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Hi, this Roger Clark here again. This time talking about article 32 on mistake of fact or mistake of law.

Article 32 is an example of a ground for excluding responsibility that could well have been folded into article 31's list of grounds to this effect. Mistake was, however, treated as a discrete problem in the negotiations and ended up with its own separate article. Let me note at the outset that while the article talks of mistake, it is equally applicable to ignorance as to mistake. A person is ignorant where she has simply not thought about the issue. A person who applies her mind to the matter but gets it wrong has made a mistake. In what follows, I generally just use "mistake" to encompass both ignorance and mistake. Article 32 applies to the thinker and the non-thinker alike.

Now, many of those involved in the drafting of the general part of the Rome Statute, myself included, believed that any special provisions for mistake were unnecessary. A mistake or ignorance, simply negates the element of culpability, for example, intent, knowledge, or negligence as may be required in respect of the particular material element of the offense concerned. As early as a 1996 Compilation of Proposals by the Preparatory Committee for the court, the point was made that:

> In view of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility, it was questioned whether this defense need be explicitly mentioned as it is merely one example of the various factors which could negate the existence of the required mental element.

Others were adamant that the issue had to be specifically addressed as it is in many national codifications. The result was article 32 of the Statute which provides:

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding

> criminal responsibility if it negates the mental element required by such a crime or as provided for in article 33.

Article 33 which is cross-referenced here appears to allow a special kind of mistake which may sometimes be a mistake of law. I discuss it in another presentation in this project.

There's a great deal of difficulty in gaining understanding of a mistake across various legal systems and much confusion. In some codifications, mistake of fact and mistake of law are treated in the same breath. In the Model Penal Code, the great American codification of 1962, for example, it is said that "Ignorance or mistake as to a matter of fact or law is a defense if the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense." Protracted negotiations on the Rome Statute led to mistakes of fact and mistakes of law being dealt with in separate paragraphs, as you will appreciate from my reading of them. In arriving at the ultimate formulation of article 32, three, in particular of the main issues that arise in such debates in courts and legislatures were canvassed exhaustively and are worth mentioning.

One issue is whether a mistake must be both honest and reasonable. Another is whether this is some kind of "confession and avoidance" defense for which the burden of persuasion shifts to the accused. A third is how far to take the common maxim that "mistake or ignorance of the law is no defense."

As to the first of the classic mistake issues, I believe that the rule that all that is required is a genuine or honest mistake, subjectively speaking, prevailed in article 32. Various references to negligent or "invincible" or "unavoidable" mistakes which could be found in early drafts simply vanished during the drafting of this article. They did come back, however, in another context. As we shall see in the discussion of that article, article 33 may include a reasonably mistaken view of the implications of the law of armed conflict as a defense. On the plain language of article 32, though, the word "mistake" is not modified by any requirement of reasonableness. Nor does any other provision in the Statute undercut this view. Perhaps I am too sanguine in this assertion as in many domestic jurisdictions, there are bound to be those who can find the doctrine of "unavoidableness" or "unreasonableness" out there as a gloss waiting to be added by the Courts. A little later, I shall note an example of such reasoning, I think mistaken, in relation to mistake of law. You, of course, may conclude that I am the one who is mistaken!

On the matter of the burden of persuasion, which you will recall I mentioned at the end of my discussion of article 31, I know of no definitive statements on the record during the drafting. But the view that mistake is conceptually a denial of the prosecution's evidence of intent and knowledge is plain on the face of the article. Mistake simply "negates" or is a denial of intent or knowledge. If that is not clear enough, there is the insistence later in article 67(1)(i) of the Statute that the defense may not be required to shoulder "any reversal of the burden of proof or any onus of rebuttal." Mistake is something for the prosecution to disprove, not something on which the accused carries any burden of persuasion.

I shall say a little more about burden of proof in the discussion of article 33.

I come to mistakes of law in particular. Mistake of fact seemed ultimately to be non-contentious. Everybody could accept that it amounted to a denial of the mental element that the prosecution was required to establish. Mistake of law was a harder problem. The proposition that a mistake of law can never be a defense is as the drafters of the Model Penal Code put it "usually greatly overstated" in most domestic legal systems. Although where the lines lie is sometimes hard to discern. Consider the crime of theft or stealing, typically defined as taking the property of

another with intent to deprive the owner permanently thereof. It must, for example, be no defense to deny knowledge of the illegality of stealing. Consider the thief who pleads, "Wow, I did not know that was criminal!" That argument won't fly, will it? What, however, if I believe that the property is mine, not that of someone else? Some such cases may be simple ones of a factual mistake in my belief about ownership. I confuse my laptop with yours. But what, as is common, if there is a legal element involved in the ownership question? I thought it was mine, but the law of personal property, often quite arcane, says that it belongs to my ex-wife, or to the landlord or to the university. It must here be a defense to introduce a belief that the property was one's own even if it was wrong in law. Again, it's no defense to a bigamy charge to insist on a belief that having two or more spouses is legal but there will be a defense for the actor who believes that the previous marriage has terminated in divorce, even if this involved some mistake as to the law relating to divorce. The typical case where what can be called the defense of mistake of law works, in domestic law is where the element in question "property of another" and "already married" in my two examples is what the Rome Statute, article 30, would call a "circumstance" element. A "circumstance element", like "human being" in relation to homicide, or "property of another" in relation to larceny, or "already married" in relation to bigamy, or "protected person" in the law of armed conflict, is part of the legal landscape rather than something that the accused does or even the result of his conduct, at least on this occasion. In other words, a mistake of law that has exculpatory effect is typically about some legal issue that is collateral to the central criminal proscription.

Article 32 appears compatible with the views just summarised. Mistake of fact goes to denial of the requisite mental element found from article 30, normally intent or especially, knowledge. Mistake of law does the same where there is an element, especially a circumstance element, that includes a legal element. The Rome Statute, especially as spelled out in The Elements of Crimes, has some obvious possibilities similar to those in the theft and bigamy cases in domestic law. Consider, for example, the war crime of "pillaging", which requires "that the perpetrator intended to deprive the owner of the property and to appropriate it for personal private use." Does that sound familiar? A mistake as to the legal status, the ownership of the property, may provide a defense.

Now, regarding a number of possibilities for the application of a mistake of law argument, however, the drafters of The Elements worked a creative sleight of hand by re-casting the material element in factual rather than legal terms. For example, there are numerous examples in the elements of war crimes where the knowledge requirement in relation to the circumstance element that there be an armed conflict is re-cast as, "The perpetrator was aware of the factual circumstances that established the existence of an armed conflict." The prosecution does not have to prove that the accused characterized these facts as the legal concept "armed conflict." There is some doubt about whether these manipulations of law to fact are compatible with the Statute. That will no doubt be litigated sometime in the future. My point, though, is that whether or not one agrees with the validity of the gloss provided in The Elements, article 32 provides a framework and accepts that there will be some cases where a mistake as to a legal matter will exclude responsibility.

The late Professor Otto Triffterer, while agreeing essentially with my analysis of article 32 paragraph 1, had a somewhat different approach to some aspects of article 32 (2) in his famous Commentary on the Rome Statute. He suggested that paragraph 2 does not codify the whole concept and permits a reference out to general principles. Otto and I had many friendly, if heated discussions at conferences all across Europe about this. His strongest argument is the difference in language between paragraphs 1 and paragraph 2. Paragraph 1 says that mistake of fact "*shall be* a

ground for excluding criminal responsibility *only* if it negates the mental element." The first sentence of Paragraph 2, drafted with an equally imperative but this time with a negative "shall", says that a "mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court *shall not be* a ground for excluding responsibility." The second sentence of paragraph 2 is, however, worded differently. It does not say "shall." It says that "a mistake of law *may, however*, be a ground for excluding criminal responsibility, if it negates the mental element required by such a crime." What is to be made, in context, of the "may"? For Professor Triffterer, and he is surely right, the Court has no discretion about the matters mentioned in the first sentence of paragraph 2. A mistake about whether conduct is a crime within the jurisdiction of the Court is of no moment. It is no defense to say, "Oh dear, I did not know that genocide is a crime" or even "Oh dear, I did not know that genocide is one of the crimes within the jurisdiction of the ICC." There is criminal responsibility in spite of that plea. But Professor Triffterer continues:

> However, with regard to other mistakes of law referred to in sentence 2 there is a discretion which is expressed by the word 'may'. There is no obvious hint in article 32 or elsewhere in the Statute about how to exercise this discretion. Since this differentiation between sentence 1 and sentence 2 must presumably make some sense it may be based on the following reason: The Court has to decide to which category the mistake of the suspect should be assigned to, is it an error on the underlying facts or a mistaken legal evaluation? Assuming the first, the consequence is related obligatorily by paragraph 1 because the error is one of fact and therefore falls under this provision. The discretion expressed in paragraph 2 [says Professor Triffterer], sentence 2 therefore concerns exclusively a mistake of law by wrongful evaluation. This means, the Court may judge that even in these cases a mistake of law may negate the mental element required and thus exclude responsibility because the error was unavoidable. [It then goes on,] the 'unavoidableness' is not mentioned in article 32, but this criterion is well accepted by general principles of law.

I have to say, I am doubtful about professor Triffterer's discretion argument. I doubt that the "may" in paragraph 2 carries all this freight and I doubt, it represents anything more than the vagaries of a complicated negotiation. I think it is just careless drafting for "shall." In particular though, it is hard to see how it re-inserts notions of "unavoidability", by which I think Professor Triffterer and other European lawyers mean something close to negligence that sank without trace in the drafting process.

Nevertheless, I do think that the issue of unavoidability is a nice example of a fundamental issue with any codification, national or international. To what extent does the new regime amount to a clean break from the past, so that everything is within the four corners of the codification? Or perhaps to put it more softly, how strong is the presumption of interpretation that it is all in the code or the Statute? Civil law professors often tell you that it is "all in the code" and then drift off, like my old friend Otto, to talk about the modifications provided by the commentators. What role is there in the Rome Statute for the baggage of the old dispensation taught by law professors the world over in different ways? Or is the Statute unique or *sui generis* in Latin.

Mistake of law is sometimes a defense, dear listener, but divining its contours requires a little magic.