

Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy

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Following a report from the Secretary General in May 1993, the United Nations Security Council adopted Resolution 827 and its Statute establishing an International War Crimes Tribunal for the Former Yugoslavia (ICTY) located in The Hague, The Netherlands. Although such action has been discussed in the past, this is the first time the international community has established a tribunal to indict and try individuals for war crimes. The crimes had been previously "created" by multilateral international treaties. The ICTY Rules of Procedure and Evidence allowed for "any special defense, including that of diminished or lack of mental responsibility." Precise legal parameters of the defense were not specified. In 1998, a defendant at the ICTY "Celebici" Trial named Esad Landzo raised the defense of diminished mental responsibility. The Celebici Trial Chamber thus became the first legal body to consider reduced mental capacity as it applies to international criminal law. This article is an examination of the application of the affirmative defense of diminished responsibility at the ICTY and relates the process to the need for further definition of mental incapacity defenses at the newly established International Criminal Court (ICC). At the ICC preparatory commission, drafting material elements of crimes was emphasized, with less consideration given to mental elements. That diminished capacity and diminished-responsibility defenses have often confused scholars and practitioners alike is explored in this article with suggestions for further directions.

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In 1993, the International War Crimes Tribunal was established by the United Nations (UN) Security Council in response to the international community's demand for urgent action against widespread violations of international humanitarian law in the former Yugoslavia. The purposes of the Tribunal were threefold: to do justice, to contribute to the restoration and maintenance of peace, and to deter further crimes.¹ The use of the defense of reduced mental capacity found its first concrete application in November 1998, in the Tribunal's Celebici Judgment, in which the Trial Chamber dealt with "diminished responsibility," a concept seemingly borrowed from the criminal law of England and Wales.²

The Celebici Indictment against three Bosnian Muslims and one Bosnian Croat alleged that in 1992 Bosnian Muslim and Croat forces took control of villages with predominantly Bosnian Serb populations in and around the Konjic municipality in cen-

tral Bosnia-Herzegovina. Captured Serbs were held in a prison camp in the village of Celebici, where they were allegedly killed, tortured, sexually assaulted, and subjected to cruel and inhuman treatment. The accused, a young camp guard (Esad Landzo), the camp commander (Zdravko Mucic), the camp deputy commander and later commander (Hazim Delic), and the coordinator of Bosnian-Croat forces in the area and later a commander in the Bosnian Army (Zejnil Delalic), were charged with offenses under the international humanitarian law constituting grave breaches of the Geneva Conventions and violations of laws or customs of war pursuant to Articles 2 and 3 of the International Criminal Tribunal for the former Yugoslavia (ICTY).³ Mr. Landzo and Mr. Delic were charged for the most part with individual criminal responsibility pursuant to Article 7¹ of the ICTY Statute as direct participants in certain of the alleged crimes, including acts of murder, torture, and rape.⁴ Mr. Landzo was specifically charged with beating several detainees to death with wooden planks, baseball bats, chains, and other items and with torturing prisoners by inflicting burns and suffocation.⁵

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At an early stage in the trial, in response to the charges brought against him, Mr. Landzo raised the special defense of “diminished, or lack of, mental responsibility,” as specified in the ICTY rules of procedure and evidence.⁶ He later made a submission requesting clarification from the Trial Chamber as to the precise legal parameters of the defense. The Trial Chamber determined that a party offering a special defense of diminished or lack of mental responsibility “carries the burden of proving this defense on the balance of probabilities” but reserved a decision on a definition of the defense until final judgment.⁷ The Celebici Trial Chamber thus became the first and, at this writing, the only organ to infuse the ICTY’s “diminished, or lack of, mental responsibility” formulation with practical content. Mr. Landzo raised the defense in the form of a “diminished responsibility” plea. Because Rule 67(A)(ii)(b)⁶ does not identify the elements of the defense, the Chamber established a two-part test: at the time of the alleged acts, the accused must have been suffering from an “abnormality of the mind” that “substantially impaired” his ability to control his actions.^{7,8}

Another aspect of the analysis of this or most other criminal offenses relates to the necessary mental element (or *mens rea*) of the crime. Often, this centers on the question of criminal intent. At the Celebici Trial, the defense sought to rely on a circumscribed concept of intent, and, in particular, to establish that the defendant acted recklessly without specific intent to cause death by his actions. The defense argued that the *mens rea* element of the offense of “willful killing” as specified in the ICTY Statute required a showing by the prosecution that the accused must have had a specific intent to commit murder. Although different legal systems use different forms of classification of mental elements in the crime of murder, the ICTY Trial Chamber held that some form of intention was clearly required for a murder conviction, but was silent about the exact nature, or even the existence, of requisite mental elements.⁷

Because the interface between psychiatry and the law is often controversial, particularly regarding various forms of excuse from responsibility for criminal behavior, ICTY precedents in this area will undergo careful scrutiny.⁹ In particular, due to the diversity of practical content in the defense as defined by various municipal legal systems, the Celebici Trial raised questions about restraints on an international court’s

norm-creating authority under “general principles of law.”^{10,11}

This article is an examination of the application of mental abnormalities in the use of the affirmative defense of diminished responsibility at ICTY and how it may pertain to evolving international criminal law. I contrast this with three alternative concepts of reduced mental capacity, including diminished capacity or a “failure-of-proof” defense that was developed in the United States and was introduced by the defense at the Celebici Trial. I will show that even though the Celebici Trial Chamber expected to employ a single diminished responsibility concept, four variations were pursued and discarded without resolution about which one to use. As a result, the international legal community was figuratively left in the lurch, having received little practical guidance for the newly established International Criminal Court (ICC) where mental incapacity defenses have yet to be well defined.¹²

Background

Following a report from the Secretary General in May 1993, the UN Security Council adopted Resolution 827¹ and its Statute establishing an International War Crimes Tribunal for the former Yugoslavia (ICTY) to be located in The Hague, The Netherlands. The Statute defined the Tribunal’s authority to prosecute particular crimes and set forth basic guiding principles. It authorized the Tribunal to indict and try four different categories of crimes: grave breaches of the 1949 Geneva Conventions; violations of the laws or customs of war; crimes against humanity; and genocide. The Security Council did not create the list. Each one was based on longstanding customary international law or international treaty.¹³

The Tribunal’s Statute does not address defenses in general, but paragraph 58 of the Report of the Secretary General, which embodies the intent of the drafters, directs that “The International Tribunal itself will have to decide on various personal defenses that may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.”¹⁴ Non-inclusive examples were given; therefore, it was interpreted that if a defense was available under general principles of law, it should be available under the Statute.¹⁵

Legal Concepts

Criminal Intent

Criminal law constitutes a description of harms that society seeks to prohibit by threat of criminal punishment. At the same time, the criminal law includes an elaborate body of qualifications to these prohibitions and threats based on absence of fault. A common usage is to express these qualifications to liability in terms of the *mens rea* requirement. This usage is the thought behind the classic maxim, *actus non facit reum, nisi mens sit rea*, or in Blackstone's translation, "an unwarrantable act without a vicious will is no crime at all" (Ref. 16, p 203). One way in which the *mens rea* requirement may be rationalized is through a common-sense view of justice that blame and punishment are inappropriate and unjust in the absence of choice.¹⁷ So viewed, a great variety of defenses to criminal liability may be characterized as presenting *mens rea* defenses—involuntary acts, duress, legal insanity, accident, or mistake, for example. This all-encompassing usage may be referred to as *mens rea* in its general sense.

There is, however, a narrower use of *mens rea*, which may be referred to as *mens rea* in its special sense, that refers only to the mental state required by the definition of the offense that produces or threatens harm. Not all possible mental states are relevant to the law's purposes. Whether a defendant acted regretfully, arrogantly, eagerly, or hopefully may be relevant for a judge contemplating a sentence, but the mental states relevant to defining criminal conduct and differentiating degrees of culpability in legal systems are more limited. Indeed, mental state is something of a misnomer. The concern of criminal law is with the level of intentionality with which the defendant acted—in other words, with what the defendant intended, knew, or should have known.¹⁶

Every crime involves the uniting of act (*actus reus*) and criminal intent (*mens rea*). In the 20th century, in most U.S. jurisdictions, the idea of *mens rea* and the law has evolved from its earlier sense of guilty mind into a number of narrow and technically defined mental states.¹⁸ American law has employed an abundance of *mens rea* terms, such as general and specific intent, malice, willfulness, wantonness, recklessness, scienter, premeditation, criminal negligence, and the like, exhibiting what Justice Jackson, in a famous Supreme Court opinion, called, "the variety, disparity and confusion of definitions of the

requisite elusive mental element" (Ref. 19, p 252). In the last century, *mens rea* terms have burgeoned in common law countries such as the United States and England. In civil law systems, such as those of most European countries, the *mens rea* concept is more limited, usually involving a combination of either awareness and desire or knowledge and intent.

Process of Proof

Rules allocating the burden of proof deal with two distinct problems. The first concerns allocating the burden of coming forward with enough evidence to put a certain fact into issue, commonly referred to as the burden of production. The second problem concerns allocating the burden of convincing the trier-of-fact, commonly called the burden of persuasion. With respect to most elements of most crimes, the prosecution bears both burdens. That is, the prosecution must introduce enough evidence not only to put the facts at issue but also to persuade the trier-of-fact beyond a reasonable doubt. In some instances, state law may require the defense to bear both burdens, but if it does, a due process proviso is that the defendant may never bear the burden of persuasion for an element of the crime. The state must always disprove defenses that negative an element of the crime beyond a reasonable doubt. An intermediate position is also possible: the law may allocate the burden of production to the defense, but allocate the burden of persuasion to the prosecution. For example, the state may provide that a defendant seeking acquittal on grounds of duress must introduce some evidence of duress, but once this is done, the prosecution must prove the absence of duress beyond a reasonable doubt.

When the defendant bears the burden of production that does not negative an element of the crime, it is commonly referred to as an affirmative defense. In some states, when an issue is designated an affirmative defense, the defendant must bear the burdens of both production and persuasion, but it is common practice to treat burdens of production and persuasion as separate issues. Thus, the defendant may bear the burden of persuasion on some affirmative defenses, but with respect to others, he may only bear the burden of production.¹⁶ Under the American Law Institute Model Penal Code, the defendant generally bears only the burden of production, and once an affirmative defense is raised, the prosecution must disprove it beyond a reasonable doubt.²⁰ Examples of

affirmative defenses are self-defense, duress, or mental incapacity.

Concepts of Justification and Excuse

There are three distinct defenses that can be invoked to bar conviction for an alleged crime. The first asserts that the prosecution has failed to establish one or more required elements of the offense. The defendant may deny, for example, that he was anywhere near the scene of the crime, or he may concede the fatal shot but deny that he acted intentionally. These are simply efforts to refute (or raise a reasonable doubt about) whatever the prosecution must prove (failure-of-proof defense). The defendant may attempt to put forth evidence to disprove either the mental elements and/or material elements of the crime. In the former, the defendant essentially states, "I did not commit the crime charged because I did not possess the requisite *mens rea*." Of course, the prosecution always retains the burden of proving its own case and of disproving any rebuttal efforts beyond a reasonable doubt.²¹

The other two sorts of defenses are justifications and excuses, which do not seek to refute the required elements of the prosecution's case but rather suggest further considerations that negate culpability even when all elements of the offense are clearly present. Thus, both self-defense and insanity claims suggest reasons to bar conviction even when it has been clearly proved that a defendant killed intentionally. It is customary, moreover, to distinguish sharply between these two groups of defenses (justifications and excuses). Self-defense, for example, is traditionally considered a justification, while insanity is considered an excuse. In one defense, the defendant accepts responsibility but denies bad behavior; in the other, the defendant admits that the behavior was bad but does not accept full responsibility.²²

The Celebici Trial

Willful Killing and Murder at Celebici

The Celebici indictment alleged that each of the accused was responsible for the killing of several detainees in the Celebici Detention Camp by either personal participation or exercise of superior authority over those directly involved. The indictment was formulated in such a way as to classify these acts as both "willful killing," punishable under Article II of the Statute of the International Tribunal, and "mur-

der," punishable under Article III of the Statute. The Trial Chamber found that there was no qualitative difference between "willful killing" and "murder" and noted that "willful killing" was incorporated directly from the Four Geneva Conventions—in particular, Articles 50, 51, 130, and 147—which set out those acts that constitute "grave breaches" of the Conventions.⁷

Celebici defense lawyers, however, contended that there was a contradiction between the definition of "willful" in Article 85 of Additional Protocol I to the Geneva Convention and Article 32 of the Fourth Geneva Convention. Specifically, in the Additional Protocol it is noted that "most of the acts listed in this article can only be committed with intent."²³ The defense, in a motion to dismiss, relied on the final sentence of the Commentary to Article 85 contending that it "strongly suggests that murder requires intent."²⁴ The nature of this "intent" requirement listed in the protocol was left unexplained, however. The defense took the position that "intent" meant specific intent and that the "reckless" acts of the Celebici defendants may not meet requirements for a specific-intent crime.

The prosecution disagreed and asserted that the defense wrongly sought to equate the concept of recklessness with simple negligence. The word "willful," they pointed out, should be interpreted to incorporate reckless acts as well as a specific desire to kill, therefore just excluding negligence, which by definition is inadvertent. In support of this argument, the Prosecution relied on the Commentary to Article 85 of Additional Protocol I, which defines "willfully" in the following terms:

[T]he accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses concepts of 'wrongful intent' or 'recklessness,' viz, the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences [Ref. 25, ¶ 3474].

The Trial Chamber agreed, noting that the Commentary to Additional Protocol I, Article 11 incorporates the concept of "recklessness" into that of "willfulness," while just excluding mere negligence from its scope. In addition, in relation to Article 85 of the Additional Protocol, the Commentary sought to distinguish ordinary negligence from conscious-risk creation or recklessness and regarded only the latter

as encompassed by the term “willful.”⁵ The Trial Chamber also found that the ordinary meaning of the English term “murder” is also understood as something more than manslaughter, and thus no “difference of consequence” flows from the use of “willful killing” in place of “murder.”⁷

Finally, the Trial Chamber stated that there was no doubt that the necessary intent, meaning *mens rea*, required to establish the crimes of willful killing and murder, as recognized by the Geneva Conventions, is present when intention is demonstrated on the part of the accused to kill or inflict serious injury in reckless disregard of human life. “It is in this light that the evidence relating to each of the alleged acts of killing is assessed. . . .” (Ref. 7, ¶ 439, pp 160–1). Thus, the Trial Chamber failed to begin to create a hierarchy of international capital crimes with corresponding required mental elements, thereby eschewing a task of daunting complexity. They found, instead, that there is no definitional difference between willful killing and murder, both of which simply require intent to inflict serious harm and for practical purposes may be encompassed by mental elements of gravity greater than negligence.

The Special Defense of Diminished Mental Responsibility

In Sub-rule 67(A)(ii)(b) of the rules of procedure and evidence of the International Tribunal, it states that “the Defense shall notify the Prosecutor of its intent to offer: any special defense, including that of diminished or lack of mental responsibility. . . .”⁶ The plea of diminished responsibility is distinguished from the plea of lack of mental responsibility (or insanity). In particular, it was apparent that the special defense provided for in Sub-rule 67 was interpreted to have its closest analogy in the English Homicide Act, clearly articulated in Section 2 (1) which only permits a diminished-responsibility defense when an accused who kills another “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 acts or omissions in doing or being party to the killing.”²⁶

The English interpretation had gained currency with the Trial Chamber because of the specific term “diminished responsibility” in the rule, as opposed to, for example, the American term “diminished ca-

capacity.” In England, the first attempt to define the phrase “abnormality of the mind” within the meaning of Section 2, was in *R. v. Byrne*, in which Lord Chief Justice Parker, delivering the judgment of the court, stated as follows, “. . .[I]t means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal” (Ref. 27, p 396). This cryptic definition avoided fastening a condition to any particular mental abnormality.

As the Celebici Trial preparation progressed, the defense lawyers for Esad Landzo, after some debate, recommended a variation of the insanity defense to their client, and, as a result, pursuant to the rules of procedure and evidence, Mr. Landzo advanced the plea of diminished responsibility for all charges brought against him. He at first argued that he suffered from diminished responsibility due to circumstances that had precipitated the psychiatric condition post-traumatic stress disorder (PTSD). The plea of diminished responsibility was based on the premise that despite recognizing the wrongful nature of his actions, Mr. Landzo, on account of his abnormality of mind, was unable to be in complete control of his actions. A defense lawyer described Mr. Landzo as “a good kid driven to beastly acts by the war.”²⁸ While the concept of diminished responsibility was not defined in the Statute, it was the Trial Chamber’s position that such a defense had been articulated in the laws of various national legal systems and that it was, therefore, permissible to resort to such systems in defining the diminished-responsibility concept expressed in the rules.

Because of initial concerns about Mr. Landzo’s emotional state during his early incarceration, he was examined by three court-appointed European psychiatrists to assess his fitness to stand trial. After he was determined to be fit, the same psychiatrists were then asked by the defense to comment about the existence of diminished or lack of mental responsibility. The decision to pursue a diminished-responsibility plea was initially proposed by one defense attorney over the objections of another, and the attorney who favored the strategy prevailed with the defendant.²⁸ When initial evaluations pointed toward PTSD, it was decided to advance that diagnosis as a basis for a diminished-responsibility defense. Subsequent evaluations, however, were heavily weighted toward Mr. Landzo’s abnormal personality

dynamics and putative “personality disorder” which ultimately became the basis for his defense.

At trial, five psychiatrists—two retained by the defense, one by the prosecution, and two originally appointed by the court and called by the defense—testified about Mr. Landzo’s mental state at the time of the acts in question.⁷ With the exception of the prosecution’s expert, all testified that Mr. Landzo suffered from mental disorder(s) at the time of the acts, but there was wide disagreement about specific diagnoses. In both their reports to the court and their testimony at trial, psychiatrists generally eschewed DSM-IV and ICD-9 diagnostic criteria, instead citing Mr. Landzo’s personality characteristics variably described as narcissistic, antisocial, schizoid, compliant, borderline, inadequate, immature, impulsive, unstable, and deprived. The particular permutations of Mr. Landzo’s personality-disorder defense were quite complex and are beyond the scope of this article. A companion article is in preparation that will focus on the use of personality disorder-based mental-incapacity defenses in international legal systems as exemplified by the Celebici Trial.²⁹

Because, as mentioned previously, Sub-rule 67(A)(ii)(b)⁶ does not identify the parameters of the defense, the Trial Chamber established a two-part test for the “diminished-responsibility” component, with language borrowed from Section 2(1) of the Homicide Act. At the time of the alleged acts, the accused must have been suffering from an “abnormality of mind” which “substantially impaired” the ability of the accused to control his or her actions. It was also established that diminished responsibility is an affirmative defense and that the accused must bear both the burden of production and persuasion. On the facts, the Chamber accepted that Mr. Landzo suffered from an “abnormality of mind” at the time of his acts, but rejected his claim, not because an affirmative defense was raised but because he failed to satisfy the second prong (e.g., Mr. Landzo’s “mental condition” did not prevent him from controlling his behavior). Mr. Landzo was found guilty on 17 counts of war crimes, and sentenced to 15 years’ imprisonment. In pronouncing sentence, the Chamber cited Mr. Landzo’s “mental condition” as a mitigating factor.⁷

Discussion

The fact that Sub-rule 67 does not spell out the parameters of the special defense became an issue of

contention at trial. The defense claimed that it was required to use a legal test of diminished responsibility without understanding the interpretation of the rule. Unfortunately, the Celebici Camp judgment provided little guidance on this crucial question. The concept of reduced mental capacity caused enormous confusion at trial, resulting in repetitive attempts at clarification.³⁰

By not accepting the diminished-responsibility contention of defense, and therefore not demonstrating how their particular reduced-mental-capacity interpretation was applicable to future ICTY judgments, the Chamber in effect remained silent and left the matter in doubt. A key question is whether diminished responsibility is better considered as an affirmative defense or a sentencing mitigation factor. This is an important issue that can have significant substantive and procedural consequences. And, as any informed observer would acknowledge, diminished responsibility and its American counterpart, diminished capacity, have been exceptionally confusing and troublesome to courts and scholars alike. One reason is that there are several versions of the defense, each with a fundamentally different conceptual basis.³¹ Over time, municipal legal systems have established one or more of the following as possible consequences of a finding of reduced mental capacity: (1) the “diminished-responsibility” doctrine created by Section 2 of the English Homicide Act of 1957²⁶; (2) the *mens rea* variant; (3) the partial responsibility variant; and (4) the use of a mental disorder to reduce sentences.

Diminished Responsibility

The diminished-responsibility defense is a creation of Scottish common law in the 19th century. Scottish courts have used the term to refer to situations in which a person is found to merit a lesser punishment because of a mental disorder.³² Subsequently, England enacted it in statutory form at a time when capital punishment was still used in premeditated murder cases. Under the English statute, a defendant charged with first-degree murder could introduce evidence showing that he was mentally disturbed at the time of the offense.³³ If the jury agreed, it could find him guilty of manslaughter if it also concluded that this abnormality of mind substantially impaired his responsibility for his acts, even though the prosecution had proved all the elements of murder. The jury was permitted to enter a more

lenient verdict because it would avoid the imposition of a death sentence on a mentally disturbed, but not insane, offender. Thus, the purpose of the English rule of diminished responsibility was to alleviate the inflexibility of the mandatory death sentence. In essence, the British doctrine is a form of punishment mitigation by reducing the grade of the offense in homicide cases.³¹ In the course of the Celebici Trial, the Tribunal Chamber essentially adopted the definitional features of the English model in an effort to recognize the relationship between partial mental incapacity and criminal charges.

A question, however, arises as to whether the English sense of proportionality in this matter is transferable to international criminal law, which has never tried to distinguish between murder and manslaughter.³⁴ As a general principle, do categories of international crimes exist in a fundamental hierarchy? For a structure incorporating the English variant to function, a system of lesser included offenses would either have to be found within one or more of the core crimes, or the core crimes themselves would have to be arranged in a vertical hierarchical structure based on gravity. In either case, it would necessitate close examination of the elements of international crimes to determine a proper hierarchy. An impediment to the foreseeable realization of such an undertaking is the fact that the task of identifying the mental elements of international crimes is far from complete.

In sum, it can be said that reception of the English variant would entail considerable doctrinal and practical complexities. Regardless, it could still be viewed as suitable for international prosecution if indeed it is necessary to advance the system's objectives. In this regard, however, seemingly crucial factors are the absence in the international system of minimum mandatory sentences and the apparent availability of the partial-responsibility variant due to the flexible sentencing discretion afforded to international courts.^{9,35} As a result, the English variant's rationale—the avoidance of mandatory sentencing—is not relevant, and simple mitigation of punishment could satisfy the fundamental fairness concerns associated with the mental-incapacity defense, unless it is determined that the English principle of dictated correlation between the crime and its punishment should take priority.

If these conclusions are valid, it would be beneficial for the ICTY to consider abandoning the English variant, particularly since the notion of lesser crimes

has not received universal acceptance in the ICTY itself.^{11,36} This could be accomplished either by plenary amendment of Sub-rule 67(A)(ii)(b), or by judicial decision, in which the ICTY would make the phrase “diminished responsibility” applicable only to mitigation of punishment, not reduction of the level of criminal responsibility.

Mens Rea Variant

The second use of mental-abnormality evidence is referred to as the *mens rea* variant and is the only mental variant explicitly adopted in U.S. jurisdictions.²¹ In this view, which is usually termed diminished capacity, evidence of mental abnormality is admitted to negate the required state of mind or mental element of the offense charged. As mentioned earlier, diminished capacity is called a “failure-of-proof” defense because it is used to show that the prosecution has not proved its case. This view recognizes that because the defendant must possess a certain state of mind to be convicted of certain crimes, any evidence showing the absence of that state of mind is admissible.

Celebici defense lawyers' efforts to introduce U.S. *mens rea* definitional concepts into ICTY proceedings failed because the Trial Chamber hesitated to enter territory where others have lost their way. Indeed, the most far-reaching *mens rea* defenses grew out of a series of provocative landmark California cases in the 1950s and 1960s, but the defense eventually lost national credibility after the Dan White murder trial in 1981 (and the “Twinkie defense”).³⁷ In a short period, diminished capacity went from being only known to lawyers to being notorious, and deeply troubling to the public.³⁸ In 1984, Professor Stephen Morse aptly coined the phrase “undiminished confusion” to highlight the fact that definitions of *mens rea* mental elements had become increasingly arcane and difficult to understand.³⁹ He argued for the use of a “properly defined” and actually formed *mens rea* rather than whether the defendant possessed the “capacity” to form it. California eventually abolished the diminished-capacity defense, which it had previously nurtured. The new statute declared that, while evidence of a mental disorder could not be introduced to negate a defendant's “capacity” to form a required mental state, such evidence was still admissible on the question of whether the accused had actually formed the required specific intent. This has been referred to as “diminished actuality” in Cal-

ifornia, to emphasize its distinction from the now forbidden diminished-capacity plea.³⁷ In practice, the distinction between the capacity to form *mens rea* and actually forming *mens rea* has mostly become a semantic one.

Similar problems surfaced when the ICC Preparatory Commission, meeting in 2000, discussed draft recommendations for mental elements of crimes, and it became clear that national practices and theories differed substantially.⁴⁰ When concepts such as recklessness or negligence were advanced, there was a widespread disposition to avoid including culpability based on either one. Most conceded that, at best, the occasions for recklessness or negligence liability would be few.³³ The ICC statute limited the jurisdiction of the court to “the most serious crimes of concern to the international community as a whole,”⁴¹ which suggests that the parsing of such crimes would be detrimental to the mission of international prosecution.² The agreed upon mental element language in the initial ICC statute states that “a person shall be criminally responsible. . . if the material elements are committed with intent and knowledge.”⁴²

Partial Responsibility Variant

In the partial responsibility variant, the criminal defendant does not use mental abnormality evidence to rebut the prosecution’s case as seen in the *mens rea* variant. Instead, the defendant uses the evidence to put forth a form of lesser legal insanity. This variant is a less circumscribed version of the English rule of diminished responsibility and, as in England, the inquiry is essentially a moral one. It is the same as diminished responsibility but is broader in scope because it may apply to crimes other than homicide. The defendant claims that, as a result of mental abnormality, he is not fully responsible for the crime proved against him and uses expert testimony about his mental abnormality to show that he may have been less responsible than other defendants. Thus, the prosecution’s *prima facie* case against the defendant is not challenged; rather, the defendant claims that he is less culpable and either seeks conviction of a lesser crime or seeks to have his punishment reduced.

In some European legal systems in which this variant is used, the trier-of-fact may reduce the criminal defendant’s punishment if the defendant is seen as less blameworthy.²¹ For example, the Italian crimi-

nal code⁴³ provides for reduced punishment if a defendant’s responsibility is greatly reduced at the time of the crime by virtue of “partial mental deficiency.” French law gives lessening of individual criminal responsibility for a “psychic or neuropsychic disorder, which impairs understanding or interferes with the control of his or her acts. . . .” The court shall take this into “account. . . when it determines the penalty and fixes its regime.”⁴⁴ In both instances, however, evaluation of social dangerousness accompanies the sentencing decision, which may include order to a judicial psychiatric hospital.⁴⁵

In The Netherlands, the area between full responsibility and total nonresponsibility is referred to as “diminished responsibility” and is the most direct example of partial responsibility and correlative punishment. The term is not in the statutes but is based on Article 37A of the Criminal Code, which states that a person may be sentenced to TBS (placement under a hospital order) when he commits an offense while suffering from “developmental deficiencies and pathological disturbance.” The mental disturbance must be one of the factors that led to the offense, and the stronger the connection, the lower the responsibility. There are five levels of responsibility, ranging from fully responsible to not responsible. A distinction is drawn in the gradations of diminished responsibility in relation to the intensity of the role played by the psychological disorder in the offense. A prison sentence is imposed for the part for which the perpetrator may be held personally responsible. The greater the personal responsibility imputed by the court, the longer the sentence. TBS is always enforced after the prison sentence has been served, which need not, however, be served in full.^{46,47}

Germany has a similar dual system, whereby offenders found to have partial responsibility can be given a prison sentence as well as compulsory treatment. Here, however, the committal to a psychiatric hospital precedes the prison term, and the time spent under compulsory treatment is counted toward the prison sentence.⁴⁸ Diminished responsibility in sentencing has also been recognized in South African law. Primarily, it appeared in relation to psychopathy and mental deficiency, but now is clearly considered in various cases short of legal insanity. While this allows a finding of extenuating circumstances, it does not have the effect of reducing the crime category as in England. During sentencing, the court must take into account mental responsibility even if short of

insanity.⁴⁹ This was enacted into the Criminal Procedure Act of 1977:

[I]f the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act, but his capacity to appreciate the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused [Ref. 50, § 78, art. 7].

Within the Canadian and Swedish legal systems, a formal provision for partial criminal responsibility does not exist.^{51,52}

The partial-responsibility variant is a reaction to the all-or-nothing approach that traditionally recognized only two classes of defendants: the sane and the insane.⁵³ In some U.S. jurisdictions, diminished capacity, ostensibly an investigation of a defendant's capacity for intent, has become a disguised version of partial responsibility.³⁹ To add to the confusion, it continues to be called diminished capacity. This practice has received criticism, including pleas for its elimination.^{39,54}

Although Celebici defense lawyers paid homage to the English diminished-responsibility variant, they hoped to make Mr. Landzo less culpable in the eyes of the judges due to his "mental disorder." The sentencing provisions of the ICTY statute include the "individual circumstances" of the offender as a potential mitigating factor, and mandatory minimum sentences are absent.² At trial, despite the ministrations of the Celebici Chamber, the practical application of the Landzo defense was more in keeping with the partial-responsibility variant than with the English Homicide Act. The Celebici Chamber cited Esad Landzo's mental condition as a mitigating circumstance in their sentence pronouncement. In particular, it is noted that the Chamber had earlier concluded that Mr. Landzo satisfied the "abnormality of mind" prong of the diminished-responsibility test but not that of "substantial impairment."⁷

Sentence Mitigation

In the United States, sentence mitigation based on the fact-finder's (or sentencer's) perception that the offender's criminal responsibility is diminished is unique in capital cases, in that mitigating reasons (or "factors") are typically set out in the statute, and their consideration, if present, is mandatory (although nonenumerated mitigating factors may also be considered). Many states list mental impairment, by one

designation or another, as among statutory mitigating factors. The complexity of the state's current death penalty schemes is a reaction to the case of *Furman v. Georgia*.⁵⁵ In *Furman*, the U.S. Supreme Court struck down Georgia's death penalty statute, because it left the jury with unfettered discretion in applying the statute. When the states redesigned their statutes in the wake of *Furman*, their dominant pattern was one in which the jury's discretion was now appropriately guided (or "channeled") by explicitly stated sets of aggravating and mitigating factors.⁵⁶

Ten U.S. jurisdictions and the Model Penal Code allow for the admission of mental-abnormality evidence in sentencing by statute when deciding between imposing death or life imprisonment.²¹ At least one jurisdiction considers such evidence for imposing a probationary sentence.⁵⁷ Contemporary death penalty jurisprudence requires the sentencing authority to consider any relevant mitigating evidence that a defendant offers as a basis for a sentence less than death.⁵⁸ Despite support for allowance of mitigating factors in *Lockett v. Ohio*⁵⁹ and *Eddings v. Oklahoma*,⁶⁰ recent judicial trends have placed limitations on mitigation evidence.⁶¹

According to some theorists, the use of mental illness in a capital punishment penalty phase may have a double edge, because such testimony raises questions of unpredictability and dangerousness, perhaps suggesting to the jury that the defendant poses a continuing threat to society.^{58,62} The Capital Juror Project in South Carolina, a study of 41 capital murder cases belied this hypothesis, however, reporting that 29.5 percent of jurors were slightly less likely and 26.7 percent much less likely to vote for the death penalty if the defendant had a history of mental illness.⁶³ The burden of proof varies according to jurisdiction. For example, depending on the state, an insanity defense may need to be proved by a preponderance of the evidence, while sentencing hearings may only require the defendant to produce evidence "sufficient to support a finding" of a mitigating factor.⁶⁴

In England, the Criminal Justice Act of 1991 encouraged sentencers to take into account a wider range of considerations when mitigating than when aggravating penalties. It is only "information about the circumstances of the offense" that can aggravate, but a court may mitigate an offense "by taking into account any such matters as in the opinion of the

court are relevant. . . .”⁶⁵ In 2001, however, the government published a White Paper that addressed a wide range of issues related to the criminal justice system, including sentencing provisions. One conclusion underscored the presence of too narrow a focus on the circumstances of the specific offense during sentencing, to the exclusion of other probative information.⁶⁶ As a result, the Criminal Justice Act of 2003 expanded aggravating factors to allow for more consideration of prior transgressions of the defendant. Also, motives for the offense based on racial, religious, sexual orientation, and/or disability of the victim may be considered aggravating factors.⁶⁷ These changes have been accompanied by both longer commensurate sentences and community supervision.

Morse³⁹ argues that there are simply no normative or factual criteria to guide the determination of how mental disorder in its various manifestations affects responsibility. In jurisdictions with indeterminate sentencing schemes (e.g., ICTY, ICC), where the range of sentences for each crime may be wide, Morse concludes that sentence mitigation inevitably creates arbitrary practices and unequal punishments.

Conclusion

Before the establishment of the ICTY, the question of a mental-incapacity defense received little attention in anticipation of international criminal prosecution. Accordingly, in 1993, when the mental-incapacity defense was made possible by the ICTY’s unvarnished statement in the rules of procedure and evidence allowing “any special defense, including that of diminished or lack of mental responsibility” the application of that provision became preeminent. Because the textual content of the mental-incapacity defense in the ICTY statute is slim, the possibilities for its use became expansively wide; this, despite the fact that these defenses have long been the subject of debate in various national jurisdictions, with periodic calls for their elimination or, at least, restriction, particularly after high-profile trials. As exemplified by the Celebici Trial, “excuse” defenses will undoubtedly play a paradoxical role in international prosecution. They are often seen as posing a threat to the attainment of the objective of justice, redress, protection, and prevention associated with the principle of accountability for serious humanitarian law violations. And yet, they are made available because they serve fundamental fairness and are viewed as an

essential component of a culture of legality. Because of the complexity of the issues and the high visibility in municipal legal systems, it can be expected that the mental-incapacity defense will have an impact on pursuit of all these goals.

At the Celebici Trial, the effort to equate the diminished-responsibility defense called for in the ICTY statute with British doctrine seemed to have little practical applicability. In fact, it is my premise that the Trial Chamber unwittingly considered all four variants of the use of reduced mental capacity without settling on one measure. While this flexibility may allow for some creative uses of the defense, pressing questions arise regarding normative standards for its use in international law. For example, should the defense be an affirmative one raised by the defendant, a failure-of-proof defense, or should it be a sentencing mitigation factor to be considered by the trier-of-fact? What are the consequences of a determination of either full mental incapacity or of reduced capacity? There is an implicit suggestion in the Celebici case that the accused’s mental condition, even if not amounting to full “mental incapacity,” can still serve as a basis for mitigation of punishment. Partial responsibility has never been accepted in the United States, primarily because of fear of runaway “excuses” and because such systems are considered by some to be cumbersome and expensive.⁶⁸

At the ICC Preparatory Commission, drafting material elements of crimes was emphasized with a somewhat inconsistent approach to mental elements.⁶⁹ There was also an understanding not to address grounds for exclusion of criminal responsibility in the elements of each crime and a widespread reluctance to embark on burden-of-proof considerations. Concepts such as specific and general intent were discarded as well. Agreed upon grounds for excluding criminal responsibility in the ICC Statute now include mental disease or defect that “destroys. . .[a] person’s 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.”⁷⁰ Reduced capacity is not mentioned, but it is certain to have future adherents both because of its international ubiquity and because it is often intricately linked with *mens rea*.

At the Celebici Trial, the introduction of a reduced-mental-capacity defense highlighted its procedural difficulties, not the least of which was a quasi fishing expedition by the defense to find a suitable

psychiatric diagnosis for the defendant. While proportionality in sentencing is a laudatory goal, it often loses something in the implementation, particularly in adversarial systems.

Assessment of *mens rea*, long considered a cornerstone of national legal systems, provides the most familiar, albeit narrow, way for those with reduced mental capacity to be adjudicated in the international setting. In most national systems, the accused is permitted to rebut evidence that he or she had the requisite criminal intent or *mens rea* to commit the crime charged. Both diminished responsibility and the partial-responsibility variant, often confuse responsibility and culpability, and the specific contours of the doctrines are not always clear. They should be dropped from international criminal jurisprudence in favor of a strict *mens rea* formulation that has the potential advantage of simplicity and fairness. Before this can be accomplished, however, the cataloging of mental elements for international crimes must proceed. *Mens rea* terms do not have to be confusing and may be collapsed into relatively few categories.³⁹ Downward departure, a hallmark of both the U.S. diminished-capacity and British diminished-responsibility systems, is not essential for all categories of crimes. Consideration of *mens rea* may result in a lesser charge if appropriate, but also may be deliberated in isolation when lesser charges are not available.

Psychiatric testimony suggesting that a defendant lacks *mens rea* often focuses on the presence or absence of self-awareness (e.g., perception of intent) rather than the ability to form intent at the time of the crime and, as a result, is not relevant. Even the most psychiatrically ill often have the capacity to form intentions by thinking, planning, and executing an action—capacities that usually satisfy any *mens rea* requirement. At trial, if it is determined by the jury that the defendant possesses *mens rea* but the usual control structures are significantly compromised, the evidence could be admitted into court for the purpose of sentence mitigation as in, for example, the U.S. Sentencing Guidelines.⁷¹

With the ICC in the formative stage and with continual ethnic strife on the horizon, these issues are nascent. Nearly every commentary on diminished capacity (or diminished responsibility) begins with the statement that the subject is confusing.⁵⁴ If direction is not offered, adverse publicity that has shadowed both “excuse” and “failure-of-proof” defenses

in national jurisdictions could conceivably generate a negative sociopolitical backlash, creating unsure footing on the predictably slippery slope of international criminal prosecution.

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