: Classical Structure of the Crime

| I. Objective wrong (<i>Unrecht</i>) = <i>Actus reus</i> | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------|
| 1. (objective) elements of the offence (<i>Tatbestandsmäßigkeit</i>) | 2. Wrongfulness (<i>Rechtswidrigkeit</i>) |
| Act <i>(volitional bodily movement)</i> Result/consequence <i>(change in the external world)</i> causation <i>(theory of equivalence – condicio sine qua non)</i> | |
| II. Subjective (psychological) culpability (<i>Schuld</i>) = <u>Descriptive + normative</u> <i>mens rea</i> | |
| Mental responsibility/capacity as requirement of culpability Elements of culpability: <i>Intentions, motives</i> <i>Intent/dolus (Vorsatz)</i> (consciousness of the wrong, controversial) Absence of causes of exclusion of culpability (necessity et al.) | |

Table 2: (Post-)Finalist Structure of the Crime

| I. (Objective and subjective) elements of the offence (<i>Tatbestandsmäßigkeit</i>) | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1. Objektive | 2. Subjektive |
| act result/consequence causation as minimum requirement of (objective) imputation | (specific) intentions, motives Intent/dolus (<i>Vorsatz</i>) |
| II. Wrongfulness (<i>Rechtswidrigkeit</i>) | |
| objective situation and act of justification subjective element of justification | |
| III. Culpability (<i>Schuld</i>) in a purely normative sense [= <u>normative mens rea</u>] | |
| Mental capacity Consciousness of the wrong (<i>Unrechtsbewusstsein</i>) Absence of causes of exculpation Intent/dolus, specific intentions, motives as forms of culpability (post-finalist, controversial) | |

From these tables it follows that the change brought about by finalist doctrine was twofold: on the one hand, the psychological elements of culpability (*dolus* and specific intentions, equivalent to descriptive *mens rea*) were “moved up” from (psychological) culpability to the *Tatbestand*; on the other hand, the finalist doctrine confirms or reinforces the normativization of the free standing culpability already initiated by the neo-classical school.¹⁸ Thus, *culpa* is no longer (only) understood psychologically, i.e., as the (psychological) intent to cause a certain result (this intent is now—as *Vorsatz*—part of the *Tatbestand*), but as the (moral) blameworthiness of the perpetrator’s conduct, i.e., in the sense of a *normative concept of culpability*. If A kills B he may have intended this result since he knew—cognitive element—that firing a bullet into B’s heart would lead to his death and A may have also wanted—volitional element—this end result. It is quite another question, however, as to whether B’s death can be blamed on A if, for example, A acted under the influence of drugs or was suffering from a mental illness. Such a normative concept of culpability is, in fact, as correctly asserted by Fletcher,¹⁹ a consequence of the acceptance of *negligent* criminal behaviour. While purpose (will) and knowledge as the strictest standards of *mens rea* are compatible with a psychological concept of culpability, negligence implies a moral or normative judgement with regard to an objective standard of care (allegedly applied by a reasonable person) and the offender’s individual capacity to live up to this standard. To conclude that someone acted negligently is to blame her as to her deviance from the normative reasonable standard despite her ability to act otherwise.²⁰

While the finalist concept of the act has important structural consequences it is not the most important aspect of the finalist doctrine, especially if one searches for overall effects or logical deductions with regard to the system of crime as a whole. Indeed, the shift of the *Vorsatz* (*dolus*) from the *Schuld* (*culpa*) to the *Tatbestand* has been

¹⁸ On its approach, see *infra* note 47 and accompanying text.

¹⁹ GRAMMAR MANUSCRIPT, *supra* note 7, at 471, 477 *et seq.* (speaking of an “implicit recognition of the normative theory” by the MPC’s codification of recklessness and negligence and, as a further consequence, an “elaboration of the tripartite structure”).

²⁰ For a recent critical appraisal of the classical doctrine, see GUNNAR DUTTGE, ZUR BESTIMMTHEIT DES HANDLUNGSUNWERTS VON FAHRLÄSSIGKEITSDELIKTEN 41 *et seq.*, 88 *et seq.* (2001), demonstrating that already the classical conception of negligence as a violation of a duty of care could not exist without a recourse to normative standards; indeed, the concept of negligence is itself a normative one. Duttge himself takes recourse to the “*Veranlassungsmoment*,” i.e., a taking into account of the possible rule violation by the potential offender, *id.* at 356 *et seq.*, and tries to achieve greater certainty by a combined psychological-normative approach. *Cf. id.* at 361 *et seq.*

already earlier called for by *Hellmuth v. Weber*.²¹ Much more important is the *ontological approach* of the finalist school, i.e., the idea that there are pre-legal, pre-existing structures—structures of reality—which predetermine the content of our criminal laws.²² In fact, the ontological approach precedes the act approach since the latter is a consequence of the former or, in other words, the final structure of the act is one, maybe the most important, of the ontological realities.

The problem is that finalist thinking, at least in its original form, has few followers today and the subsequent German (and also Spanish and Portuguese, less the Italian)²³ doctrine has convincingly rejected many of its assumptions. First of all, the ontological approach ignores the relevance of the political, social, economic and cultural context of all legal rules. Given this, context legal rules are not the mere result of logical pre-existing structures but follow certain normative or policy decisions and these depend on the given context.²⁴ The Japanese scholar Keiichi Yamanaka rightly demands a “change of context”, a “Japanisation of the German theories” to make them applicable in the social reality of his home country.²⁵ Indeed, for criminal law as for any socially relevant science, the famous proverb of development policy “all politics is local, all governance is local” applies.²⁶ For this very reason it is not possible to conceive the act as an ontological predefined concept but only as an expression of something socially relevant, be it

²¹ HELLMUTH VON WEBER, GRUNDRISS DES TSCHECOSLOWAKISCHEN STRAFRECHTES (1929), in DEUTSCHE JURISTEN ZEITSCHRIFT 663, 666 (1931); ZUM AUFBAU DES STRAFRECHTSSYSTEMS 9 *et seq.* (1935).

²² Cf. FRITZ LOOS, *Hans Welzel*, in RECHTSWISSENSCHAFT IN GÖTTINGEN 486, at 495 *et seq.* (Fritz Loos ed., 1987); HANS-JOACHIM HIRSCH, *Die Entwicklung der Strafrechtsdogmatik nach Welzel*, in FS KÖLN 399, 401 *et seq.*, 415 *et seq.* (Rechtswissenschaftliche Fakultät University of Köln ed., 1988); BACIGALUPO, *supra* note 10, at 62 *et seq.*, 73 *et seq.* (2005); CEREZO, *supra* note 10, at 101 *et seq.* (2005) (considering that the object of reference of the ontological is the “cognition of existence” (“Erkenntnis des Seins”), not the factual or real.).

²³ In Italy, the finalist approach did not have many followers in the first place: it was first (in the 1950s and 1960s) rejected for theoretical reasons and subsequently (1970s) for policy reasons. Cf. DONINI, *supra* note 2, at 15-16, with various references.

²⁴ See the fundamental criticism by Roxin, *Zur Kritik der finalen Handlungslehre*, 74 ZStW 515 (1962); CLAUS ROXIN, KRIMINALPOLITIK UND STRAFRECHTSSYSTEM 5-6, 13-14 (2d ed. 1973); ROXIN, *supra* note 2, § 7 mn. 24. Even the followers of finalism have abandoned the ontological approach. Cf. Bacigalupo, *supra* note 10, at 74. For an Anglo-American perspective, see Peter Alldridge, *Making Criminal Law Known*, in CRIMINAL LAW THEORY, *supra* note 4, at 111 (“criminal law is historically and culturally various.”)

²⁵ In a recent German-Japanese Symposium “*Rezeption und Reform in deutschen und japanischen Recht*,” organised by the Law Faculties of the Kansai-University Osaka and the Georg-August-Universität Göttingen, held in Göttingen from September 11th to 13th, 2006, Yamanaka gave a speech with the title: “Wandlung der Strafrechtsdogmatik nach dem 2. Weltkrieg.” Referring to the necessary “Kontextwechsel” he said: “Um die Aufgabe der Anpassung der Norm an die soziale Wirklichkeit zu erfüllen, sollte die originale Theorie entsprechend dem japanischen sozialen Kontext modifiziert werden.”

²⁶ Cf. the editorial in 47 ENTWICKLUNG UND ZUSAMMENARBEIT (DEVELOPMENT AND COOPERATION) 310 (2006).

on the basis of a theory of social communication or any other theory which takes into account that an act refers to an inter-subjective, communicative relationship. This does not exclude the possibility of an autonomous, i.e., pre-legal concept of the act²⁷ but this concept cannot be developed ontologically or at least not exclusively. This is the reason that we still have different criminal laws, even in our similar western societies, and that our legal concepts cannot, without more, be transferred from one system to another. In addition, the ontological approach ignores the importance of language in the construction of our reality and, thus, of our legal rules.²⁸ The words we use are not mere reflections of reality but an expression of how we see the things; they are not logical deductions from a pre-existing structure of the world but human constructions on the basis of social consensus. From this it follows that the final structure of the act is in itself not an ontological consequence but a construction based on a consensus among criminal lawyers.²⁹ Last but not least, recent psychological research has shown that “consciousness exists in degrees”³⁰ and that “most people do not consciously plan all of their behaviors.”³¹ Indeed, one can hardly dispute that there exists “involuntary” or at least “unintended” acts. If I step on my neighbour’s foot during dinner I do not act—in the finalist sense—with wish, desire, objective etc., but nonetheless I still do act in the sense of a controlled bodily movement. One may only negate the act character of my conduct if I was forced to step on the foot or if I was so heavily drunk that I did not even realize what I was doing. From this it follows that the alleged final structure of the act cannot necessarily explain the subjectification of the *Tatbestand* along the lines of the tripartite structure of crime. Rather than an ontological consequence, the theory of the final structure of the act demonstrates that *an act cannot be understood solely on the basis of its objective externalisation but that the subjective relationship between the actor and the act possesses a symbolic importance in that the actor expresses his*

²⁷ See GRAMMAR MANUSCRIPT, *supra* note 7, at 390 (stating that “concept that has a life of its own”).

²⁸ Cf. Mir Puig, *Grenzen des Normativismus im Strafrecht*, in EMPIRISCHE UND DOGMATISCHE FUNDAMENTE, KRIMINALPOLITISCHER IMPETUS: SYMPOSIUM FÜR BERND SCHÜNEMANN ZUM 60 GEBURTSTAG 83-84 (2005). The Spanish original “*Limites del normativismo en derecho penal*” was published in el HOMENAJE AL PROF. DR. RODRÍGUEZ MOURULLO 665-90 (Thomson Civitas, ed., 2005).

²⁹ Cf. Mir Puig, *supra* note 28, at 92-93.

³⁰ Cf. Deborah W. Denno, *When Two Become One: Views on Fletcher’s “Two Patterns of Criminality,”* 39 TULSA L. REV. 781, 793 *et seq.* (2004) (stating—on the basis of recent research on consciousness—that “most people’s mental processes are not at a heightened state of consciousness; rather, they occur in a ‘twilight world of not properly conscious impulses, inklings, automatism, and reflexive action.’”) (quoting JOHN MCCRONE, GOING INSIDE: A TOUR ROUND A SINGLE MOMENT OF CONSCIOUSNESS 135 (1999)).

³¹ *Id.* at 797-98.

*opposition to the norm proportional to the degree and intensity of his intent.*³² At the same time with the intensity of the intent also increases the danger for the interest or good to be protected by the norm.³³

All these critical observations, however, do not change the claims made by the finalist theory with regard to the structure of crime as shown in Table 2 above; in other words, the systematic consequences of the finalist approach remain correct, notwithstanding the rejection of its normative (ontological) assumptions.³⁴ There is no other theory on the nature of crime—analysed by Fletcher³⁵—with similar strict and stringent claims. The harm principle and the parallel doctrine of the *Rechtsgut* do not predetermine the question of the correct structure of crime; they, importantly enough, try to limit the application of the criminal law but it is increasingly controversial if they are able to do so adequately.³⁶ I also fail to see in how far Hegel's theory of punishment as validation of the norm decides the question of structure in a holistic sense.³⁷ In fact, this theory is followed by one of the most original German criminal law theorists, Günther Jakobs, who sees in punishment the confirmation or reinforcement of the norm called into question by the criminal action; this confirmation is “against the fact” (kontrafaktisch) since, as a matter of fact, the norm was broken but it is re-established by the criminal sanction. While one may consider Jakobs' system as “holistic,”³⁸ he still follows a tripartite structure of crime.³⁹ The reason is that even a holistic approach cannot do without structured thinking, i.e., classification, systematisation and ordering, if it comes to solving concrete cases.⁴⁰

³² See Mir Puig, *supra* note 28, at 97-98.

³³ *Id.* at 98 *et seq.*

³⁴ For the same view, see DONINI, *supra* note 2, at 16, with further references in note 33.

³⁵ GRAMMAR MANUSCRIPT, *supra* note 7, at 57-66.

³⁶ For a recent criticism of the *Rechtsgutslehre*, in particular its inability to effectively limit criminal law intervention in the light of new forms of offences, i.e., its only limited critical value, see TATJANA HÖRNLE, *GROB ANSTÖSSIGES VERHALTEN* 11 *et seq.* (2005) and Lothar Kuhlen, *Die verfassungskonforme Auslegung von Strafgesetzen*, in *MEDIATING PRINCIPLES: BEGRENZUNGSPRINZIPIEN BEI DER STRAFBEGRÜNDUNG* 152, 154-55 (2006). For a general account, see *DIE RECHTSGUTSTHEORIE: LEGITIMATIONS BASIS DES STRAFRECHTS ODER DOGMATISCHES GLASPERLENSPIEL?* (Roland Hefendehl, Andrew von Hirsch & Wolfgang Wohlers eds., 2003). As to the harm principle Fletcher already criticized in *RETHINKING CRIMINAL LAW* 404 (1978) that it is “infinitely expandable,” see Douglas N. Husak, *Crimes Outside the Core*, 39 *TULSA L. REV.* 755, 766 (2004).

³⁷ GRAMMAR MANUSCRIPT, *supra* note 7.

³⁸ *Id.* at 422.

³⁹ GÜNTHER JAKOBS, *STRAFRECHT, ALLGEMEINER TEIL: DIE GRUNDLAGEN UND DIE ZURECHNUNGSLEHRE* (2d ed. 1991).

⁴⁰ See *supra* note 2 and accompanying text.

II. INALIENABLE ELEMENTS OF THE SYSTEM AND THE COHERENCE OF THE WHOLE SYSTEM

Despite the criticism made against some finalist assumptions and its ontological starting point, it cannot be denied—indeed, it is the underlying working hypothesis of *Grammar*—that “criminal law rests on certain philosophical premises of universal validity”⁴¹ and these premises play a very important role in limiting the excesses of a purely normative criminal law theory.⁴² One of these premises refers to the theory of human acts and states that human beings—unlike non-human creatures—possess a specific ability to determine their conduct notwithstanding the quality and substance of this ability, i.e., whether it is volitional in the finalist sense, cognitive or just conscious.⁴³ It is equally true that this ability of—let us say—conscious self-determination is the necessary prerequisite of all legal rules⁴⁴ since otherwise, i.e., if human acts were only the consequence of blind causation, it would be a futile exercise to try to command or control human conduct by such rules.⁴⁵

A further and in my view undeniable consequence—and as such inalienable system element—of finalist thinking is the distinction between the mental element of an offence (*dolus*, *Tatvorsatz*) and culpa (*Schuld*) in a normative sense, as developed above and illustrated in

⁴¹ George P. Fletcher, *From Rethinking to Internationalizing Criminal Law*, 39 TULSA L. REV. 979, 990 (2004).

⁴² The limits of a purely normative criminal law theory have been criticized forcefully in recent writings. See especially Mir Puig, *supra* note 28. Indeed, the excesses of criminal law doctrine during the National socialist regime show how normativist criminal law theory may serve to convert any feeling of resentment into a criminal law provision with deadly consequences for the objects of these feelings. See Brettel, GA 2006, 608 ff. Et seq. (reviewing BINDING/HOCHE, TEXT ZUR FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS (Berlin 2006)); see also Naucke’s introduction to this text. Similarly, the objective teleological interpretation has been criticized as “ein Einfallstor für ganz persönliche Wertungen und Vorurteile des Rechtsanwenders” since its results cannot be verified. See Hilgendorf, GA 2006, 656 (reviewing SIMON, GESETZESAUSLEGUNG IM STRAFRECHT (Berlin 2005), 475-76; see also ERIC HILGENDORF & LOTHAR KUHLEN, DIE WERTFREIHEIT IN DER JURISPRUDENZ 23 (2000). Last but not least, for the increasing materialisation of criminal law, see J. VOGEL, EINFLÜSSE DES NATIONALSOZIALISMUS AUF DAS STRAFRECHT 58 *et seq.* (2004), which leads to uncertainty by the introduction of uncertain legal concepts and the loosening of the legality principle, i.e., materialisation instead of formalisation.

⁴³ In the sense of the “consciousness . . . in degrees” referred to by Denno, *supra* note 30. In the same vein, see GRAMMAR MANUSCRIPT, *supra* note 7, at 387 (“something that enables us to move in this autonomous way”).

⁴⁴ See, albeit from a finalist perspective, Fritz Loos, *Hans Welzel (1904 - 1977)*, 59 JZ 1116, n.22 (2004).

⁴⁵ See WELZEL, DAS NEUE BILD, *supra* note 8, at 4; Mir Puig, *supra* note 28, at 93-94. This approach adheres, in fact, to Austin’s concept of laws or rules as commands. See JOHN AUSTIN, LECTURES ON JURISPRUDENCE 11 (13th ed. 1920).

Tables 1 and 2. This distinction is the result of the long and complex evolution of the theory of crime⁴⁶ which started with the discovery of internal or subjective elements as the constitutive part of the (objective) *actus reus* (*Tatbestand*) in so called ulterior intent crimes, e.g., pure property offences (theft, misappropriation/embezzlement) which possess as a constitutive element the specific intent to deprive the owner permanently of his property (specific intent of expropriation and appropriation); in other words, this specific intent is part of the definition of the act and as such belongs to the subjective *Tatbestand*. This discovery goes back to the beginning of the nineteenth century (Christoph Carl Stübel coined the term “*personaler Tatbestand*”;⁴⁷ also Anselm von Feuerbach⁴⁸) and concluded later—with *H.A. Fischer*⁴⁹ and *Hegler*⁵⁰—with the so-called neo-classical structure of crime.

Interestingly enough the Anglo-American doctrine also recognizes the distinction between *mens rea* in a narrower (descriptive) sense or, as Kadish called it “in its special sense,”⁵¹ encompassing only the psychological subjective elements (all forms of intent, including specific or ulterior intent) and in a broader (normative) sense (*mens rea* in the sense “of legal responsibility”⁵²) referring to the normative-subjective elements in the sense of moral blameworthiness.⁵³ It is equally recognized that there are offences where the *actus reus* can only be understood or defined taking into account the specific intent or purpose given to the act by the agent, e.g., in the case of a simple theft (larceny) the taking away must be accompanied by the specific intent to deprive the owner permanently of his property or in the case of hindering apprehension or prosecution the objective act (e.g., the buying of a plane ticket) must be accompanied by the specific intent to hinder the criminal prosecution.⁵⁴ Thus, it is clear that in these cases the

⁴⁶ On the five epochs in this development, see SCHÜNEMANN, *supra* note 2, at 18 *et seq.* distinguishing between naturalism, neokantianism, the holistic approach (*Ganzheitsbetrachtung*), finalism, and the purpose oriented rationalist approach (*Zweckrationalismus*).

⁴⁷ CHRISTOPH KARL STÜBEL, UEBER DEN THATBESTAND DER VERBRECHEN, DIE URHEBER DERSELBEN UND DIE ZU EINEM VERDAMMENDEN ENDURTHEILE ERFORDERLICHE GEWISSEHEIT DES ERSTERN, BESONDERS, *in* RÜCKSICHT DER TÖDTUNG, NACH GEMEINEN IN DEUTSCHLAND GELTENDEN UND CHURSÄCHSISCHEN RECHTEN §§ 4, 18 (1805).

⁴⁸ Paul Johann Feuerbach & Ritter von Anselm, *Lehrbuch Des Gemeinen, in* DEUTSCHLAND GELTENDEN PEINLICHEN RECHTS § 55 (14th ed. 1847).

⁴⁹ HANS ALBRECHT FISCHER, DIE RECHTSWIDRIGKEIT MIT BESONDERER BERÜCKSICHTIGUNG DES PRIVATRECHTS 138 *et seq.* (1911).

⁵⁰ August Hegler, *Die Merkmale des Verbrechens*, 36 ZStW 19, 31 *et seq.* (1915).

⁵¹ Sanford H. Kadish, *The Decline of Innocence*, 26 C.L.J. 273, 274 (1968)

⁵² *Id.* at 275.

⁵³ See also Paul H. Robinson, *in* 3 JOSHUA DRESSLER, ENCYCLOPEDIA OF CRIME AND JUSTICE 995 (2d ed. 2002); BEATE WEIK, OBJEKTIVE UND SUBJEKTIVE VERBRECHENSELEMENTE IM US-AMERIKANISCHEN STRAFRECHT 47, 80-81 (2004).

⁵⁴ See, e.g., WEIK, *supra* note 53, at 187 *et seq.*; For examples of statutory offences that incorporate knowledge and/or belief as *mens rea* elements, see also Stephen Shute, *Knowledge*

“mental elements are necessary to capture precisely the conduct sought to be prohibited.”⁵⁵ This “subjectification” of the *actus reus* or the objective act can even be more clearly seen in the case of inchoate offences (attempt, conspiracy, solicitation) for in this case the mere external act does not violate a criminal prohibition and as such is neutral or innocent.⁵⁶ Take the example of an attempted injury where the perpetrator waives his hand to hit someone but the waiving could also be interpreted as trying to embrace this person; the meaning of the act of waiving depends on the purpose pursued by the agent. In general terms, “to describe the minimum requirements of prohibited conduct, the definition of a criminal attempt must include a state-of-mind-requirement—the intention to engage in conduct that would constitute a rule-violation.”⁵⁷ Still there is some confusion in the use of terminology. It is, for example, confusing to use the term culpability to capture the psychological elements of *mens rea* in its descriptive (narrow) sense.⁵⁸ Also, notwithstanding the correct distinction between descriptive and normative *mens rea* (see also the parallels drawn in Tables 1 and 2), the system as a whole (the structure of crime) continues to operate on a bipartite basis along the lines of the classical dichotomy between the objective (external) and subjective (internal) side of the crime (as illustrated—classical structure—in Table 1 above). The natural union of *actus reus* and *mens rea* continues to be ignored. I fail to understand this resistance of the old system and even Anglo-American theorists do not seem to have an explanation for it.⁵⁹

The distinction between (subjective) responsibility and culpability also has consequences with regard to the relevance of a *mistake or error* and, above all, for the further distinction between mistake of fact and mistake of law. In reality, the lack of knowledge of the law constitutes

and Belief in the Criminal Law, in CRIMINAL LAW THEORY, *supra* note 4, at 171, 202 *et seq.*

⁵⁵ Sanford H. Kadish, *Act and Omission, Mens Rea, and Complicity: Approaches to Codification*, 1 CR. L. FORUM 65, 72 (1989).

⁵⁶ WEIK, *supra* note 53, at 189.

⁵⁷ Paul H. Robinson, *Should the Criminal Law Abandon the Actus Reus–Mens Rea Distinction?*, in ACTION AND VALUE IN CRIMINAL LAW 187, 209 (Stephen Shute, John Gardner & Jeremy Horder eds., 2003).

⁵⁸ See, e.g., MODEL PENAL CODE § 2.02 (2) (referring to the four mental states as “kinds of culpability”); G.R. Sullivan, *Knowledge, Belief, and culpability*, in CRIMINAL LAW THEORY, *supra* note 4, at 297 (considering knowledge, belief, and willful blindness as culpability requirements). *Id.* at 209, 215, 220, 225. *But see* GRAMMAR MANUSCRIPT, *supra* note 7, at 419. For a different view, see Kyron Huigens, *Fletcher’s Rethinking: A Memoir*, 39 TULSA L. REV. 803 (2004) who on the one hand criticizes the distinction between descriptive and normative proposed by Fletcher, *id.* at 804-05, and, on the other, gives the distinction between intentional and non-intentional conduct more importance, *id.* at 809.

⁵⁹ I put this question to the participants of the Conference “Fletcher’s The Grammar of Criminal Law” (Benjamin N. Cardozo School of Law, Yeshiva University, New York, November 5th and 6th 2006) but it remained unanswered.

a (pure)⁶⁰ mistake of law and such a mistake leaves the intent (*Vorsatz*) as part of the *actus reus* (*Tatbestand*) untouched. If a soldier kills an enemy ‘*hors de combat*’ and he does not know this is a war crime, the soldier certainly acts with intent, knowing the result of his act and wanting this result. Another question, however, is whether the soldier can be held responsible or, more precisely, can be blamed for his ignorance of the law. The traditional *error* or *ignorantia iuris doctrine* would answer in the affirmative since the doctrine is based on a *presumption of knowledge* of the law. Obviously, this is a fiction; for not all crimes are ‘*mala in se*’ and, as such, known to everybody. In fact, the growing amount of special criminal laws produces more and more *mala prohibita*.⁶¹ The same holds true for ICL, at least as far as war crimes are concerned. Things are more complicated if one considers grounds excluding criminal responsibility (*defences*) as negative requirements of the offence and thus extends the knowledge requirement to these grounds. Clearly, their existence and scope are often unknown to the average citizen. Against this background, it is not surprising that there is a clear tendency against the *ignorantia iuris* doctrine not only in civil law systems⁶² but also in common law, summarized most authoritatively in Section 2.04 (3) of the Model Penal Code which recognizes the defence of a (pure) mistake of law.⁶³ Similarly, one may argue, that the recognition of a free-standing, constitutionally grounded principle of culpability, still lacking in Anglo-American law,⁶⁴ would contribute to overcome “objective” doctrines such as *ignorantia iuris*.

⁶⁰ “Pure” mistake of law as opposed to a mistake referring to normative elements of the offence. See WEIK, *supra* note 53, at 144, 206, 212.

⁶¹ The exact contents of the categories in modern criminal law is controversial anyway. See the different views of Antony Duff, *Rule-Violations and Wrongdoings*, in CRIMINAL LAW THEORY, *supra* note 4, at 54 *et seq.* and Alldridge, *supra* note 24, at 107 *et seq.* On the almost parallel distinction between “true crime” and “regulatory offence,” see A.P. Simester & Stephen Shute, *On the General Part in Criminal Law*, in CRIMINAL LAW THEORY, *supra* note 4, at 10.

⁶² See Strafgesetzbuch [STGB] [German Penal Code] 1987, § 17 (recognizing the “*Verbotsirrtum*” going back to the fundamental judgment of the German Bundesgerichtshof (*Grosser Senat*), judgment of 18 Mar. 1952, published in vol. 2, at 194 of the official collection of judgments).

⁶³ For a summary of the discussion, see WEIK, *supra* note 53, at 144 *et seq.*

⁶⁴ Searching in major U.S. textbooks in criminal law one does not encounter a chapter of the principle of culpability. See, e.g., LA FAVE, CRIMINAL LAW (4th ed. 2003) (referring only to violations of due process by strict liability statutes); see also SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES (7th ed. 2001) (referring to culpability, *id.* at 173 *et seq.*, and covering everything from voluntary conduct, *id.* and (descriptive) *mens rea*, *id.* at 203 *et seq.*, to proportionality, *id.* at 278 *et seq.*, and legality, *id.* at 290 *et seq.*). One must not overlook, however, that the formal recognition of certain rule of law principles like culpability and legality is intimately linked to totalitarian experiences or traditions. This may explain that these principles are more strongly embodied in the (written) law of the civil law countries of Central, South, and East Europe as well as Latin America and less in the Anglo-American world and North Europe. See also Gimbernat, *supra* note 2, at 387.

Another consequence of an autonomous concept of culpability—be it normatively or psychologically framed—is the *distinction between wrongfulness and blameworthiness* (culpability) of conduct or, expressed in the terminology of grounds excluding responsibility, between justification and excuse.⁶⁵ Kant's plank example⁶⁶ or the Dudley Stephen case⁶⁷ makes the difference clear: while the taking of another one's life for the sake of the own survival violates the prohibition of manslaughter and as such is a wrongful act no human being can, on a personal level, be blamed for giving preference to the own life over the one of another.⁶⁸ The justification/excuse divide takes this difference into account and thus provides not only for a more just but also a more realistic solution in these cases. The distinction gains particular importance in ICL in cases where a person is forced to act against the law, e.g., by killing innocent civilians, but cannot be blamed for that because of the sheer degree of the force exerted against him and the consequences to be expected in case of disobedience. Concretely speaking: if, as in the Erdemovic case, a simple soldier is forced to kill civilians since otherwise he himself and his family will be killed, it would be too much to expect from him to resist the pressure. Although the ICTY took the opposite, strict view arguing, in essence, that the taking of the life of innocents is inadmissible under any circumstance⁶⁹ (and thereby ignoring the difference between wrongfulness and culpability), this view was set aside by Article 31 (1) (d) of the International Criminal Code since this provision does not foresee another's life as an absolute limit of duress but only requires a necessary and reasonable act to avoid the harm and a kind of subjective proportionality ("does not intend to cause a greater harm than the one sought to be avoided"). Last but not least, the distinction between

⁶⁵ On the fundamental importance of this distinction and its historical development, see Eser, *supra* note 6, at 37 *et seq.*

⁶⁶ See also Fletcher, *supra* note 36, at 231 *et seq.* But see Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875, 888 *et seq.* (2004). From a German perspective, see WILFRIED KÜPER, IMMANUEL KANT UND DAS BRETT DES KARNEADES: DAS ZWEIHEUTIGE NOTRECHT IN KANTS RECHTSLEHRE (1999).

⁶⁷ Dudley & Stephens [1884], 14 Q.B.D. 273 (summarized in German by GUSTAV RADBRUCH, DER GEIST DES ENGLISCHEN RECHTS 69-74 (3d ed. 1956)). On the basis of Radbruch's reception the case became famous in German doctrine under the name "Mignonette-case" (referring to the name of the shipwrecked yacht), see, e.g., HANS-HEINRICH JESCHECK & TOMAS WIEGEND, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 195 (5th ed. 1996).

⁶⁸ For duress as an excuse, see Duff, *supra* note 61, at 63 *et seq.*

⁶⁹ Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment, ¶ 19 (Oct. 7, 1997) (disposition 4). For a discussion with further references, see Kai Ambos, *Other Grounds for Excluding Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1003, 1042 *et seq.* (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

justification and excuse also allows for an appropriate solution in the battered women cases: While the killing of the sleeping tormenter cannot be justified, in particular not by self-defence for lack of an imminent attack,⁷⁰ it may be excused by necessity or duress as an excuse.⁷¹ The underlying value judgment to this decision is that while the killing still constitutes a wrong, it cannot be blamed on the killer given the history of abuse and the lack of alternatives.

Another area where the distinction between *wrongfulness and blameworthiness/culpability* serves some useful purpose is in the case of a mistake about the factual elements of a justification, also referred to as “putative justification”⁷² or in German as *Erlaubnistatbestandsirrtum*. Take the English Morgan case—as an example of a putative consent—where the House of Lords decided that the rapists (Morgan’s friends) of a woman (Morgan’s wife) who claimed to have committed the crime in the belief that the woman liked to be raped (i.e., consented to the sexual intercourse) acted in good faith and therefore could invoke the defence of consent.⁷³ Or let us—as an example of putative self-defence—recall the *Goetz* case where Goetz opened fire on four men approaching him in the New York subway since he believed that they wanted to assault him.⁷⁴ In both cases the accused (Morgan’s friends and Goetz) claim that they believed in a factual situation (a consent of the rape victim and an imminent attack by the bystanders) which, would it have occurred in reality, would have given them the defence (justification) of consent or self-defence.⁷⁵ Assuming, *arguendo*, that the accused’s belief is credible—indeed, in court practice the implausibility of the claim is

⁷⁰ For the same view, compare Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, in *CRIMINAL LAW THEORY*, *supra* note 4, at 259, 264; with Jeremy Horder, *Killing the Passive Abuser: A Theoretical Defence*, in *id.* at 283, 284 *et seq.* (extending his subject concept of self-defence to this case since, inter alia, the abused person is held hostage by the abuser). *Id.* at 295.

⁷¹ The German Supreme Court had to decide on various cases where the tormenter (Haustyrann) was killed by the wife or other family members and it admits, in principle, the defence of necessity as an excuse in the sense of Strafgesetzbuch [STGB] [Penal Code] Dec. 19, 2001, § 35 (BGH NJW 1966, 1823 *et seq.*; NStZ 1984, 20 *et seq.*; BGHSt. 48, 255 *et seq.*) For the same view from an Anglo-American perspective, compare Dressler, *supra* note 70, at 275, 282 *et seq.* (arguing for an excuse defence “ideally, a broad version of duress”) with Horder, *supra* note 70, at 296-97.

⁷² FLETCHER, *supra* note 36, at 762.

⁷³ *Director of Public Prosecutions v. Morgan*, (1976) A.C. 182, (1975) 2 All E.R. 347, (1975) 2 W.L.R. 913 (H.L.).

⁷⁴ *See* *People v. Goetz*, 73 N.Y.2d 751 (1988). For a thorough study on this case, see GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988).

⁷⁵ For the sake of argument, I treat consent as to sexual intercourse here as a justification although it is more convincing to consider it as part of the definition of the offence since rape is a specific form of coercion and as such implies the overcoming of the victim’s free will. *Cf.* Lenckner/Perron, in ADOLF SCHÖNKE & HORST SCHRÖDER, *STRAFGESETZBUCH-KOMMENTAR* § 177 mn. 4, 11 (27th ed. 2006); *see also* Duff, *supra* note 61, at 72-73 (commenting on Morgan).

often the easiest way to reject putative defences⁷⁶—it is clear that the alleged defence must be taken into account in establishing responsibility but the controversial issue remains how this should be done.⁷⁷ Simplifying matters it seems clear that the accused acted, on the one hand, objectively wrong but, on the other, subjectively (in his or belief) right and this subjective right excludes, albeit not the wrongfulness, but the culpability of their acting. Thus, the distinction of wrongfulness and culpability lies at the heart of the solution of these cases and the failure to recognize this distinction leads to solutions like the subjectification of self-defence (Section 3.09 (1) of the Model Penal Code) treating real and putative justification alike⁷⁸ and thus negating the (real) victims the right to defend themselves against the (real) attackers.⁷⁹ Going beyond either the justification or excuse solution, one may argue that putative justification is not completely identical to either of these alternatives: It is neither a straightforward justification since it is lacking the objective justification situation nor it is a straightforward excuse since the actor would not only be excused but justified if her representations were true. Thus, while it is correct to say that the simple application of the justification-excuse distinction to putative justifications “ignores crucial differences,”⁸⁰ a pure terminological approach—distinguishing between “right”, “wrong” and “warranted” acts⁸¹—does not solve the substantial issue at hand. In substance, the gist of the *sui generis* character of putative justification lies in the fact that the actor, in her own mind, does not behave disloyal to the legal order, but acts in accordance with it on the basis of a justification.⁸² Thus, given that both the subjective element of the offence and the one of the justification *together* represent the negative value of the conduct (*Handlungsunwert*) with regard to the (overall) wrongfulness of an act, the existence of the subjective element of the justification annuls the subjective element of the offence, and it is, therefore, most convincing to treat the putatively justified actor *analogously* to an actor lacking intent given that, in the result, both lack

⁷⁶ This practical point is apparently overlooked by GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 160 (1998) (criticizing too harshly the lack of intent approach).

⁷⁷ For the possible solutions, see FLETCHER, *supra* note 76, at 158-63; see also Fletcher, *Deutsche Strafrechtswissenschaft aus ausländischer Sicht*, in *DIE DEUTSCHE STRAFRECHTSWISSENSCHAFT VOR DER JAHRTAUSENDWENDE* 235, at 248 et seq (Albin Eser, Winfried-Hassemer & Bjorn Burkhardt eds., 2000).

⁷⁸ According to Muñoz-Conde, *supra* note 1, at 952, the Spanish Supreme Court takes the same view.

⁷⁹ See the correct critique in FLETCHER, *supra* note 76, at 161-62. For a rejection of Fletcher's solution, see Huigens' analysis of the Morgan case, *supra* note 58, at 809 et seq.

⁸⁰ R.A. Duff, *Rethinking Justifications*, 39 *TULSA L. REV.* 829, 841 (2004).

⁸¹ *Id.* at 841-42.

⁸² Cf. BGHSt 3 105, 107 (where the Supreme Court made the classical statement that the actor is “as such loyal to the legal order” (“an sich rechtsreu”)); in a similar vein, see also Roxin, *supra* note 2, § 14 mn. 64.

the subjective element of the wrongfulness (comprising both the existence of the elements of the offence and the lacking of *all* elements of the justification).⁸³ If the actor's wrong belief in the justification can be blamed on her since she acted in negligence of the ordinary standard of care she may be punished for having committed the respective offence negligently;⁸⁴ this is the same as asking whether the actor could have reasonably believed in the respective circumstances and, in the negative, that she would be punished for her unreasonable belief.⁸⁵

The situation is reversed if the actor is objectively justified but does not know of her luck. The Anglo-American doctrine refers to this as "*unknown justification*" while the German doctrine speaks of a lack of the subjective element of justification ("Fehlen des subjektiven Rechtfertigungselements") thus leaving consciously open what exactly is subjectively required (only pure knowledge or a more volitional moment as specific intent, purpose or motive).⁸⁶ Here again a correct solution must, on a first level, start from the distinction of (objective) wrongfulness and (subjective) culpability: If the frustrated wife W expects her always late and drunk homecoming husband H to enter and she waits with a pan behind the front door to punish him for his repeated disobedience but then hits the burglar who, this night, comes instead of the husband, she objectively acts in self-defence (with regard to the burglar's attack against her property) but is, subjectively, not aware of it. Thus, although she committed objectively no wrong (she may invoke an objective cause of self-defence) she must, subjectively, be blamed since she committed, taking her own mind seriously, an assault against her husband, i.e., she committed the right deed with the wrong imagination.⁸⁷ Yet, again, her act cannot be clearly assigned to the causes of justification or excuse since as to the former she lacks the

⁸³ This is the view of the so called "limited theory of culpability" ("*eingeschränkte Schuldtheorie*") in its variant referring to the (overall) wrongfulness of the conduct "*unrechtsrelevante eingeschränkte Schuldtheorie*," overlooked by Fletcher as quoted in *supra* note 77. For a good explanation of the German theories, see KRISTIAN KÜHL, STRAFRECHT, ALLGEMEINER TEIL § 13 mn. 70 *et seq.* with further references (5th ed. 2005). For a more recent account, see HELMUT FRISTER, STRAFRECHT. ALLGEMEINER TEIL, ch. 14 mn. 26 *et seq.* (2006) and C. Momsen & P. Rackow, *Der Erlaubnistatbestandsirrtum in der Fallbearbeitung*, 38 JURISTISCHE ARBEITSBLÄTTER 550 *et seq.*, 654 *et seq.* (2006) [hereinafter JA].

⁸⁴ Cf. ROXIN, *supra* note 2, at 14 mn. 64.

⁸⁵ For this reasonability standard, See Muñoz-Conde, *supra* note 1, at 952.

⁸⁶ The dominant doctrine considers that knowledge is sufficient, see ROXIN, *supra* note 2 § 14 mn. 97 *et seq.*; GÜNTHER JAKOBS, STRAFRECHT, ALLGEMEINER TEIL: DIE GRUNDLAGE UND DIE ZURECHNUNGSLEHRE ch. 11 mn. 18 *et seq.* (21) (2d. ed. 1991); URS KINDHÄUSER, STRAFRECHT ALLGEMEINER TEIL § 15 mn. 9 (2d. ed. 2006). The case law requires a specific intent or purpose of justification, see, e.g., BGHSt 5, 245, at 247; BGH GA 1980, at 67; see also I BERND HEINRICH, STRAFRECHT ALLGEMEINER TEIL, mn. 386 *et seq.* (2005).

⁸⁷ Contrary to George P. Fletcher, *The Right Deed for the Wrong Reason—Reply to Mr. Robinson*, 23 UCLA L. REV. 293 (1975), I do not consider this as a problem of "reason" but of "imagination."

subjective element and as to the latter the act constitutes objectively no wrong. For this very reason the so called success solution (*Vollendungslösung*),⁸⁸ convicting W for a completed assault, is not convincing since it treats the completely unjustified actor equally with the only subjectively unjustified actor. Similarly, exempting W completely from any criminal responsibility arguing that she “does not merit a criminal conviction,”⁸⁹ is not correct since it means treating the fully justified or excused actor equally with the only objectively acting justified actor. The right solution, then, lies in the so called attempt solution (*Versuchslösung*) drawing an analogy of the (only) objectively justified actor to the actor attempting an offense.⁹⁰ To call this solution “absurd”⁹¹ is overlooking the subjectivation of attempt: It is only absurd from an objective perspective to argue that W attempted to assault her husband (since he was still kilometers away in his favourite bar) but from a subjective perspective it exactly corresponds to W’s imagination, i.e., to have her husband entering the house and hitting him with the pan.

A further consequence of the normativization brought about by the neoclassical and finalist school is the theory of normative attribution or imputation (*objektive Zurechnung*) which intends to develop rules for the (normative) attribution of particular events to a responsible agent.⁹² This theory also has some historical precedents and underpinnings which must be taken into account to fully capture the importance of the currently applied so called normative imputation in the narrow sense. The doctrine of imputation in its *original* sense, related to natural law, can best be described by the opposing concepts of *imputatio facti*—*imputatio iuris* or *imputatio physica*—*imputatio moralis*. Accordingly, we are concerned first with a factual or physical imputation of an *event*

⁸⁸ This was the traditional view of the German Supreme Court, see BGHSt 2, 114; diss., however, BGH Juristische Rundschau 206 (1992) [hereinafter JR]. For the same result, see Fletcher, *supra* note 36, at 563 *et seq.* (565) arguing that such an actor does not merit a justification defence.

⁸⁹ Duff, *supra* note 80, at 847, 849 preferring, generally, a casuistic approach arguing that not all cases can be treated equally. For the same result, see Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 288-91 (1975) arguing, from an utilitarian perspective, that the lacking knowledge as to the justification does not make the actor lose her justified status. *But see* Fletcher, *supra* note 87.

⁹⁰ The attempt solution is the dominant doctrine in Germany and is favored by many scholars in other continental systems. See, e.g., ROXIN, *supra* note 2, § 14 mn. 104 *et seq.*; KRISTIAN KÜHL, STRAFRECHT ALLGEMEINER TEIL § 6 mn. 14 *et seq.* (5th ed. 2005). For the Anglo-American doctrine, see Larry Alexander, *Unknowingly Justified Actors and the Attempt/Success Distinction*, 39 TULSA L. REV. 851, 855 *et seq.* (2004), who is in favour of the doctrine, but treats self-defence as an excuse, *id.* at 855-56, and ultimately considers the issue as “a question of policy.” *Id.* at 858.

⁹¹ Duff, *supra* note 80, at 845.

⁹² The term “attribution-responsibility,” used by Victor Tadros, *Recklessness and the Duty to Take Care*, in CRIMINAL LAW THEORY, *supra* note 4, at 227, 231, aptly catches the meaning.

controlled by (humane) will (a “natural act”) to a particular *person* (the perpetrator or agent); then we have to qualify this event legally or morally in the sense of normative imputation, that is, to perform a normative evaluation of the act as wrongful or immoral and thus in need of a sanction.⁹³ Thus, imputation is understood as “the establishment . . . of a relationship between an event and a human being”⁹⁴ as the “link between an event (*Seinstatbestand*) and a subject on the basis of the norm.”⁹⁵ Imputation in a *broader* sense concerns the central question of the general part of criminal law: what person shall be punished under what normative assumptions?⁹⁶ To put it more abstractly: how should “the relationship between the subject of the offence and the result” be “construed”?⁹⁷ The imposition of a sanction requires, as a minimum, that the person can be held to account for certain consequences of her acts since she realized these on purpose (*zweckhaft*);⁹⁸ otherwise, these consequences have to be considered as “bad luck” and as such cannot be attributed to anybody.⁹⁹ Obviously, in addition to the attributable act, the imposition of a criminal sanction presupposes that the person acted wrongfully and deserves to be blamed

⁹³ For this differentiation based on the natural law doctrine of the eighteenth century, see SAMUEL VON PUFENDORF AND CHRISTIAN WOLFF, F. SCHAFFSTEIN, *DIE ALLGEMEINEN LEHREN VOM VERBRECHEN IN IHRER ENTWICKLUNG DURCH DIE WISSENSCHAFT DES GEMEINEN STRAFRECHTS* 36-37 (Aalen 1986); JOACHIM HRUSCHKA, *STRUKTUREN DER ZURECHNUNG* 2-3, 35 (1976); Bernd Schünemann, *Über die objektive Zurechnung* 207, 208 GA (2003). In a similar vein, see HANS KELSEN, *HAUPTPROBLEME DER STAATSRECHTSLEHRE: ENTWICKELT AUS DER LEHRE VOM RECHTSSATZ* 73 *et seq.* (2d ed., Aalen 1984) according to which the imputation possesses a non-causal, non-teleological and non-volitional character since it rests “exclusively and solely on the Ought (*Sollen*), on the norm.” *Id.* at 75 (translation from German); *see also* Manfred Maiwald, *Zur strafrechtssystematischen Funktion des Begriffs der objektiven Zurechnung*, in FS MIYAZAWA 465 *et seq.* (Hans-Heiner Kühne ed., 1995) (tracing back imputation in its original, two-tiered sense to Larenz, Honig, and Welzel).

⁹⁴ WERNER HARDWIG, *DIE ZURECHNUNG: EIN ZENTRALPROBLEM DES STRAFRECHTS* 7 (1957) (“die Feststellung . . . eines Zusammenhangs zwischen einem Geschehnis und einem Menschen.”)

⁹⁵ KELSEN, *supra* note 93, at 72, 144. Later Kelsen characterized the relationship between “Seinstatbestand” and subject of the norm as “*Zuschreibung*” (“ascription”) and used the term imputation only as analogy to scientific causality. *Cf.* HEINZ KORIATH, *GRUNDLAGEN STRAFRECHTLICHER ZURECHNUNG* 146-49 (1994).

⁹⁶ *Cf.* JAKOBS, *supra* note 86, at ch. 6 mn. 1.

⁹⁷ ROXIN, *supra* note 2, § 10, mn. 55: “Wie muß die Beziehung zwischen Deliktssubjekt und Erfolg beschaffen sein?”; *see also* Wolfgang Frisch, *Zum Gegenwärtigen Stand Der Diskussion Und Zur Problematik Der Objektiven Zurechnungslehre* 719, at 725-26 GA (2003).

⁹⁸ *Cf.* Claus Roxin, *Gedanken zur Problematik der Zurechnung im Strafrecht*, in *FESTSCHRIFT FÜR RICHARD M. HONIG* 132 *et seq.*, 134 (1970) (referring to Honig); *see also* Maiwald, *supra* note 93, at 465 *et seq.*; Winfried Hassemer, *Person, Welt und Verantwortlichkeit. Prolegomena einer Lehre von der Zurechnung im Strafrecht*, in *AUFGEKLÄRTE KRIMINALPOLITIK, ODER, KAMPF GEGEN DAS BÖSE? BAND I: LEGITIMATIONEN* 354-55 (Klaus Lüderssen ed., 1998); Wolfgang Frisch, in *FESTSCHRIFT FÜR CLAUD ROXIN* 214-15 (2001).

⁹⁹ *Cf.* Günther Jakobs, in *VERANTWORTUNG* 65 (Neumann/Schulz eds., 2000).

for it (in the sense of the tripartite structure).¹⁰⁰ In contrast, normative imputation is imputation in the *narrow* sense, imputation to the result provided for in the *Tatbestand*. This type of imputation was initially developed by Richard Honig¹⁰¹ who was himself influenced by Karl Larenz' doctoral dissertation in civil law on Hegel's theory of imputation and the concept of objective imputation.¹⁰² Honig was concerned with the broad and unlimited attribution produced by the causal theories of his time and tried to limit these theories taking recourse to the pre-legal criterion of "objective purpose" (*objektive Zweckhaftigkeit*).¹⁰³ He argued that only those results which a person realized "on purpose" can be imputed to that person.¹⁰⁴ In addition, the person must not only have the possibility to control the causal course of events but truly be able to control it.¹⁰⁵ Honig's approach was subsequently normativized and complemented with a broad range of legal or normative criteria,¹⁰⁶ in particular by Claus Roxin.¹⁰⁷ This also brought about a change of perspective as to the function of objective imputation: some theorists no longer consider it only as a way to restrict unlimited natural causation but as a foundational theory of individual criminal responsibility as such.¹⁰⁸ In any case, the new understanding of normative imputation in essence requires that the act under consideration creates or increases—from an *ex ante* perspective—a risk or danger for a specific legal good or interest and that this risk has been—from an *ex post* perspective—specifically realized in the given criminal result.¹⁰⁹ There is a certain affinity of this doctrine to the

¹⁰⁰ Cf. Hardwig, *supra* note 94, at 4 ("Ist ein Tatbestand einschließlich der Rechtswidrigkeit und der Schuld erfüllt, dann . . . wird die bestimmte Verhaltensweise dem Täter als die seine zugerechnet"); *But see* DETLEF KRAUSS, DIE ZURECHNUNG DES ERFOLGES IM UNRECHTSTATBESTAND 6 (1963) construing imputation from the perspective of the criminally relevant wrong presupposing the distinction between wrongfulness and culpability. Apparently different, *see* KELSEN, *supra* note 93, at 73 *et seq.*, 143 *et seq.* considering "culpability" as imputation of the juridical-ethical, i.e., normative (instead of psychological) "wanted" external result, thus conceiving it solely as a normative imputation ("the Ought" = "das Sollen") in the sense explained in the text.

¹⁰¹ *See* Richard M. Honig, *Kausalität und objektive Zurechnung*, in FESTGABE FÜR REINHARD VON FRANK 174 (1930). For a recent positive reappraisal of Honig's theory, *see* Maiwald, *supra* note 93, at 465 *et seq.* Interestingly, Honig was expelled by the Nazis from his chair in Göttingen and exiled to Turkey and later the United States but did not influence U.S. criminal law.

¹⁰² *See* KARL LARENZ, HEGELS ZURECHNUNGSLEHRE UND DER BEGRIFF DER OBJEKTIVEN ZURECHNUNG (1927).

¹⁰³ *See* Honig, *supra* note 101, at 184 and *passim*.

¹⁰⁴ *See id.* at 184, "Zurechenbar ist demnach derjenige Erfolg, welcher als zweckhaft gesetzt gedacht werden kann."

¹⁰⁵ *See id.* at 187 and *passim*.

¹⁰⁶ Cf. Maiwald, *supra* note 93, at 474 *et seq.*; Frisch, *supra* note 97, at 721; CHRISTOPH HÜBNER, DIE ENTWICKLUNG DER OBJEKTIVEN ZURECHNUNG 125 *et seq.* (2004).

¹⁰⁷ *See* Roxin, *supra* note 98.

¹⁰⁸ *See* HÜBNER, *supra* note 106, at 69.

¹⁰⁹ You can find details in any German textbook or treatise on criminal law. *See, e.g.*, ROXIN,

proximate cause doctrines in Anglo-American law, at least as far as they are not understood as pure naturalistic restrictions of causations but as normative theories.¹¹⁰

III. INTERNATIONAL CRIMINAL LAW (ICL), ESPECIALLY THE ICC STATUTE, AND THE QUESTION OF THE SYSTEM

A comprehensive analysis of the case law and codifications in International criminal law with regard to the General Part and the structure of crime¹¹¹ results in a *twofold system* or bipartite structure along the lines of the Anglo-American *actus reus/mens rea-versus-defences* dichotomy.¹¹²

Table 3: The Structure of Crime in International Criminal Law

| I. Offence/individual responsibility/attribution | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Objective requirements (<i>actus reus</i>) | |
| a) Participation | b) Expansion/extensions of responsibility/attribution |
| (1) (Direct/immediate) perpetration (2) Co-perpetration, including joint criminal enterprise (I, II) (3) Indirect perpetration/p. by means, especially control by virtue of a hierarchical organisation (4) Complicity: | (1) Command/superior responsibility (2) Attempt (3) Other contribution to collective/group crime, including conspiracy (sic!), joint criminal enterprise III |

supra note 2, § 11 mn. 39-136; *see also* Fletcher, *supra* note 36, at 495-96. For more details, see HÜBNER, *supra* note 106, at 154 *et seq.* who himself argues for a combination of Honig's doctrine of "objektive Zweckhaftigkeit" and the normative concept of the permitted risk. *Id.* at 291, 294, 301-02. For a profound critique, see Frisch, *supra* note 97, at 733 *et seq.*, arguing that the focus should be on the conduct encompassed by the Tatbestand and not only on the result caused by this conduct. For a recent defense, see Schünemann, *supra* note 93, at 213 *et seq.*

¹¹⁰ Cf. M.S. Moore, *Causation*, in Dressler, *supra* note 53, vol. 1, 150, at 152, 158. For a first account of normative attribution from an Anglo-American perspective, see A. von Hirsch, *Extending the Harm Principle: "Remote" Harms and Fair Imputation*, in HARM AND CULPABILITY 259, 265 *et seq.* (Simester/Smith eds., 1996), invoking fair imputation principles to deal with remote risks; *see also* Tadros, *supra* note 92, at 236 (defining his attribution-responsibility as "determining whether an agent is answerable for a particular action, consequence, or state of affairs at all" and considering that at its heart lies causation).

¹¹¹ For a comprehensive analysis, see KAI AMBOS, *DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS: ANSATZE EINER DOGMATISIERUNG* (2004), First and Second parts (summarizing at 70-1, 515) [hereinafter AT]; *see also* HELMUT SATZGER, *INTERNATIONALES UND EUROPÄISCHES STRAFRECHT* § 14 mn 17 (2005).

¹¹² *See* HUSAK, *supra* note 9, at 123 (referring to this system as a "dualistic" model). In fact, given the *actus reus/mens rea* and the offences/defences dichotomy one can speak of a "double dualism."

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|
| Inducement/instigation/incitement and aiding/abetting | |
| 2. Subjective requirements (<i>mens rea in the broad sense</i>) | |
| II. Defences/grounds excluding responsibility | |
| 1. Substantive (material) grounds | 2. Other (procedural) grounds |
| a) Complete exclusion of responsibility (culpability) because of mental or other defect (intoxication!) b) Self-defence c) Superior order d) Necessity/duress, especially threat to life and limb of perpetrator (<i>Nötigungsnotstand</i>) e) Mistake of fact/of law | a) Immunities b) Amnesties, pardons, others |

This twofold structure ignores the inalienable system elements discussed earlier. First, it does not distinguish between the subjective (psychological) elements of the offence in the sense of a *Tatvorsatz* (*dolus*) and specific intentions (descriptive *mens rea*) on the one hand, and the blameworthiness of the act expressed by an autonomous (third) level of (normative) culpability (*Schuld*, normative *mens rea*) on the other (cf. Table 2). Secondly, it does not distinguish between wrongfulness/justification and culpability/excuse as the two- or threefold structure of an offence as applied in the Germanic systems (Table 2). Thus it seems as if Fletcher's view "that the bipartite system is now incorporated into the basic structure of the ICC" and that "the model of the common law prevails in the design of the substantive law" is correct.¹¹³ The hard question is, however, whether the ICC Statute really decides the question of the system, indeed, whether it was really designed by the drafters with a certain system in mind. As I will explain in a moment, this was not the case either during the Preparatory Committee meetings in New York or during the actual States' conference in Rome. As to a specific interpretation of the norms belonging to the "General Part" (Part III) of the ICC Statute, Fletcher

¹¹³ GRAMMAR MANUSCRIPT, *supra* note 7, at 71, 72.

refers to Art. 30 to 32 without, however, analysing these provisions in more detail in the first volume of his Grammar. Thus, the question remains what really can be concluded from these and eventually other provisions of the “General Part” of the ICC Statute?

Article 30 defines the *mental element* as “intent and knowledge” (para. 1). Intent is characterized by the words “means to”, either “engage” (with regard to conduct) or “cause” (with regard to consequences), i.e., it expresses purposeful, willful causation (para. 2). In addition, a person acts with intent when she is “aware” that a certain consequence “will occur in the ordinary course of events” (para. 2 (b)), i.e., intent also encompasses cognitive or conscious causation with regard to consequences. In other words, intent has a double volitional and cognitive meaning just as the common law intent consisting of intention in its core sense plus virtual certainty¹¹⁴ and the continental *dolus* or *Vorsatz* consisting of a volitional and cognitive element. Most recently, the ICTY’s Oric Trial Chamber has given the same definition on intent.¹¹⁵ As to the common-civil law divide on the issue of *dolus eventualis* and recklessness Art. 30 is silent or at least not decisive. The definition of “knowledge” as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events” (para. 3) can be interpreted as encompassing *dolus eventualis* or not—that depends ultimately on one’s concept of *dolus eventualis*; in any case para. 3 covers, *a fortiori*, the so called (subjective or advertent) Cunningham recklessness in the sense of a “conscious taking of an unjustified risk.”¹¹⁶

As to Article 31, the provision of “Grounds for excluding criminal responsibility,” many things can be said (for example, quoting Fletcher, that it does not “a very good job of articulating either a theory of justification or of excuse”)¹¹⁷ except that it indicates a clear preference for one system over another. First of all, the provision was, in the words of Per Saland, chairman of the working group on general principles at the Rome conference, “perhaps the most difficult one to

¹¹⁴ See MODEL PENAL CODE § 2.02(2)(a) (using “purposely” and “knowingly”). This terminology is clearer than the use of “intent” in Art. 30 since this term has a double meaning. In the same vein, see GRAMMAR MANUSCRIPT, *supra* note 7, at 458.

¹¹⁵ Prosecutor v. Naser Oric, Case No. IT-03-68-T, Judgment, ¶ 279 (June 30, 2006) (“cognitive element of knowledge and a volitional element of acceptance”); see also *id.* ¶ 288.

¹¹⁶ Cf. MODEL PENAL CODE § 2.02(c): “consciously disregards a substantial and unjustifiable risk.” See also ASHWORTH, *supra* note 14, at 182; ANDREW P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 140 *et seq.* (2d ed. 2004). According to Shute, *supra* note 54, at 17-18, knowledge and/or belief are the “core elements underpinning any defensible subjectivist definition” of recklessness. For a middle ground between this subjective concept and an object concept of recklessness focusing on a duty to take care with regard to particular risks, see Tadros, *supra* note 92, at 227-28, 257-58 and *passim*.

¹¹⁷ GRAMMAR MANUSCRIPT, *supra* note 7, at 448.

negotiate . . . because of the conceptual differences which were found to exist between various legal systems.”¹¹⁸ The term “grounds” (excluding criminal responsibility) instead of “defences” was deliberately chosen to avoid from the start the established common law interpretations implied by this term.¹¹⁹ Indeed, the terminology makes clear that the provision refers to substantive “defences”, thereby following in essence a narrower understanding excluding mere procedural defences, such as *ne bis in idem* or—in most systems—statutes of limitation.¹²⁰ At the same time, the provision does not distinguish between justification and excuse, at least not explicitly. In fact, it mixes up exclusionary grounds which traditionally—in the civil law systems—belong either to the causes of justification (self-defence) or excuse (mental defect, intoxication) or—depending on their exact codification—to both (necessity as a justification, duress as an excuse).¹²¹ In particular the recognition of duress as a broad exclusionary ground when acting to avoid a “threat of imminent death or of continuing or imminent serious bodily harm” against oneself or another person without a limitation in terms of objective proportionality or the life of others—setting aside, as mentioned above, the ICTY Erdemovic case law¹²²—may be interpreted as a concession to the civil law tradition, almost a kind of late rehabilitation of Kant’s solution of the plank case.

As to the provision on *mistake*, paragraph 1 of Article 32 recognizes an exclusionary effect of a mistake of fact “if it negates the mental element required by the crime.” This is a mistake negating or negating *mens rea* well known in common law (Section 2.04 (1) (a) of the Model Penal Code) but also recognized in civil law as “*Tatbestands*” or “*Tatumstandsirrthum*,” *error de tipo* etc. Thus, while paragraph 1 does not indicate a certain prevalence for common or civil law, paragraph 2, establishing as a principle the *ignorantia iuris* doctrine, criticized already above,¹²³ clearly is a common law legacy. In fact, the final wording was mainly based on a proposal by the Canadian delegation in Rome. Strictly applied, this would lead to an overcriminalisation largely ignoring the principle of culpability (which is, albeit not explicitly mentioned in the ICC Statute,¹²⁴ recognized in

¹¹⁸ Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 206 (Roy S. Lee ed., 1999).

¹¹⁹ Cf. Kai Ambos, *The General Principles of Criminal Law in the Rome Statute*, 10 *CRIM. L. FORUM* 1-32, 2 (1999). See also Saland, *supra* note 118, at 206-07.

¹²⁰ Arguing for a more sophisticated use of the term of defences, see Jane Gardner, *Fletcher on Offences and Defences*, 39 *TULSA L. REV.* 817 (2004); Duff, *supra* note 80, at 831.

¹²¹ For a detailed analysis, see Ambos, *supra* note 69, at 1027 *et seq.*

¹²² See *supra* note 69 and accompanying text.

¹²³ See GRAMMAR MANUSCRIPT, *supra* note 7, at 469 (rightly calling this a “very unfortunate regression”).

¹²⁴ But see GRAMMAR MANUSCRIPT, *supra* note 7, at 447.

ILC since Nuremberg).¹²⁵ Take for example the highly practical case of a soldier who kills a civilian on the basis of an order believing in its legality. He acts with intent and in this sense commits the war crime of killing civilians in its objective (*actus reus*) and subjective (*mens rea*) sense. His possible error as to the validity and exonerating effect of the order, i.e., an error iuris, would be irrelevant since Article 32 (2)'s first clause excludes any exonerating effect of an error iuris (mistake of law). Although for the special situation of a superior order this situation is remedied by the second clause of Article 32 (2) providing for an exception with regard to Article 33 (1)(b) as far as war crimes are concerned (Article 32 (2) *e contrario*)¹²⁶ the general problem of the little sensibility of the *ignorantia iuris* doctrine as to the accused's (normative) culpability continues to exist. This general problem can only be remedied by a *generally* more flexible approach with regard to mistakes of law given the growing complexity of (international) criminal law. Indeed, a criterion of *avoidability* or even *reasonableness* could make practical and just solutions possible on a case-by-case basis.¹²⁷ Be that as it may, it is true that Article 32 (2) rests on a common law concept of mistake although the abolition of the *ignorantia iuris* doctrine in civil law systems is of recent date¹²⁸ and by no means extends to all civil law countries.

There are other provisions in the Rome Statute which may be interpreted in one or the other direction, i.e., expressing preference to the civil or common law systems. Thus, for example, the recognition of a negligence standard in Article 28 (responsibility of the superior) seems to imply, given the normative impact of negligence demonstrated above,¹²⁹ that "a principle of normative responsibility or culpability underlies the entire Rome Statute."¹³⁰ In addition, to have a full picture one must include the procedural provisions which show either "adversarial" or "inquisitorial" tendencies. Take for example Article 64

¹²⁵ As I have explained elsewhere the principle of culpability can be derived from Art. 21 either as customary law or as a general principle of law. See KAI AMBOS, INTERNATIONALES STRAFRECHT: STRAFANWENDUNGSRECHT, VOLKERSTRAFRECHT, EUROPÄISCHES STRAFRECHT: EIN STUDIENBUCH § 7 mn. 9 (2006). It was recognized in Nuremberg. See Ambos, *supra* note 111, at 86-7, 125, 361; see also Hans-Heinrich Jescheck, *The General Principles of International Criminal Law set out in Nuremberg as mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 44-45 (2004) and by the ICTY-Appeals Chamber (Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 186 (15 July 1999)).

¹²⁶ Thus, if the soldier does not know the unlawfulness of the order such a mistake will be considered relevant (as negating his or her *mens rea*). This privilege for subordinates can only be explained with the balance of power and sense of compromise lying over the Rome negotiations, especially as regards certain military interests.

¹²⁷ See Ambos, *supra* note 111, at 822 *et seq.*

¹²⁸ In Germany, it goes back to BGH. See *supra* note 62.

¹²⁹ See *supra* note 19 and accompanying text.

¹³⁰ Cf. GRAMMAR MANUSCRIPT, *supra* note 7, at 471.

(8) (a) and 65 which at first sight seem to be adversarial in introducing an admission of guilt procedure apparently modeled after the common law guilty plea (Article 64 (8) (a) even uses the term “plead . . . guilty”, albeit in its negative sense); a closer look, however, reveals that the provision in fact turns the classical guilty plea procedure on its head leaving it to the Court how to treat the admission of guilt, i.e., either accepting it and rendering a sentence on this basis or asking the prosecutor for additional evidence or even continuing with the proceedings as if the admission had not occurred (cf. Article 65 para. 2 to 4); in any case, “[A]ny discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court” (Article 65 (5)).

All this confirms that the Rome Statute does not decide the question of the “system.” To read such a decision into the Statute would overstate the theoretical level and depth of the discussions in New York and Rome as well as overestimate the intellectual capacities of the great majority of the negotiators (who were mainly diplomats and not legal experts, even less criminal law experts). It would, in turn, understate and underestimate the highly politicized climate of the negotiations and could only be noted by people who took part in these negotiations, like this author, as academic wishful thinking detached from the reality of international diplomatic negotiations.

CONCLUSION

If it is true, as argued in this paper, that the Rome Statute does not solve the question of the system the work of the International criminal law theorists only just begins. In this sense, it is correct if Fletcher invokes Article 21 (1)(c) of the ICC Statute and interprets this provision as enabling comparative criminal lawyers to push “the project of a deriving a comparative synthesis from the bottom up.”¹³¹ It is equally true that the Rome Statute has a “top-down influence” *vis-à-vis* national criminal law.¹³² In fact, the necessary implementation of the ICC statute in the—at the time of this writing (MARCH 23, 2007)—104 state parties did not only produce a whole new area of research within International criminal law¹³³ but also forces the state parties to rethink

¹³¹ GRAMMAR MANUSCRIPT, *supra* note 7, at 492.

¹³² *Id.*

¹³³ We could call it “implementation research.” See the project *National Prosecution of International Crimes* of the Max Planck Institute for Foreign and International Criminal Law, originally designed by Albin Eser and Helmut Kreicker, which led to the publication of 23 country reports (counting Latin America as one report) in six volumes (2003-2005) and a comparative summary in the 7th volume (2006). See also 1 THE ROME STATUTE AND DOMESTIC

traditional solutions in their substantive and procedural criminal law. This process of rethinking—the similarity to George Fletcher’s fundamental work of 1978 is coincidental but not accidental—must be accompanied by solid groundwork in comparative criminal law starting with conceptual clarifications as offered by Fletcher in the *Grammar*;¹³⁴ at the same time, the considerable achievements in criminal theory and practice over the centuries with regard to the rule of law and fundamental considerations of fairness must not—for the sake of an allegedly more vigorous prosecution of international criminals—be abandoned but reinforced and integrated into the rules of attribution of International criminal law.¹³⁵ While *Rethinking* served as a bridge between continental thought and common law,¹³⁶ the *Grammar* may go beyond that in creating a basis for truly supranational principles of criminal law.¹³⁷ In this sense, Fletcher’s own (self-critical) appeal to “serious scholars” who “carry this inquiry forward and refine the argument” deserves our strongest and unreserved support.

LEGAL ORDERS (Kress/Lattanzi eds., 2000); GENERAL ASPECTS AND CONSTITUTIONAL ISSUES (2000) and 2 CONSTITUTIONAL ISSUES, COOPERATION AND ENFORCEMENT (2005). For Latin America, see the work of the “Grupo Latinoamericano de Estudios sobre Derecho Penal Internacional” (Programa de Estado de Derecho para América del Sur de la Konrad-Adenauer-Stiftung y Dept. de Derecho Penal Extranjero e Internacional del Instituto de Ciencias Criminales de la Universidad de Göttingen, available at http://lehrstuhl.jura.uni-goettingen.de/kambos/Forschung/laufende_Projekte.html) with its last publications: DIFICULTADES JURÍDICAS Y POLÍTICAS PARA LA RATIFICACIÓN O IMPLEMENTACIÓN DEL ESTATUTO DE ROMA DE LA CORTE PENAL INTERNACIONAL, (Ambos/Malarino/Woischnik eds., 2006) Y COOPERACIÓN Y ASISTENCIA JUDICIAL CON LA CORTE PENAL INTERNACIONAL (Ambos/Malarino eds., 2007).

¹³⁴ Or by this author with regard to the *nullum crimen, nulla poena* principles, see Kai Ambos, *Nulla Poena Sine Lege In International Criminal Law*, in SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW, 17-35 (R. Haveman & O. Olusanya eds., 2006).

¹³⁵ See Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. INT’L CRIM. JUST. 660, 669 (2006) (calling for a recognition of fundamental principles of criminal law in ICL).

¹³⁶ Fletcher, *supra* note 41, at 985 (making the point that “comparative effort to communicate an understanding of Continental thought to theorists in common law countries, reciprocally, to provide those outside the tradition with access to American thinking in criminal law”).

¹³⁷ This was maybe more clearly suggested by the former title “Internationalizing Criminal Law.” See Fletcher, *supra* note 41, at 992-93 (explaining the gist of this book project).