



## Critical Study on “Mental Incapacity in International Criminal Court

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**Abstract:** The subject of area defenses is debated and not yet settled. So law makers and jurist are undecided about desirability of formulating discrete separate defenses there has been much disagreement on the defense as defined by different municipal legal system. The ICTY an ICC definition of mental incapacity are broadly state, without any prospectively applied categorical exclusion one response to procedural difficulty might be through a change in the substantive law that narrows the definition of mental in capacity. International criminal court has been confused between excuse and justification within defense of mental incapacity thus, such difficult led to differentiate sentence in some cases, which this question will be contrary to criminal justice.

**Keywords:** diminished responsibility; mitigation responsibility; common law; mental incapacity

### 1. Introduction

The Rome Statute contains a catalogue of defenses in articles 31-33. The term “defense” derives from Anglo-American law and is a rather broad and undifferentiated concept, comprising both, substantive and procedural bars to punishability and prosecution. Most civil law systems refrain from putting both types of exoneration under one heading. Thus the mental incapacity defense presents multifaceted challenge to the system international prosecution.

The subject area of defenses is extremely unsettled. So law marker and jurist have been undecided about desirability of formulating discrete separate defenses there has been much disagreement on the defense as defined by different municipal legal system. Under the international prosecution systems adversarial, the accused has the right to present his or her own testimony, including expert, witness, in the respect, international criminal prosecutions also differ from criminal proceeding in most continental legal system.

It is obvious the defense of mental incapacity derived from national criminal law, where it has been accepted plea for many centuries. It played a limited role in the

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Nuremberg proceedings and has only recently been recognized in international criminal law. The Nuremberg Tribunal seemed to have recognized that insanity can affect on criminal responsibility: defense mental incapacity come from lack of mind guilty. Under international criminal law, individual criminal responsibility requires a certain state of mind on the part of the perpetrator, which must accompany the act or omission as specified in the definition of the crime the requirement of a mental element is generally recognized in the customary law (Fletcher, 1978, pp. 440-441) (Smith & Hogan, 1996, pp. 58-59), article 30 of the ICC statute now provides a general rule, applicable in principal to all crimes under international law.

Article 30 of the ICC statute consists of three subsections. First under these provisions the intent requirements related to conduct and consequences only when the knowledge related to circumstance and consequence only so material element that must be covered by both intent and knowledge is the consequence of a crime.

Second intent and knowledge have differing meanings depending on the material element in question. Third article 30 of the ICC statute explicating allows differing or supplementary rules, which take precedence over the mental element as established in article 30 itself. The principle defense which relative to international criminal law are mistake of fact the defense of mistake of fact is recognized in article 32 (1) of the Rome statue a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. As the statue of Rome ICC, defense of mental incapacity demands *destruction* of the defendant's capacity to know or control his or her conduct.

## 2. Mental Incapacity in Substantive Law

Mental in capacity, formulated as an excuse and not as indicating the justification,<sup>1</sup> is codified in 39 (a) (c) of the ICC statute and also found in the procedural of cods the Rules of procedure and Evidence (RPE) of the ICTY and ICTR.

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<sup>1</sup>All substantive defenses represent claims that the material element of the offence was indeed committed by the accused, but for a reason which is acceptable under the relevant criminal justice system. In this respect, domestic legal systems distinguish between two types of defense in which the accused claims to lack the requisite *mens rea* to commit the underlying crime; justification and excuses. Defenses operating as justifications usually regard the act as harmful but not as wrong in its particular context, whereas excuses are grounded on the premise that although the particular act was indeed wrongful, its surrounding special circumstances would render its attribution to the actor unjust.

Noticeably, neither the ICTY nor the ICTY Statute make known the defense of mental disease or defect (Jones & Powles, 2003, p. 448), article 31 (1) (a) of the (1998) ICC statute under grounds for excluding criminal responsibility states<sup>74</sup> that a person shall not be criminally responsible if at the time of that person conduct, he or she suffer from a mental disease or defect that destroys that persons capacity to appreciate the unlawfulness or nature of his or her conduct or capacity to control his or her conduct to conform to the requirements of law and the courts procedural and evidential rules will be important for the application of this provision. according to Rules 45 (2) (a) (i) of statute of Roma “the circumstances be lacking of constituting grounds for exclusion of responsibility, such as mental incapacity or duress as mention above article 31 and Rule 145 is not clear about consequence. Article 31, the mental incapacity is accepted as justification there or accused is deserve to acquitted and he or she shouldn’t held criminally responsibility unlike, Rule 145 the mental incapacity is execute in defense so is partial defense and accused is entitle for reducing in sentence.

According to 31 (a) of the ICC statute is the first codification of defense of insanity in international the element of mental in capacity, set up in the statute of Rome including:

- a. persons capacity to appropriate unlawfulness or nature of his or her conduct (mistake of fact);
- b. capacity his or her to the requirement of law (mistake of law)

So only mental disturbances that destroy the perpetrator’s capacity to appreciate or control his or her conduct lead to exclusion of responsibility. Such as person is deserve, acquitted on the basic of lack of mental capacity. But this is important, the domestic law a person is acquitted on the basis of lack of mental capacity it is necessary liable to some other form of order, which provides for psychiatric evaluation and treatment.

Article 31(10) (a) of the ICC statute distinguish between three effect of mental disease of defect, each of which can lead to exclusion of responsibility destruction of the capacity to appreciate the unlawfulness of conduct. Destruction of the capacity to appreciate the nature of conduct and destruction of the capacity to control’s own conduct was confirmed to the requirement of law. It is notable that article 31(1) (a) requires destruction, rather than impairment of ability .This is a high standard, although one which is consistent with the way most domestic jurisdictions deals with the matter.

### 3. Definition of Mental Incapacity in Judicial Jurisprudence

In the case of *Delalic*, was mentioned to lack of mental capacity as a complete defense. If it can be proven that defendant was acting without reason due to mental incapacity, such that he UN aware of nature and quality of his action, and he thus did not know that what he was doing was wrong” this is the ICTY chamber in the *Delalic* case had this to say: <sup>1</sup>

It is as essential requirement of the defense of diminished responsibility that the accuser’s abnormality of mind should substantially impair his ability to control his action; the question of the substantiality of impairment is subjective and is one of the facts. The ability of exercise self-control in relation to one’s physical acts, which is relevant to the defense of diminished responsibility, is distinct from the ability to form a rational judgment which must mean that is distinct from the level of intelligence of the accused as the champed stated.

The defendant raises the issue of lack of mental capacity; he is challenging the presumption of sanity by a plea of insanity. The defendant bears the onus of establishing it such a plea if successful, is a complete defense to a charge and it lead to an acquittal. So the chamber did consider diminished mental capacity as a mitigating factor in the context of sentencing. The ICC statue has also excluded diminished mental capacity as a defense, but has included insanity or lack of mental capacity that set up in statute of Rome including.

In *Celebic* case the trail chamber held the defense of mental disease or diminishes responsibility is only admissible in two events, in case of an impairment of the accuser’s capacity to appreciate the unlawfulness of the nature of his conduct. The same criterion is in fact in corporate into article 31 (A) (a) of the ICC statute.

### 4. Criteria of Mental Incapacity

Sustentative base of the defense is limited to the two elements common to general definition of mental incapacity in the ICC statute and Celebici judgment.

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<sup>1</sup>See *Delalic* case in ICTY chamber.

1. Mental disease or defect in the former, abnormality of mind in the latter the abnormality arose in one of three ways: "Arrested or retarded development of mind to fall into this category the condition must be permanent"
2. Any inherent causes this covers all mental disorders which do not have an external cause, and included functional disorders.
3. Induce by disease or injury this includes organic mental disorder and disease of the brain in other hand taking medically prescribed pills does not constitute an injury (Herring, 2005, p. 263)

So, it must be show is not necessarily that the defendant was incapable of controlling his behavior and it was more difficult for him to control his behavior by evaluation of evidence including

#### **a) Clinic evaluation**

The international prosecution system's framework for the admissibility and presentation of evidence is conducive to a significant role for experts the RPE of the ICTY and ICTR expressly authorize court appointment of mental health professionals rule 44 of ICTY RPE state "a trial chamber may, make request of a party order a medical, psychiatry or psychological examination of the accused, in such case, the registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up the registry and approved by Bureau. A similar delegation of a authority is considered by the preparatory commission for the ICC.

#### **b) Testimony**

The procedural and evidentiary frame work for the mental in capacity defense has implications for judicial efficiency, administration of justice; with regard to efficiency there is extensive testimony to the factual record of proceeding in which it is raised in the United States, reduced the role of expert witnesses because it fails to acknowledge the ongoing redefinition of mental illness or disorder and unique nature of each individual mental state. On the anyway, the court can bring in experts to established mental disease or defect. However the ICC statute contains no explicit rule regarding expert testimony, it is admissibility is presumed this arises from numerous provision of which article 48 (4) and 100 (1) (d) are the most explicit.

## 5. Consequence of Mental in Capacity

In the theoretical basis diminished responsibility in partial defense in particular there is the defense of no men's automatism and insanity. So the defendant who successfully raises the defense is still guilty of manslaughter with the potential for a life sentence in the other hand, peter sparks has argued that the defendants abnormality of mind might justify a complete defense or no defense, but not a partial defense so however the abnormality of mind made it difficult, but not impossible, to avoid killing.

On the way municipal legal systems established two consequence of a finding of mental in capacity a complete defense, partial defense in which the defense will be found guilty of lesser crime than that which her or she was charged or mitigation of an offender's punishment. Article 31 (1) (a) of the ICC statute clearly accepted a complete defense but does not state the other options are also available. (Schabas, 2008, p. 399)

On the other hand, the reference to 'conduct' includes the relevant circumstantial elements such as, there was an armed conflict, there was a widespread or systematic attack on the civilian population, or a manifest pattern of similar events, although given the phrasing of article 30 of the ICC Statute, they would appear to be included.

### a) Mitigation of punishment

Mitigation of punishment refers to implementing the notion of reduced capacity. The sentencing provisions of the statutes all include the individual circumstances of offense as a potential mitigating factor, and mandatory minimum sentences are absent. It is clear that the ICTY and ICT have the authority to mitigate by taking into account evidence concerning an offender's mental condition and there a clear grant of discretion in the statute's sentencing provisions and there is no explicit prohibition of mitigation in article 3191) (a).<sup>1</sup>

The ICC defense of mental incapacity demands *destruction* of the defendant's capacity to know or control his or her conduct. It leaves no place for diminished

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<sup>1</sup>See Article 78(1) of the ICC Statute and Rule 145(2) of the ICC Rules of Procedure and Evidence: In addition to the factors mentioned above, the Court shall take into account, as appropriate: (a) Mitigating circumstances such as: (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.

responsibility. However, like the ICTY and ICTR, the ICC provides for diminished responsibility in its Rules of Procedure and Evidence. It provides for a plea of considerably diminished mental capacity, as a mitigating circumstance in determining a sentence<sup>1</sup>.

#### **b) Diminished responsibility**

From an Anglo-American point of view, “diminished” is regarded as moving *mens rea* and *actus reus*. Reduced punishment is then attached with a lesser offence, for instance manslaughter instead of murder. The Anglo-American position on diminished responsibility, that the Appeals Chamber too readily accepted that it is a general rule that diminished mental responsibility is solely relevant to sentencing. In common law systems, diminished mental capacity is considered to alter *mens rea* and *actus reus*, giving rise to a lesser offence for which a lesser sanction is appropriate.

So the defendant does not have the appropriate *mens rea*-unless he has something more than wrongful intent if defended prove this, thus avoid conviction of that particular offense. A defense made on these ground is generally called the defense of diminished responsibility or partial responsibility.

Diminished, as opposed to absent, ability to comprehend the nature or unlawfulness of conduct, or comply with the law is no defense in the ICC Statute, nor is it in the jurisprudence of the ad hoc Tribunals, which treat any such matter as one of mitigation of sentence<sup>2</sup>. The defense of mental defect should be clearly distinguished from that of the diminished responsibility. Similar to the ICC system, the ICTY and ICTR refer to the latter defense only in its Rules of Procedure and Evidence (RPE).

The *Celebici* Appeals Chamber agreed that the mental defect defence as diminishment responsibility but article 31(1)(a) of the ICC Statute is different from the ‘special defense’ of diminished mental responsibility as stipulated in the Rules of Procedure and Evidence at the ICTY. This (article 31 (1) (a) ICC Statute is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant’s capacity and

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<sup>1</sup> Rule 67 (a)(ii) of the ICTY Rules of Procedure and Evidence: As early as reasonably practicable and in any event prior to the commencement of the trial: the defense shall notify the Prosecutor of its intent to offer: (b) any special defense, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses

<sup>2</sup>The Trial Chamber in *Vasiljević* ICTY T. Ch.I 29.11.2002 paras. 282–3 defined.

it leads to an acquittal. It is akin to the defense of insanity. There is no express provision in the ICC Statute that is concerned with the consequences of impairment to such a capacity.

Diminish responsibility, there are different tribunal jurisprudence in prosecution, the ICTY trial chamber in judgment of November 16, 1998, rejected the defense of diminishing responsibility put forward by the accused E Landzo, nothing that, the defense did not establish the fact, at the relevant time, the accused, was unable to distinguished between right and wrong. The most likely that was apply the means of diminish responsibility that was lay down by the Rule 67 (A) (ii) (b) a step which should then also be followed by the ICTR or by a judicial decision in which the ICTY would make the phrase diminished responsibility applicable only to mitigation of punishment, not to reducing the level of criminal responsibility.<sup>1</sup> Diminish responsibility in English law is a defense only to murder so diminished responsibility is not a defense to attempt murder. If successfully proved the mental in capacity of the accused he or she will be acquitted of murder, but convicted of manslaughter in according to section 2 (1) of the homicide act (1957).<sup>2</sup>

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury as substantially impaired his mental responsibility for his mental responsibility for his diminished in American jurisdiction at least half of all American jurisdiction reject the doctrine of diminished responsibility. Because that evidence of defendant's mental condition (other than insanity) is not admissible to show his lack of capacity to form the mental state required for the crimes charged but is admissible to show that he did not in fact form a required specific intention.

The ICTY an ICC definition of mental incapacity are broadly stated, without any prospectively applied categorical exclusion one response to procedural difficulty might be through a change in the substantive law that narrows the definition of mental in capacity. The defense of diminished responsibility in *Celebici* camp

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<sup>1</sup> The draft RPE of The ICC, considered by The preparatory commission during its second session From July 26, 1999 and August 93, 1999. It contains a similar provision Rule 6.13 Medical Examination of The Accused.

<sup>2</sup> For further information see criminal law text and materials (Herring, 2005, p. 328).



barrows from a particular municipal model without adequate assessment of the model consistency the international norms and procedures.

## 6. Conclusion

One unfortunate aspect of article 31 (1) (a) is its failure to provide for a special verdict in the eventuality of a person being acquitted on the basis of mental incapacity. This is important; in domestic systems, a person who is acquitted on the basis of lack of mental capacity is necessarily liable to some other form of order, which provides for psychiatric evaluation and treatment. It is to be hoped that some arrangements may be found with the mental health authorities in States supportive of the ICC that will provide for those who have been acquitted by the ICC, but are in need of treatment or confinement on the basis of their disorder. In basic of perspective above, International criminal court has been confused between excuse and justification within defense of mental incapacity thus, such difficult led to differentiate sentence in some cases, which this question will be contrary to criminal justice.

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