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Individual Criminal Responsibility in International Criminal Law.
The Quest for Diminished Responsibility as a New Defence Mechanism
with regard to Victim-Perpetrators.

A Master's Thesis in Partial Fulfilment of the Requirements for the Degree of
'Master in Law'

By

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“For man, when perfected, is the best of animals, but when separated from law and justice, he is worst of all.”

- ARISTOTLE

Acknowledgments

"Success is not final, failure is not fatal, it is the courage to continue that counts."

- WINSTON CHURCHILL

With this dissertation I close one of the most inspiring, intellectually challenging and sometimes incredibly difficult and exhausting chapters of my life. Using the term "bumpy road" to describe my way through law school would be an understatement and there were often times I thought this dissertation would never see the end of day. During the years, I had to overcome not only intellectual struggles, but also battles with myself. As university is in the first place an environment of learning, it definitely confronted me with quite some disappointments and unrealistic expectations. This however, made me realise that a setback doesn't mean the world is ending, you just have to adjust and keep fighting for what you believe in. Therefore I would like to express my sincere gratitude to some of the people, without whose support, kindness and tremendous patience, I probably was still miles away from the finish line.

First and foremost, my kind-hearted parents, whose never-ending love and support I cannot even begin to describe. Their encouragement and, sometimes necessary, pushes to keep my head in the game are well appreciated. But it is especially the opportunity of an education, in order to pursue my dreams, I will always cherish and acknowledge as one of the greatest gifts in life.

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Thirdly, special thanks to team Barlonyo and Professor Karen Büscher, providing me with the opportunity to join a research project in Uganda and the valued friendship that grew out of it. However, it was not entirely about the case I will make in this thesis, it was eye-opening and inspiring how the relevance of this topic came into play.

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Writing these acknowledgments is where this chapter ends for me and the road for you begins. I hope you will enjoy it.

Anne-Sofie Stockman
Ghent, 14 December 2016

Preface

What if, a young boy, abducted and recruited as a child soldier, becomes one of the most notorious war criminals of this century? And what if, that same boy, who is now an adult, is indicted by the International Criminal Court and currently awaiting trial at The Hague for the same crimes that were committed against him?

These questions formed the onset of my research proposal. The upcoming trial of Dominic Ongwen, a former child soldier indicted for war crimes and crimes against humanity committed as an adult, before the International Criminal Court raises numerous afflicting justice questions among a different amount of people, varying from scholars to law practitioners and even the general public that has the slightest interest in international criminal justice. I, myself heard from the case for the first time during a Summer School in international criminal law at the University of Leiden. Even if it was only briefly mentioned during one of the lectures, it immediately struck my attention. Conducting extensive research, the case inspired me and eventually led me to write this master's thesis. Additionally, my interest spiked again when taking part in a research project in northern Uganda, concerning the screening of the Pre-Trial hearing of Dominic Ongwen. The pressing questions and difficulties surrounding this case became even more apparent, leading to an increased motivation to discover and formulate some answers in this inquiry.

It was however, only when I started writing that I discovered how difficult and complex the questions, asked in this thesis, actually are. The novelty of the subject, lack in scholarly attention and overall coherence makes the result of this work definitely one of trial and error. Nevertheless, I hope the relentless efforts made, will pay off by addressing and clarifying some of the main difficulties at stake and proposing potential answers on the issues that will be presented.

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List of Abbreviations

AP I	Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts
CRC	Convention on the Rights of the Child
DCC	Dutch Criminal Code
DCCP	Dutch Code of Criminal Procedures
ECHR	European Convention on Human Rights
ICC/The Court	International Criminal Court
ICC/Rome Statute/Statute	Rome Statute to the International Criminal Court
ICL	International Criminal Law
ICR	International Criminal Responsibility
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal
JRP	Justice and Reconciliation Project
LRA	Lord's Resistance Army
NMT	The Nuremberg Military Tribunals
Pbw	Penitenciaire Beginselenwet
RPE	Rules of Procedure and Evidence
UN	United Nations
UNSC	United Nations Security Council

Introduction

1. The case against Dominic Ongwen, indicted for numerous accounts of war crimes and crimes against humanity by the International Criminal Court¹ and currently standing trial in The Hague, is in particular interesting because it can be seen as a case of 'firsts'. For the first time in history, a former child soldier will be appearing before an international criminal court for the crimes he committed as an adult as part of an armed group. This dissertation will use this case, however will not be limited to it, as a starting point to introduce and discuss the potential difficulties that can, and probably will, develop when such an individual stands on trial.

2. Following this indictment, a new kind of 'evil' seems to have appeared in international criminal law, taking the form of both victim and perpetrator. It will, as this is the least to say, be interesting to see how the Court will deal with this particular group of perpetrators when establishing accountability. When considering their unique dual status a discussion on the effects on children as to their long-term socialisation within an armed group is imperative. This establishes the potential devastating consequences on human and moral development, which do not, just like that, disappear when entering adulthood. According to several studies, the risk of developing a mental impairment is highly probable in this case. It will be argued that the existence of a mental deficiency, however not meeting the required high standard of the mental incapacity defence under the Rome Statute, can mitigate the culpability of the person in question and should therefore be considered when establishing criminal responsibility. It will be shown that people like Ongwen possibly lack full responsibility for their crimes and should therefore be able to enhance diminished responsibility, at least as a partial defence before the Court.²

3. Until now, the Court has never dealt with this particular defence, simply because it has never been invoked yet. It is in this distinct object, the case against Ongwen has the potential to be a game changer in the development of international criminal law.

¹ Hereinafter referred to as "The Court" or "ICC".

² It is in no way the intention of the author to refute the severity of the crimes, nor to exonerate the person in question for the crimes he allegedly committed. This research only wants to elucidate his specific status as victim-perpetrator and the implications this brings with it, when appearing before an international criminal court or tribunal.

Earlier, the plea for diminished responsibility or lack of mental capacity was introduced before the ICTY in the case against Esad Landžo.³ Hence, despite the efforts made by his defence team, the tribunal denied the claim, found him guilty of war crimes and sentenced him to 15 years of imprisonment.⁴ Although, the ICTY Trial Chamber acknowledged the existence of a personality disorder, it rejected it as a mitigating factor in establishing diminished responsibility.⁵ This reasoning repeats itself in further case law of the international tribunal. It seems that the tribunals often acknowledge the existence of a psychological disturbance, however do not apply it in the case before them. While the regulation of mental incapacity progressed significantly with the entrance of the Rome Statute and the ICC RPE, their effectiveness and consequences in practice remain at this moment, due to non-existent case law, unclear.

Relevance of the problem, research question and sub-questions

4. In the wake of mass atrocities, accountability is an important part of dealing with the past and enabling the reconstruction of post-conflict societies. International criminal prosecutions before an international court or tribunal can be seen as a tool employed to achieve this goal.⁶ The Statute to the International Criminal Court acknowledges this focus in its preamble stating that it is established to end impunity of those most responsible⁷ for “the most serious crimes of concern to the international community as a whole”.⁸

³ Landžo was convicted for grave breaches of the Geneva conventions (such as wilful killings and torture) while he worked as a guard at the Čelebići camp; ICTY, Case information sheet “ČELEBIĆI CAMP”, Case No. IT-96-21 (available at: http://www.icty.org/x/cases/mucic/cis/en/cis_mucic_al_en.pdf) (consulted 15 October 2016).

⁴ ICTY Trial Chamber, Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (hereinafter referred to as Prosecutor v. Zejnil Delalić et al.), Judgement, Case No. IT-96-21-T (16 November 1998); ICTY Appeals Chamber, Prosecutor v. Zejnil Delalić et al., Judgement, Case No. IT-96-21-A (20 February 2001).

⁵ ICTY Trial Chamber, Prosecutor v. Zejnil Delalić et al., Judgment, Case No. IT-96-21-T (16 November 1998), para. 1186.

⁶ R. CRYER, H. FRIMAN, D. ROBINSON en E. WILMHURST (hereinafter referred to as R. CRYER et al.), *An Introduction to International Criminal Law and Procedure. Third Edition*, Cambridge, Cambridge University press, 28.

⁷ ICC Office of the prosecutor (hereinafter referred to as ICC-OTP), Paper on some policy issues before the Office of the Prosecutor, 2003, 7 (available at: https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf) (consulted 5 September 2016); ICC-OTP, Strategic Plan 2016-2018, 6 July 2015, 15-16 (available at: https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf) (consulted 5 September 2016); ICC-OTP, Policy Paper on case selection and prioritisation, 15 September 2016, 14 (available at: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) (consulted 17 October 2016).

⁸ Preamble to the Rome Statute of the International Criminal Court (as amended 29 November 2010), *United Nations Treaty Series*, Vol. 2187, 3, 17 July 1998 (hereinafter referred to as Rome Statute of the International Criminal Court), para 4.

5. To a certain extent, people acknowledge that someone like Ongwen is a victim as well as a perpetrator of the most heinous atrocities imaginable. Hence, there exists no consensus on the possible consequences that can follow out of this status, neither on the impact it can have on establishing culpability.

6. Mental illnesses have always encompassed heated debates in both domestic and international legal systems. The idea that people who commit horrible crimes can be acquitted or obtain a mitigating sentence due to psychological reasons, is often hard to accept by society and even by some law-makers and practitioners. Bearing in mind the jurisdiction of international criminal courts and tribunals for the so-called 'core crimes' makes this even harder. The tendency not to differentiate between perpetrators in general and the problematic view towards those suffering from a mental illness will form the basis theme in this analysis.

7. This well-discussed issue of mental impairment is regulated differently in the various domestic legal systems. Most systems favour some sort of reduced capacity when mental capacity of the offender is not completely destroyed but still impaired. This is often followed by internment in medical centres as an alternative of imprisonment in order to accomplish goals as rehabilitation and re-socialisation. While national jurisdictions strongly focus on those particular goals, international criminal law emphasises rather on retribution and deterrence over other acknowledged aims. Therefore, it seems to go against the exact nature and purpose of international criminal law if international courts or tribunals would acquit or diminish a person's culpability because of a mental deficit.

8. This hesitation and lack in clarity in dealing with this kind of perpetrators can also be noticed in the different Statutes and RPE, as well in the case law of the different criminal tribunals. The tribunals used poor regulations to avoid dealing with this imminent question. Accordingly, we can observe a *legal vacuum* with regard to concrete legal rules and consequences of having a mental illness as an accused criminal. However, it is strongly advised to provide clarification on this subject. For one, it will strengthen the fair balance principle and the rights of the accused. Secondly, it elucidates the recognition of rehabilitation as an equally important goal of international criminal law. This thesis urges for the necessary creation of an adequate regulation with clear legal consequences regarding offenders suffering from a mental disturbance in the Rome Statute and RPE, in order to give a criminal offender the possibility to submit his or her mental deficit before the Court and to allow the Court to consider this evidence appropriately when establishing accountability and sentencing.

9. The following question and sub-questions will be answered in this dissertation:

Can the status of victim-perpetrator lead to a diminished responsibility defence in international criminal law, in light of the different goals this branch of law aims to achieve?

What does the concept of victim-perpetrator mean and what are the possible consequences of this status on establishing accountability?

Can diminished responsibility currently be used as a defence in international criminal law?

How and which domestic legislation model can be used to establish a coherent and useful defence mechanism based on a diminished mental capacity?

Methodology and limitations

10. This research is mainly desk-based and therefore primarily theoretical. Hence, some references will be made to interviews conducted in northern Uganda during a field research project in April 2016. Answering the research questions will be predominantly descriptive and evaluative, including a comparative analysis between two domestic legal systems. This inquiry uses an interdisciplinary approach⁹ to understand and explain the interaction and potential influences between the law, medical and social sciences. To establish an as accurate and reliable analysis as possible, the most relevant and credible sources are used. Primary sources are the international and national legal documents, such as international conventions and treaties, statutes and rules of procedure and evidence and UN documentation. In addition, secondary sources are explored. Next to case law of international criminal tribunals, this includes academic books and articles, information of non-governmental organisations and different sources of the court and tribunals themselves.

11. Due to time and space limitations, this research will be, without question, limited. The focus will lay on the legal regime concerning mental insanity and diminished responsibility in international and national criminal law and how victim-perpetrators fit in this regime. Furthermore, the research is in particular concerned with mental deficiencies at the moment of committing the crime. Therefore, it leaves mental insanity during trial (unfitness to stand trial) or during sentencing out of the occasion.

⁹ Specifically, references will be made to the field of psychology, psychiatry and criminology as well as neuroscience.

This thesis emphasises on mental insanity and diminished responsibility as a form of complete defence, partial defence or mitigating circumstance in relation to establishing accountability and sentencing in international as well as national legal systems.

Outline of the dissertation¹⁰

12. This dissertation exists out of four parts, each divided in different chapters.

13. The first part starts with a general introduction, examining the various goals and general principles of international criminal law, particularly as found in the Rome Statute. Key concepts and terminology such as individual criminal responsibility and mental insanity are discussed from a general perspective. Subsequently, the case of Dominic Ongwen will be introduced, illustrating and justifying the importance of this research. Further, it discusses the current shortcomings in international criminal law with regard to victim-perpetrators and their accountability. Based on research on the long-term implications of child soldiering, the theory of a mental impairment that can alter criminal responsibility will be set out. Additionally, the concept of diminished criminal responsibility as a new defence mechanism appears, together with the advantages and possible difficulties of such a defence regarding international crimes.

14. In order to apprehend the current feasibility of this defence mechanism, the second part examines and analyses the development of mental insanity and diminished responsibility at the different international criminal tribunals. It addresses the regulation and case law starting from the earliest stages during the Nuremberg trials, to the evolution made by the ICTY and the new possibilities created with the entrance of a permanent International Criminal Court. Certain difficulties surrounding this defence will be looked at more closely, as they play an important role in the probability and effectiveness of raising this defence.

15. The third part of this inquiry considers two domestic legal systems, namely that of England and The Netherlands, to explore if diminished responsibility can be derived as a defence from municipal law regimes. Therefore, this part will analyse and discuss English and Dutch substantive and procedural law, in relation to mentally ill offenders.

¹⁰ This dissertation counts 51.971 words, footnotes and bibliography included.

16. The fourth part of this master's thesis makes an evaluation *de lege ferenda*. Based on the study of the two domestic law models, an examination will be made as to the possible transference of national features in international criminal law in order to establish a more clear and suitable regulation regarding people who suffer from a mental disturbance.

I. Diminished responsibility in International Criminal Law: an introduction and illustration of its necessity and current inadequacy

17. In this part I aim to build a case for the possible implementation of diminished responsibility as a new defence mechanism in international criminal law. As it is my intention to address a broad audience, originating from different backgrounds, a general clarification of some of the legal concepts of international criminal law is imperative. In an introductory chapter, an overview of the different goals and principles of international criminal law will be given. This allows the reader to establish a comprehensive knowledge of concepts such as individual criminal responsibility, the elements of a crime and grounds for excluding responsibility. This provides for a better understanding when legal arguments for diminished responsibility will be made.

18. The second chapter introduces a case of a former child soldier, now an adult, who is currently standing trial at the International Criminal Court in The Hague. By submitting this case, I hope to illustrate the urgency and relevancy of the questions asked in this inquiry. Victim-perpetrators will hereby appear as a new kind of 'evil' committing international crimes. Special attention is dedicated to the lifetime spend as a child soldier and how accountability is perceived in this regard.

19. Throughout the third chapter, an analysis will be made of the possible psychosocial consequences and long-term implications of the socialisation in an armed group, in particular on human and moral development. Investigating and understanding the psychology of those who commit such heinous crimes improves our understanding why people commit these crimes and allows us to design an appropriate legal response.

20. The fourth chapter will bring our attention on the advantages of a system that includes diminished responsibility as a potential defence in international criminal law proceedings. To make this analysis as reliable and convincing as possible, some obstacles and counterarguments, made by sceptical doctrine, will be presented as well.

1. A closer look to the general principles and objectives of International Criminal Law

1.1. Introduction

“Those who cannot remember the past are condemned to repeat it.”

- GEORGE SANTAYANA

21. Extermination camps in Nazi-Germany, genocide in Rwanda, mass killings in Srebrenica. These are only a few examples of the most heinous crimes of human mankind, committed during the last century. Such extraordinary human evil forms a black spot in history and affects everyone, in a direct or indirect way. In order to address those major forms of violence and destruction, a regime of international criminal law came into existence.¹¹ Since the effective response on the domain of law only manifested since the early nineties, with the establishment of the ad hoc tribunals for Rwanda and the former Yugoslavia, international criminal law can be seen as a rather recent development in international law.¹²

22. ICL features as the supranational body of *criminal law*. It offers a tool through which certain goals such as, the prevention and suppression of wide-scale human rights abuses and gross violations of the laws and customs of war, the enhancement of accountability and reduction of impunity and the establishment of international criminal justice, can be achieved.¹³ It is largely based on fundamental principles entrenched in and similar to domestic criminal judicial systems¹⁴, which are gradually transformed to the international level.¹⁵

23. In contrast to *international law*, which generally concerns the rights and responsibilities of states, criminal law governs prohibitions directed to individuals from which violations can lead to accountability and possible penal sanctions.

¹¹ I. TALLGREN, “The Sensibility and Sense of International Criminal Law”, *European Journal of International Law*, Vol. 13, No. 3, 2002, 561-562.

¹² R. CRYER et al., *An Introduction to International Criminal Law and Procedures. Third Edition*, Cambridge, Cambridge University Press, 2014, 1-26.

¹³ M. C. BASSIOUNI, *Introduction to International Criminal Law: Second Revised Edition*, Leiden/Boston, Martinus Nijhoff Publishers, 2013, 1.

¹⁴ See for example: the principle of legality (*nullum crimen sine lege*, article 22 Rome Statute of the International Criminal Court) and the prohibition of multiple convictions (*ne bis in idem*, article 20 Rome Statute of the International Criminal Court)

¹⁵ E. SLIEDREGT, “The Curious Case of International Criminal Liability”, *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, 1172.

As a branch of public international law, a degree of cooperation from nation states is essential to accomplish these goals. It reflects the need of a well-established balance between principles of national sovereignty and the need to regulate various relations and interests of states in the scope with one another and with those of the international community.¹⁶

24. ICL assembles a set of rules protecting the values of the international order. The recent establishment of the different international criminal courts and tribunals led to an enormous development and evolution of international criminal rules. As a permanent international institution, the International Criminal Court forms the current flagship for ICL. The Court is established by treaty and pursues a policy of *individual criminal responsibility*¹⁷ for those most responsible¹⁸ in committing “the most serious crimes of concern to the international community as a whole”¹⁹, namely genocide²⁰, crimes against humanity²¹, and war crimes²². As of January 2017, the crime of aggression will be included within the scope of the Court’s jurisdiction.²³ The Preamble of the Statute recognises that “such grave crimes threaten the peace, security and well-being of the world”.²⁴ ANTONIO CASSESE, former president of the ICTY and strong proponent of international criminal justice, finds that the nature of these crimes call for international adjudication, which can have strong advantages as opposed to national adjudication.²⁵

25. The primary sources establishing the principles and jurisdiction of the Court are the Rome Statute, the Rules of Procedure and Evidence and the Elements of Crimes.

¹⁶ M. C. BASSIOUNI, *Introduction to International Criminal Law: Second Revised Edition*, Leiden/Boston, Martinus Nijhoff Publishers, 2013, 16.

¹⁷ Article 25 Rome Statute of the International Criminal Court.

¹⁸ ICC-OTP, Paper on some policy issues before the Office of the Prosecutor, 2003, 7 (available at: https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B2560AA962ED8B6/143594/030905_Policy_Paper.pdf) (consulted on 5 September 2016); ICC-OTP, Strategic Plan 2016-2018, 6 July 2015, 15-16 (available at: https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf) (consulted on 5 September 2016); ICC-OTP, Policy Paper on case selection and prioritisation, 15 September 2016, 14 (available at: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) (consulted 17 October 2016).

¹⁹ Preamble to the Rome Statute of the International Criminal Court, para 4; Article 5 Rome Statute of the International Criminal Court.

²⁰ Article 6 Rome Statute of the International Criminal Court.

²¹ Ibid, Article 7.

²² Ibid, Article 8.

²³ Ibid, Article 8bis.

²⁴ Preamble to the Rome Statute of the International Criminal Court, para 3.

²⁵ A. CASSESE, “Reflections on International Criminal Justice”, *The Modern Law Review*, Vol. 61, No. 1, 1998, 7-8.

As it is treaty-based, it is only binding upon state parties who ratified the Statute, which entered into force in 2002 and currently has 124 signatories.²⁶ The Court is based on the principle of complementarity²⁷, meaning that national jurisdictions remain the primary system and the Court only steps in when states are 'unable or unwilling' to investigate and prosecute these core crimes.²⁸ This emphasises the systematic relationship between different jurisdictional authorities exercising their competence over international crimes.

26. In the aftermath of violent conflict and as response to the outcry of victims of mass atrocity, the international community regards it as its duty to humanity to bring perpetrators to justice and prevent future victimisation. The building of international institutions, such as the ICC, reflect this growing interest in preventing impunity and enhancing accountability for the commission of major international crimes. However, while post-conflict justice forms the onset of these institutions, at the moment this barely resulted in extensive prosecutions of perpetrators of these *jus cogens*²⁹ crimes.

1.2. What is international criminal justice for?

27. As a rather new branch of law, ICL seeks to achieve certain ends and objectives to justify prosecution and punishment at the international level. Some of these justifications are similar to those existing in domestic criminal law systems. Others however, diverge or are at least interpreted differently. The pursuit of this justification is not without philosophical debate, since the objectives are often been criticised by scholars, considering them as inconsistent and incoherent.³⁰ Although the jurisprudence of the different tribunals have identified different goals that should be considered when sentencing, this inconsistency and lack of clarity is, at least partially, due to their absence in the Statute of the ICC or those of the ad hoc tribunals.

²⁶ Assembly of State Parties, State Parties to the Rome Statute (https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (consulted 8 October 2016).

²⁷ Preamble to the Rome Statute of the International Criminal Court, para 10.

²⁸ Article 17 Rome Statute of the International Criminal Court.

²⁹ Recognising international crimes as *jus cogens* coincides with the duty to prosecute or extradite, the non-applicability of statutes of limitation and universality of jurisdiction, irrespective of where they were committed, by whom, against what category of victims and irrespective of the context within they are committed. Genocide, war crimes and crimes against humanity are implied to be *jus cogens*; M.C. BASSIOUNI, "International Crimes: Jus Cogens and Obligatio Erga Omnes", *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, 65-66.

³⁰ R. CRYER et al., *An Introduction to International Criminal Law and Procedures. Third Edition*, Cambridge, Cambridge University Press, 2014, 28-29.

28. Next to its primary goal, namely ending impunity for the gravest breaches of human rights and preventing the latter from repeating itself, ICL endeavours a range of other purposes that are essential with regard to punishment. The following objectives can be mentioned, however are not limited: retribution for wrongdoing, deterrence, incapacitation, rehabilitation, providing a historical narrative, raise human rights values, denunciation and education, vindicating victims, restore or maintain peace and reconciliation in post-conflict societies.³¹

29. Despite the existence of this wide range of goals, tensions among them arise while not all of them are addressed equally. DAMASKA argues that the different goals are competing with each other because there is no clear set of priorities.³² In the earliest stages of criminal tribunals there was a strong emphasis on general deterrence, hoping that the threat of punishment would be sufficient enough to eradicate the most heinous crimes. Hence, initial optimism faded rapidly when it became clear that the mere threat could not prevent these horrific acts from happening again.³³ Along with deterrence, retribution takes a prominent place in discussions. These limited sentencing guidelines often dominated the course of the different tribunals. This becomes clear in the different trials held by the international military tribunals at Nuremberg and Tokyo, where sentences are often based on the pure idea of vengeance.³⁴

30. Later on, the ICTY and ICTR continued the promotion of deterrence and retribution over other objectives. Hence, the tribunals were reluctant towards the oversimplification of retribution to revenge. For example, the ICTY argued in the ALEKSOVSKI CASE that retribution “is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes”.³⁵ On its side, deterrence focuses more on the future-related benefits of prosecution, leading to the prevention of prohibited conduct.³⁶

³¹ P. AKHAVAN, “The Rise, and Fall, and Rise, of International Criminal Justice”, *Journal of International Criminal Justice*, Vol. 11, No. 3, 2013, 529; R. CRYER et al., *An Introduction to International Criminal Law and Procedures. Third Edition*, Cambridge, Cambridge University Press, 2014, 28-45.

³² M. R. DAMASKA, “What is the Point of International Criminal Justice?”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 339.

³³ Ibid.

³⁴ W. A. SCHABAS, “Sentencing by International Tribunals: A Human Rights Approach”, *Duke Journal of Comparative and International Law*, Vol. 7, No. 1, 1997, 464-465.

³⁵ ICTY Appeals Chamber, Prosecutor v. Zlatko Aleksovski, Judgement, Case No. IT-95-14/1-A (24 March 2000), para. 185.

³⁶ R. CRYER et al., *An Introduction to International Criminal Law and Procedures. Third Edition*, Cambridge, Cambridge University Press, 2014, 32.

The importance of this principle is confirmed by the Trial Chamber of the ICTY in the NIKOLIC CASE, stating that: “during times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of *respect* for the rule of law and not simply the *fear* of the consequences of breaking the law, and thereby deterring the commission of crimes”.³⁷

31. It is frequently recognised that with the establishment of the ICC we have gone from a model of so-called ‘victor’s justice’ to a model of ‘spectator’s justice’, emphasising on the role of prevention.³⁸ For instance, the Preamble acknowledges that “the most serious crimes can not go unpunished”³⁹, that “their effective prosecution must be ensured”⁴⁰ and that State Parties must be determined “to put an end to impunity for the perpetrators of these crimes and thus those responsible for international crimes”⁴¹.

32. Aside from the obvious goals of deterrence and retribution, the tribunals occasionally made references to the rehabilitative aspect of punishment. This is in particular important in relation to international human rights law, which imposes imperatives as reconciliation and reconstruction within the context of fighting impunity.⁴² The rationale of this aim is to reform the offender by enhancing criminal sanctions, rather than use them as revenge.⁴³ TALLGREN argues that a focus on the particular offender supposes to fulfil the purpose of crime prevention, either by warning the offender by rehabilitating him by means of treatment, care and education or incapacitating him to eliminate the risk of future crimes.⁴⁴ According to this theory, particular features of the offender such as, dangerousness and need for treatment are taken into account selecting the sanction. Rehabilitation can thus be understood to hold two interrelated aspects. The first one being the rehabilitation process that offers programmes during incarceration, aimed at addressing risk factors of individual offenders and the second one the rehabilitation outcome, namely the reintegration into society.

³⁷ ICTY Trial Chamber I, Prosecutor v. Momir Nikolić, Sentencing Judgement, Case No. IT-02-60/1-S (2 December 2003), para. 89.

³⁸ P. AKHAVAN, “The Rise, and Fall, and Rise, of International Criminal Justice”, *Journal of International Criminal Justice*, Vol. 11, No. 3, 2013, 530.

³⁹ Preamble to the Rome Statute of the International Criminal Court, para 4.

⁴⁰ Ibid.

⁴¹ Ibid, para 5.

⁴² W. A. SCHABAS, “Sentencing by International Tribunals: A Human Rights Approach”, *Duke Journal of Comparative and International Law*, Vol. 7, No. 1, 1997, 464-465.

⁴³ R. CRYER et al., *An Introduction to International Criminal Law and Procedures. Third Edition*, Cambridge, Cambridge University Press, 2014, 35.

⁴⁴ I. TALLGREN, “The Sensibility and Sense of International Criminal Law”, *European Journal of International Law*, Vol. 13, No. 3, 2002, 576.

It ultimately aims to enable the perpetrator to socially function in a way that is acceptable for him- or herself and society.⁴⁵ Multiple references to the concept of rehabilitation can be found in the jurisprudence, especially that of the ICTY.

33. In the TADIĆ JUDGMENT, the tribunal points out that: “while the purpose of criminal law sanctions include such aims as just punishment, deterrence, incapacitation of the dangerous and rehabilitation, the Trial Chamber accepts that the modern philosophy of penology is that the punishment should fit the offender and not merely the crime”.⁴⁶ It acknowledges hereby the importance of individualisation in the sentencing phase. Hence, the most notable one in this regard is the decision of the ICTY in the ERDEMOVIĆ CASE. The tribunal noted the existence of a set of “personal circumstances that characterises a corrigible personality”.⁴⁷

34. While the international criminal tribunals often stay quiet about the role of rehabilitation in the wider context of international crimes, it is clear that it plays a particular role in relation to the implementation of sentences and the execution thereof. In the OBRENOVIĆ CASE the Trial Chamber acknowledges that: “punishment must strive to attain a further goal: rehabilitation. The Trial Chamber observes that the concept of rehabilitation can be thought of broadly and can encompass all stages of the criminal proceedings, and not simply the post-conviction stage”.⁴⁸

35. Rehabilitation, as a particular goal, is often disregarded by scholars. Foremost, they argue that the international criminal tribunals lack a *sui generis* sentencing regime.⁴⁹ In other words, they have no control over the execution of sentences, since it depends on the cooperation and williness of states to execute sentences. Therefore, it has to rely on the penitentiary systems of those states. This issue is also confirmed by the ICTY in the KUNARAC JUDGMENT declaring that: “The Trial Chamber fully supports rehabilitative programmes, if any, in which the accused may participate while serving their sentences. But that is an entirely different matter to saying that rehabilitation remains a significant sentencing objective.

⁴⁵ J. M. KELDER, B. HOLA and J. VAN WIJK, “Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR”, *International Criminal Law Review*, Vol. 14, No. 6, 2014, 1184-1185.

⁴⁶ ICTY Trial Chamber, Prosecutor v. Duško Tadić aka “Dule”, Sentencing Judgement, Case No. IT-94-1-T (14 July 1997), para. 61.

⁴⁷ ICTY Trial Chamber, Prosecutor v. Drazen Erdemović, Sentencing Judgement, Case No. IT-96-22-Tbis (5 March 1998), para. 16.

⁴⁸ ICTY Trial Chamber I, Prosecutor v. Dragan Obrenović, Sentencing Judgement, Case No. IT-02-60/2-S (10 December 2003), para. 53.

⁴⁹ J. D. OHLIN, “Towards a Unique Theory of International Criminal Sentencing” in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, Cameron May, 2009, 382 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266702).

The scope of such national rehabilitative programmes, if any, depends on the states in which convicted persons will serve their sentences, not on the International Tribunal”.⁵⁰ Some states, recognise the predominant role of rehabilitation into society, as a goal and justification for imprisonment, in their own national legal systems. Consequently, this emphasises that life imprisonment would contradict this goal and has no rehabilitative effect on the convicted person. Other states have rejected this goal as unrealistic.⁵¹

36. Furthermore, some authorities show reluctance towards rehabilitation and reintegration into society for perpetrators of international crime, especially in light of the gravity of the crimes.⁵² In the domestic context, the idea is to reform the criminal and withdraw him from his criminal tendencies, in order to reintroduce him in society. Critics defend that these goals are inappropriate in international law and that, unlike the domestic crimes, the mindsets of offenders of international crimes are not susceptible to reform through programmes of re-education.⁵³ Some scholars even claim that convicted persons have no right to rehabilitation under international criminal law.⁵⁴

37. Nevertheless, those claiming this view are contradicting the existing legal obligations under international law. The non-violations of fundamental interests, such as the goal of rehabilitation of the convicted person, are recognised in international human rights law, as well as detention-specific instruments.⁵⁵ For example, article 10, paragraph 3 ICCPR declares that: “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”.⁵⁶

⁵⁰ ICTY Trial Chamber, Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Judgement, Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001), para. 844.

⁵¹ I. TALLGREN, “The Sensibility and Sense of International Criminal Law”, *European Journal of International Law*, Vol. 13, No. 3, 2002, 577.

⁵² B. HOLA and J. VAN WIJK, “Life after Conviction at International Criminal Tribunals. An empirical overview”, *Journal of International Criminal Justice*, Vol. 12, No. 1, 2014, 112.

⁵³ J. D. OHLIN, “Towards a Unique Theory of International Criminal Sentencing” in SLUITER, G. and VASILIEV, S. (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, Cameron May, 2009, 384 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266702).

⁵⁴ S. ZAPPALA, *Human Rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, 206-207.

⁵⁵ G. VERMEULEN and E. DEWREE, *Offender Reintegration and Rehabilitation as a Component of International Criminal Justice? Execution of Sentences at the Level of International Tribunals and Courts: Moving Beyond the Mere Protection of Procedural Rights and Minimal Fundamental Interests?*, Antwerpen/Apeldoorn/Portland, Maklu, 2014, 44.

⁵⁶ Article 10(3) International Covenant on Civil and Political Rights, 16 December 1966, *United Nations Treaty Series*, Vol. 999, 171.

Other standards are enshrined in the Standard Minimum Rules, the Body of Principles and the Basic Principles.⁵⁷ On their turn, these international legal documents focus mostly on the penitentiary aspect of rehabilitation.

38. People in favour of rehabilitation are often supporters of the idea of restorative justice. The latter focusses on the humanitarian treatment of offenders in order to establish reparation and reintegration. This differs from desert theorists, who built their theory on the central premesis that the guilty deserves to be punished.⁵⁸ Retribution in itself does not lead to justice, neither to a restorative one.⁵⁹ This underlines the importance that international criminal law should be bound by the legal principles derived from international law.⁶⁰

39. International criminal proceedings have usually been strong focussed on bringing out justice, by merely assembling evidence to establish guilt or innocence for wrongs committed by particular individuals. In the recent embracement of a more 'victim-centred' approach, the search for truth in cases of mass atrocities obtains a more prominent place, as it is often paramount to victims to tell and hear the truth. While a formal right to truth-telling is contested, scholars and legal professionals acknowledge the commitment towards truth-telling and recording history. Accordingly, it has become an undeniable part of human rights and international criminal justice discourses.⁶¹ The idea exists that it matches perfectly with the broader objectives of ICL because exposing the truth facilitates societal reconciliation, durable peace and prevention of recurrence, the unifications of countries, knowing who is responsible and adding credibility to evidence.⁶²

⁵⁷ Documents adopted by the UN concerning the general consideration of the conditions of detention and the rights of those sentenced (Examples are available at: <https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html>).

⁵⁸ A. VON HIRSCH, A. ASHWORTH and C. SHEARING, "Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?" in A. VON HIRSCH, J. V. ROBERTS, A. BOTTOMS, K. ROACH and M. SCHIFF (eds.), *Restorative Justice and Criminal Justice. Competing or Reconcilable Paradigms?*, Oxford, Hart Publishing, 2003, 25 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799216).

⁵⁹ This was confirmed by the ICTY in the DELALIĆ JUDGMENT stating that: "The theory of retribution, which is an inheritance of the primitive theory of revenge, urges the Trial Chamber to retaliate to appease the victim. The policy of the Security Council of the United Nations is directed towards reconciliation of the parties" and "A consideration of retribution as the only factor in sentencing is likely to be counterproductive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice"; ICTY Trial Chamber, *Prosecutor v. Zejnir Delalić et al.*, Judgement, Case No. IT-96-21-T (16 November 1998), para. 1231.

⁶⁰ W. A. SCHABAS, "Sentencing by International Tribunals: A Human Rights Approach", *Duke Journal of Comparative and International Law*, Vol. 7, No. 2, 1997, 464.

⁶¹ S. STOLK, "The Victim, the International Criminal Court and the Search for Truth. On the Interdependence and Incompatibility of Truths about Mass Atrocity", *Journal of International Criminal Justice*, Vol. 13, No. 5, 2015, 975-978.

⁶² Y. NAQVI, "The right to the truth in international law: fact or fiction?", *International Review of the Red Cross*, Vol. 88, No. 862, 2006, 247.

Finding out the truth is not only rewarding in relieving victims from pain but also leads to the discovery of individual circumstances of offenders, when committing the crimes.

40. Apparently, international tribunals seem to have presumed that the eridication of large-scale atrocities remains their most essential task. However, many other goals are at stake throughout international criminal proceedings, which are equally as important. Therefore, the position of the offender and the rights he is entitled to, should be taken into account from the very first moment the accused appears on trial. International courts possess a series of tools in order to fulfill these goals and establish accountability.

1.3. Nulla poena, sine culpa. Criminal responsibility and personal culpability as defined in the Rome Statute

1.3.1. Individual Criminal Responsibility

41. The concept of individual criminal responsibility for the violations of a norm that carries penal consequences is customary to all criminal justice systems, whether in national or international criminal law.⁶³ According to this, ICR can be considered a general principle. The concept of ICR emerged in ICL after the end of World War II, as part of a process of transformation of international law. Individuals came to the stage as subjects of the international legal order, having their own set of rights and responsibilities.⁶⁴ The following statement of the Nuremberg International Military Tribunal materialised the autonomous status of individuals under international law by holding that: “crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ... individuals have international duties which transcend the national obligations of obedience imposed by the individual state”.⁶⁵

⁶³ M. C. BASSIOUNI, *Introduction to International Criminal Law: Second Revised Edition*, Leiden/Boston, Martinus Nijhoff Publishers, 2013, 202.

⁶⁴ A. BIANCHI, “State Responsibility and Criminal Liability of Individuals” in A. CASSESE (eds.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, 16.

⁶⁵ Nuremberg IMT, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1947, 223.

42. With the entrance of the ICTY and the ICTR, it was the first time in history tribunals were set up to prosecute and punish individuals for the so-called 'core-crimes'.⁶⁶ When committing one of these crimes, ICL tries to impose responsibility directly on individuals and punish them for violations thereof through international mechanisms. The principle was eventually incorporated in article 25 of the Rome Statute, which articulates that:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

⁶⁶ P. GAETA, "International Criminalization of Prohibited Conduct" in A. CASSESE (eds.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, 64.

- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevent the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

43. This article applies to all crimes within the jurisdiction of the Court. The first two paragraphs set out the general principles of individual criminal responsibility. In order to clarify the concept of being “individually criminally responsible”, the term can be divided into two parts. Firstly, the notion of “individual” or “individually” emphasises the criminal responsibility of *individuals or natural persons*, as opposed to the responsibility of states or other juridical entities.⁶⁷ However, an exception has been made for persons under the age of 18 at the time of committing the crime.⁶⁸ Furthermore, it is commonly used to describe the situation where an individual is criminally responsible for his own unlawful actions. This can be placed in contrast to the scenario of “collective criminal responsibility”, where individuals are criminally responsible for the unlawful actions committed by others. Secondly, “criminal responsibility” refers to the *criminal responsibility* (as opposed to civil responsibility) of individuals *for international crimes* as defined by the provisions of international criminal law.⁶⁹ The third paragraph distinguishes between the various modes of criminal liability.

⁶⁷ C. DAMGAARD, *Individual Criminal Responsibility for Core International Crimes. Selected Pertinent Issues*, Berlin, Springer, 2008, 13.

⁶⁸ Article 26 Rome Statute of the International Criminal Court.

⁶⁹ C. DAMGAARD, *Individual Criminal Responsibility for Core International Crimes. Selected Pertinent Issues*, Berlin, Springer, 2008, 13.

44. In order to be held criminally responsible, the ICTY's Appeals Chamber holds in the TADIĆ CASE that: "The basic assumption must be that in international law, as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged in or in some other way participated (*nulla poena sine culpa*)".⁷⁰ The maxim *nulla poena sine culpa* confirms that no one can be held accountable for an act that he has not performed or in no way has participated in, or if this omission can not be attributed to him. International criminal law requires thus proof of *personal culpability*, in order to find an accused to be guilty and be able to impose a sentence.⁷¹

45. Article 25 is therefore considerably linked with the *elements of a crime*. In order to establish an offender's criminal responsibility, ICL leans on the elements of crimes that are required to be fulfilled. This implicates that the *actus rea* (the act itself) and the *mens rea* (the intention behind the act) need to be present.⁷² The Rome Statute refers to these two elements in the articles 6, 7 and 8, where the crimes under jurisdiction of the Court are mentioned. Article 30 of the Rome Statute foresees in a special provision with regard to the mental element. Hence, there is no parallel provision dealing with the material element.

46. The Trial Chamber of the ICTY confirmed in the DELALIĆ JUDGMENT that: "It is apparent that it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects. The first of these may be termed the *actus reus* – the physical act necessary for the offence ... The second aspect of the analysis of any homicide offence relates to the necessary mental element or *mens rea*".⁷³ In accordance, the physical act, as well as the mental act are required to be held criminally liable and responsible.

⁷⁰ ICTY Appeals Chamber, Prosecutor v. Duško Tadić, Judgement, Case No. IT-94-1-A (15 July 1999), para. 186.

⁷¹ E. VAN SLIEDREGT, "The Curious Case of International Criminal Liability", *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, 1172-1173.

⁷² A. DUFF, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Oxford, Hart Publishing, 2009, 202-207.

⁷³ ICTY Trial Chamber, Prosecutor v. Zejnir Delalić et al., Judgement, Case No. IT-96-21-T (16 November 1998), para. 424-425.

1.3.2. The importance of the mental element⁷⁴

47. It is generally recognised in domestic and international criminal justice systems that criminal liability should only be imposed on offenders who are sufficiently aware of what they are doing and the consequences thereof.⁷⁵ This theory has its basis in the latin maxim *actus non facit reum nisi mens sit rea*, meaning that the acts does not make one guilty unless it coincides with a guilty intention.⁷⁶ It assumes a certain amount of freedom of will, mental capacity and knowledge of the law.

48. The importance of the requisite *mens rea* is acknowledged by the Court and its Statute, making a special reference to it. It is the first time it is codified as a general requirement of individual criminal responsibility in international criminal law. Until the ICC Statute, the subjective requirement was mostly embedded in the definition of the crimes, which led to tribunals developping the mental element for each crime separately in their jurisprudence.⁷⁷ The Rome Statute tries to set a standard for a mental element that is common and applicable to all crimes within the jurisdiction of the Court and therefore for all crimes under international law.

49. Article 30 (1) of the Rome Statute stipulates that: “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”. This article, which confirms the mental element as a general requirement of culpability, is referred to as the “default rule”.⁷⁸ In accordance with article 21 of the Rome Statute, article 30 applies when no reference is made in the Rome Statute or the Elements of Crimes to the mental element of a particular conduct, consequence or circumstance and thus abstains from a more specific intent. The mental element consists out of two components, a rational (knowledge) and an emotional (intent) one.

⁷⁴ As this inquiry will focuss on the mental element of a crime only this one will be discussed in-depth, focussing on the intent part of the concept.

⁷⁵ G. WERLE and F. JESSBERGER, “‘Unless Otherwise Provided’: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law”, *Journal of International Criminal Justice*, Vol. 3, No. 1, 2005, 36.

⁷⁶ M. E. BADAR, “The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective”, *Criminal Law Forum*, Vol. 19, No. 3, 2008, 479.

⁷⁷ Ibid.

⁷⁸ Ibid, 476.

Article 30 (2) and (3) of the Statute further elaborate on the meaning of intent and knowledge. An act requires a *volitional element of intent*⁷⁹, meaning that the person has to have the intention to engage in conduct and means to cause the consequences or is aware that it will occur in the ordinary course of events.⁸⁰ Furthermore, it requires also a *cognitive component* of knowledge, meaning that there is awareness that a consequence exists or is likely to occur.⁸¹

50. For the most part relying on terminology from continental legal doctrine, the component of intent is described as *dolus*. We can distinguish three relevant forms of *dolus*. First, there is *dolus directus in the first degree* or direct intent, which refers to the offender having a meticulous will or desire to engage in the conduct and obtain the prohibited result. In this setting, the volitional dimension is predominant.⁸² Secondly, *dolus directus of the second degree* or oblique intention does not need the offender to have an actual intent or desire to bring out the consequences of the crimes, but he must be aware that by his or her conduct those consequences will be the almost inevitable outcome. Therefore, he is deemed to have desired them.⁸³ Here, the cognitive element is more important, namely that the undesired consequences will highly probably occur in the normal course of events. Thirdly, there is *dolus evenventualis*, which is analogous to the common law principle of recklessness. According to CLARK this fell out during drafting the Statute and ultimately vanished in the Rome Statute.⁸⁴ Pre-Trial Chamber II of the ICC confirms in the BEMBA JUDGMENT that recklessness is not captured by article 30 of the Statute, as it does not leave room for a lower standard than the *dolus directus* in the second degree.⁸⁵

51. When summarising, we can conclude that an accused must have intent in two situations. Where the crime requires 'conduct' the person must have intended this conduct. This is generally presumed from the proof of the conduct itself.

⁷⁹ M. E. BADAR, "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective", *Criminal Law Forum*, Vol. 19, No. 3, 2008, 479.

⁸⁰ Article 30 (2) Rome Statute of the International Criminal Court.

⁸¹ *Ibid*, Article 30 (3).

⁸² S. FINNIN, "Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis", *International and Comparative Law Quarterly*, Vol. 61, No. 2, 2012, 341.

⁸³ *Ibid*, 344.

⁸⁴ R. S. CLARK, "The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences", *Criminal Law Forum*, Vol. 12, No. 3, 2001, 301.

⁸⁵ ICC Pre-Trial Chamber II, Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 67 (7) (a) and (b) of the Rome Statute, Case No. ICC-01/05-01/08 (15 June 2009), para. 360; W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute. Second Edition*, Oxford, Oxford University Press, 2016, 626-633.

However, a person can rebut this by introducing a defence, such as mental incapacity, to argue that the conduct was not intentional despite the appearance thereof. Additionally, intent is relevant in case the material element includes a 'consequence'. Here it must be established that the accused meant to cause the consequence or is aware that it will occur following the ordinary course of events.

1.3.3. Grounds for excluding criminal responsibility - the mental incapacity defence

52. The requisite mens rea can be challenged in various ways. Defences or, as the Rome Statute refers to it, *grounds for excluding criminal responsibility*, are an often forgotten aspect of ICL and were quite irrelevant until their codification in the Statute. Regarding international crimes, there exists a general reluctance to consider such grounds because of the specific nature of the crimes. The lack of jurisprudence and scholarly attention can be partially explained by the tendency towards a lack of sympathy for defendants in international criminal proceedings.⁸⁶ In this regard, ALBERT ESER states that: "the difficulty may partly be explained by certain psychological reservations towards defences of war crimes" and that "by providing perpetrators of brutal crimes against humanity with defences for their offences, we have effectively lent them a hand in finding grounds for excluding punishability or otherwise barring criminal prosecution".⁸⁷ Another reason includes that, due to the choices made by the Prosecutor, the defendants standing trial are rarely those who can make plausible claims on defences that are recognised by law.⁸⁸ However, in order to respect fairness of trial and the rights of the accused, there must exist an opportunity to raise grounds which might excuse or justify criminal conduct. Defences are therefore a fundamental part of international criminal law.

53. Contrary to the Military Tribunals and the different ad hoc tribunals, the drafters of the Rome Statute preferred a detailed, although incomplete, codification of the different grounds for excluding criminal responsibility.⁸⁹ As the term "grounds for excluding responsibility" is used, it describes what in most national criminal justice systems is known as "defences", "excuses" and "justifications".

⁸⁶ R. CRYER et al., *An Introduction to International Criminal Law and Procedures. Third Edition*, Cambridge, Cambridge University Press, 2014, 398.

⁸⁷ A. ESER, "Defences" in War Crime Trials" in Y. DINSTEIN and M. TABORY (eds.), *Israel Yearbook on Human Rights*, Vol. 24, The Netherlands, Martinus Nijhoff Publishers, 1995, 202.

⁸⁸ R. CRYER et al., *An Introduction to International Criminal Law and Procedures. Third Edition*, Cambridge, Cambridge University Press, 2014, 398.

⁸⁹ W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute. Second Edition*, Oxford, Oxford University Press, 2016, 638.

Hence, by refusing to use the term “defence”, it leaves the question open as to whether a ground for excluding responsibility is *justifying* the wrongful act, *excusing* the perpetrator or merely *negating* punishability.⁹⁰

54. The chapeau of article 31 of the Rome Statute expresses that: “in addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible”. Hereby, the Statute confirms that it does not provide an exhaustive list of defences. This supplementarity is further elaborated in article 31 (3) of the Statute, which allows the Court to consider grounds for excluding criminal responsibility other than those referred to in article 31, paragraph 1 in the extent that they are derived from applicable law as set forth in article 21 of the Statute. So, although the first paragraph only mentions other grounds that are provided in the Statute, the invocation of other exclusionary grounds that are applicable in national and international law is still possible through the third paragraph. This provides the Court with a relatively broad margin of appreciation to scrutinise other defences, as long as they have some basis in the sources of applicable law.

55. As the primary concern of this thesis is the issue of mental impairment and culpability, this would primarily relate to the ground of mental insanity. Therefore, only this one will be discussed in the outline of this dissertation.

56. Article 31 (1) (a) of the Rome Statute provides for a defence when: “The person suffers from a mental disease or defect that *destroys* that 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”.⁹¹ This defence concerns the mental state of the accused at the time the acts were committed and has to be distinguished from the issue of fitness to stand trial.⁹² Consequently, the Statute demands two basic requirements in order to apply mental incapacity as a ground to exclude criminal responsibility namely, a defective mental state in terms of an abnormality of mind and the destruction to know the unlawfulness or to control his or her conduct.

⁹⁰ A. ESER, “Grounds for excluding criminal responsibility” in O. TRIFFERER (eds.), *Commentary on the Rome Statute of the International Criminal Court. Second Edition*, München, Beck, 2008, 869.

⁹¹ Article 31 (1) (a) Rome Statute of the International Criminal Court.

⁹² A. ESER, “Grounds for excluding criminal responsibility” in O. TRIFFERER (eds.), *Commentary on the Rome Statute of the International Criminal Court. Second Edition*, München, Beck, 2008, 872.

57. With regard to the first component, a defendant has to suffer from a certain impairment (“disease or defect”) in relation to the human mind (“mental”). This can be interpreted narrowly by only recognising mental deficiencies. According to prominent authors, *mental* might be interpreted as not only covering psychic disturbances as long as they do not affect cognitive or intellectual capacities of the accused. Therefore other psychic affections or emotional disturbances can only be taken into consideration by relying on article 31, paragraph 3. This restrictive approach seems neither compelling, nor adequate. Better arguments are made for the concept to encompass cognitive (reason) as well as volitional (emotion) impairments.⁹³

58. The insanity defence seems to be sufficient in case of any defect that *destroys* the defendant’s relevant capacity, not requiring a specific mental disease. This opens the door to almost any psychic affectation. Hence, the second component halts this by requiring that the suffering of a mental defect should not be temporarily but amounts to some duration.⁹⁴

59. With regard to the affected capacity, the Statute continues a mild approach. The defendant must have an excuse for not obliging the unlawfulness or nature of his conduct *or* an excuse to be unable to use will power to control acts, both as a result of a mental disease or defect.⁹⁵ The ultimate limitation however rests in the degree of defectation, namely it has to be destroyed. The actual meaning of *destruction* is nevertheless far from self-explaining. On the one hand, the mental deficiency can go so far to exclude a person’s ability or awareness of acting as such. In this case criminal responsibility is not only excluded by lack of culpability but possibility also a lack of human conduct or intent. On the other hand, linking a destroyed capacity to a complete elimination of cognitive reason or volitional control would set unrealistic obstacles, since mental disorders normally do not leave mentally ill perpetrators completely incapable of self-control or disorientated. For mental capacities to be destroyed, it is thus required for an extensive and far-reaching loss of self-control or reason. However, this has to remain above a mere diminished mental capacity.⁹⁶ The Statute does not provide for a complete or partial defence of *diminished criminal responsibility*, which requires some sort of less serious form of mental insanity.⁹⁷

⁹³ A. ESER, “Grounds for excluding criminal responsibility” in O. TRIFFERER (eds.), *Commentary on the Rome Statute of the International Criminal Court. Second Edition*, München, Beck, 2008, 873.

⁹⁴ *Ibid*, 874.

⁹⁵ *Ibid*, 874.

⁹⁶ *Ibid*, 875.

⁹⁷ M. SCALIOTTI, “Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2”, *International Criminal Law Review*, Vol. 2, No. 1, 2002, 20.

60. As this chapter only introduces the defence based on mental insanity, this will in part be further elaborated during the following chapters. A more comprehensive and detailed overview of how the different tribunals have dealt with this defence, in theory and practice, will be given in the second part of this thesis.

1.4. Perpetrators of international crimes

“Evil is, good or truth misplaced.”

- MAHATMA GHANDI

61. As mentioned in the introduction, the ICC seeks to establish accountability for *those who bear the greatest responsibility* in committing the crimes it has jurisdiction over. This brings us to the inevitable question of who these people are and why they commit the most heinous and barbaric acts possible. Often they got referred to as ‘evil’ however, this gives us no solid explanation, nor a realistic one. Contrary to what people may expect, research has confirmed that perpetrators of international crimes are often very ordinary people acting within extraordinary circumstances.⁹⁸ HANNAH ARENDT already addressed this in the sixties in her book *“Eichmann in Jerusalem: A Report on the Banality of Evil”*, claiming that Eichmann was just doing his job during the Nazi regime and hereby fundamentally challenging our understanding of who commits human evil.

62. First of all, it is firm to say that not all perpetrators are the same. Each individual takes a distinct position in society and has a particular understanding towards an imminent conflict. Perpetrators of international crimes often operate in a specific context of mass violence, in which their crimes are perceived as legitimate and necessary.⁹⁹ Furthermore, they differ in their level of involvement and guilt, in the roles and ranks they seize within the structure of command and in the motives that drive them.¹⁰⁰ In order to assert accountability and impose a fair and just sentence, both matching the actual blameworthiness of the perpetrator, it is of the outmost importance to carefully distinguish between the leaders and criminal masterminds, the high-ranking officials, middle-ranking officers and the low-ranking perpetrators.

⁹⁸ A. SMEULERS and W. WERNER, “The Banality of Evil on Trial” in C. STAHN and L. VAN DEN HERIK, (eds.), *Future perspectives on international criminal justice*, The Hague, TMC Asser Press, 2010, 32.

⁹⁹ A. SMEULERS, “Perpetrators of International Crimes: Towards a Typology” in A. SMEULERS and R. HAVEMAN (eds.), *Supranational criminology: towards a criminology of international crimes*, Antwerpen, Intersentia, 2008, 233-235.

¹⁰⁰ A. SMEULERS and W. WERNER, “The Banality of Evil on Trial” in C. STAHN and L. VAN DEN HERIK, (eds.), *Future perspectives on international criminal justice*, The Hague, TMC Asser Press, 2010, 32.

63. The first two categories are conceived as the political engineers and policy makers, who have a leading role in initiating the crimes however, do not physically commit them. As follows, they are not directly exposed to the effects of being a soldier, neither do they kill, torture or rape victims themselves. Those who execute the policies and physically commit the crimes are often the people described as middle-ranking or low-ranking perpetrators.¹⁰¹ Some of them are pressured, forced, coerced or tricked into perpetrating the crimes, through which they become law-abiding criminals.¹⁰²

64. In order to respond adequately on the questions asked in this thesis, it is in particular relevant to take a closer look to mentally ill perpetrators. While the crimes under jurisdiction of the Court are irrefutable committed in an environment that fosters and promotes certain criminal behaviour, SMEULERS and WERNER confirm that perpetrators of international crimes often are “very ordinary people not characterized by mental deficiencies, sadistic character traits, a violent past or criminal record”.¹⁰³ This refutes the perception that all offenders must have a prerequisite of mental insanity in order to commit such gruesome acts. Hence, this does not disregard the fact that a minority will effectively suffer from a mental deficit.

65. According to the moment when a mental deficiency appears, we can make a distinction between two categories of mentally ill perpetrators. First of all, there are those who are affected with a mental illness before they committed the crimes. In this case, the offender will take part in such atrocities because of a pre-existent mental disorder. Secondly, an individual can develop a mental disturbance due to the existing environmental circumstances in a context of mass violence, leading him or her to perpetrate the crimes. The discrepancy helps to determine in which category a particular offender belongs and enlightens the personal circumstances to establish responsibility and a suitable punishment.¹⁰⁴ Forensic psychiatric studies have tried to distinguish between different levels of intensity of mental illness based on the offender’s degree of affectation of the conflict in their personality.

¹⁰¹ A. SMEULERS and W. WERNER, “The Banality of Evil on Trial” in C. STAHN and L. VAN DEN HERIK, (eds.), *Future perspectives on international criminal justice*, The Hague, TMC Asser Press, 2010, 33.

¹⁰² A. SMEULERS, “Perpetrators of International Crimes: Towards a Typology” in A. SMEULERS and R. HAVEMAN (eds.), *Supranational criminology: towards a criminology of international crimes*, Antwerpen, Intersentia, 2008, 257.

¹⁰³ A. SMEULERS and W. WERNER, “The Banality of Evil on Trial” in C. STAHN and L. VAN DEN HERIK, (eds.), *Future perspectives on international criminal justice*, The Hague, TMC Asser Press, 2010, 32.

¹⁰⁴ N. S. SANTALAURIA, *Mental Insanity at the ICC. Proposal for a new regulation*, Master’s thesis Human Rights and Criminal Justice Utrecht, University, 2014, 15 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533743).

66. A first level where conflict can arouse mental interference, is noticeable in perpetrators that describe the revelation of nightmares, anxiety, depression, impairment of guilt, hallucinations and other symptoms related to stress reactions. This ‘Perpetration-Induced Traumatic Stress’ is subsequent to the involvement in conflict and is consistent with how we expect ordinary, mentally stable people to react.¹⁰⁵ According to WALLER this coincides with the broader category of ‘Post-Traumatic Stress Disorders’.

67. Secondly, an ‘Antisocial Personality Disorder’ (ASPD) can emerge, which according to WALLER is the most relevant for considering perpetrator psychopathology. He describes it as “a pervasive pattern of disregard for, and violation of, the wishes, rights or feelings of others and minimising the harmful consequences of their actions or simply complete indifference”.¹⁰⁶ The DSM¹⁰⁷ includes the following diagnostic criteria of people suffering from an ASPD: criminal activity, aggression, impulsivity, indifference to the mistreatment of others, deceitfulness and irresponsible. The estimated prevalence of ASPD is 4.5 % in men and 0.8 % in women, making men more inclined to develop an ASPD.¹⁰⁸ While often used interchangeably, because of criterion overlap, a distinction should be made between people with antisocial personality disorder and the so-called sociopaths and psychopaths. Studies on incarcerated offenders show that 90% who meet the criteria for psychopathy also meet the criteria for ASPD, but as few as 30% of those suffering from ASPD also meet the criteria for psychopathy.¹⁰⁹

68. A third category of mental disturbance includes the pathological sadist. These are offenders with pre-existing, often hidden, tendencies to commit crimes or behave violently and sadistically. This type of perpetrator forms a minority, however are clearly driven by violent, sadistic and sexual impulses. While the tendencies are already present, it is through the consequences of being in an environment where violence seems legitimated or unrestrained this will lead to exacerbation of extreme forms of violence.¹¹⁰

¹⁰⁵ J. WALLER, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, Oxford, Oxford University Press, 2002, 69.

¹⁰⁶ Ibid, 70.

¹⁰⁷ DSM stands for the American Psychiatric Association’s Diagnostic and Statistical Manual of mental disorders, which gives us a classification of mental disorders and associated criteria. It is recently revised, leading to the fifth edition of the manual.

¹⁰⁸ K. J. DEREFINCO and T. A. WIDIGER, “Antisocial Personality Disorder” in S. H. FATEMI and P. J. CLAYTON (eds.), *The Medical Basis of Psychiatry*, New York, Springer, 2016, 229-232.

¹⁰⁹ Ibid; J. WALLER, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, Oxford, Oxford University Press, 2002, 70.

¹¹⁰ A. SMEULERS, “Perpetrators of International Crimes: Towards a Typology” in A. SMEULERS en R. HAVEMAN (eds.), *Supranational criminology: towards a criminology of international crimes*, Antwerpen, Intersentia, 2008, 247-248.

69. Consequently to the above-mentioned, we can conclude that a continuous exposure to atrocities can provoke the development of psychological features in these specific groups of individuals. SMEULERS argues that such a context of collective violence is characterised by “mass involvement of people, progressive use of violence usually towards one specific group that is blamed for the misfortune of the masses and an alleged legitimacy of the violence which is provided by an ideology”.¹¹¹ This specific context can convert more or less mentally stable persons into perpetrators of the most horrifying crimes. These actual circumstances, leading to commit cruel acts are often forgotten in criminal proceedings. However, it is of the utmost importance to acknowledge and ensure perpetrators rights and safeguards during trial. Therefore, it is essential to take these circumstances in regard when establishing responsibility and an appropriate sentence, despite the cruelty they performed during the conflict.

¹¹¹ A. SMEULERS, “Perpetrators of International Crimes: Towards a Typology” in A. SMEULERS en R. HAVEMAN (eds.), *Supranational criminology: towards a criminology of international crimes*, Antwerpen, Intersentia, 2008, 235.

2. Dominic Ongwen on trial – an illustration

2.1. Context and history

70. In January 2015, Dominic Ongwen, an alleged Brigade Commander of the LRA, surrendered to US Forces and was extradited to the International Criminal Court at The Hague. The former Commander is charged with several counts of war crimes and crimes against humanity, allegedly committed in northern Uganda during his time with the LRA.¹¹² However, next to being an indicted war criminal, his recruitment as a (former) child soldier within the armed rebel group can give him equally the position of victim.

71. Since 1986, a war has been waging in northern Uganda, leaving a tremendous impact on the entire population of the region. For over 20 years there existed a raging strife between the Lord's Resistance Army, one of the world's most brutal rebel organisations led by the infamous Joseph Kony, and the Ugandan People's Defence Forces, under the instruction of the Government of Uganda and its current President Museveni. For decades the power in Uganda laid in hands of the military, existing from the northern part of the country. When Museveni, originating from the South, took power in 1986 his followers started to perpetrate revenge killings, mainly against the Acholi people, as retaliation for atrocities committed by the previous regimes. The shift in political and military power and the continuous use of violence against the Acholi led to resentment from the North and the uprising of rebel groups, one of them the LRA.¹¹³ Kony and his movement are especially well known for their use of various strategies aimed at civilians rather than government soldiers.¹¹⁴ The most dominant strategy is the abduction of civilians, most of them children, and the forced recruitment into their ranks.¹¹⁵

¹¹² ICC Case Information Sheet, Situation in Uganda, Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, last update 2 December 2016 (available at: <https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf>).

¹¹³ K. TITECA and T. COSTEUR, "An LRA for Everyone: How Different Actors Frame the Lord's Resistance Army", *African Affairs*, Vol. 114, No. 454, 2015, 99.

¹¹⁴ R. DOOM and K. VLASSENROOT, "Kony's message: a new Koine? The Lord's Resistance Army in Northern Uganda", *African Affairs*, Vol. 98, No. 390, 1999, 25; J. McKNIGHT, "Accountability in Northern Uganda: Understanding the Conflict, the Parties and the False Dichotomies in International Criminal Law and Transitional Justice", *Journal of African Law*, Vol. 59, No. 2, 2015, 197.

¹¹⁵ C. BLATTMAN and J. ANNAN, "The consequences of child soldiering", *The Review of Economics and Statistics*, Vol. 92, No. 4, 2010, 882-883.

Dominic Ongwen was one of those children, abducted at the age of ten and trained to be a child soldier. During his stay in the armed group he became so invested in the cause and incredibly loyal to his superiors that he got the “chance” to climb the ranks and become part of the inner circle surrounding Kony.¹¹⁶

72. From 2002 until 2004, the Government of Uganda launched Operation Iron Fist I and II respectively, which led to a turning point in the conflict. The LRA retaliated with mass abductions and raids into Internally Displaced Camps.¹¹⁷ Late 2003, President Museveni made a referral of the case to the ICC, in the hope indictments for LRA members would follow. This resulted in the first State referral to the ICC and the first situation in the Court’s history.¹¹⁸ In accordance to the request and after investigations were carried out, the ICC started issuing arrest warrants in July 2005 for LRA top commanders, including Ongwen.¹¹⁹ As a consequence of the involvement of the Court, peace talks that had started in 2003 took a serious setback.¹²⁰ The rebel group however, reduced rapidly in number and retreated out of northern Uganda. Ultimately, the war, described as one of the deadliest and most brutal ones, came more or less to an end in 2007 when the Government, following the Juba Peace talks, signed an agreement on accountability and reconciliation with the LRA.¹²¹ Although the number of attacks and overall violence has decreased significantly since mid-2010, the LRA still continues to operate in neighbouring countries, such as the Democratic Republic of Congo, The Central African Republic and South Sudan.¹²²

73. With the capture of Ongwen the Court is finally able, after nearly a decade, to show its effectiveness in the Uganda situation. Furthermore, this case resulted in the first indictment ever of the ICC for a person that is charged for crimes where he is simultaneously also a victim from.

¹¹⁶ E. K. BAINES, “Complex political perpetrators: reflections on Dominic Ongwen”, *Journal of Modern African Studies*, Vol. 47, No. 2, 2009, 163-173.

¹¹⁷ L. N. MALU, “The International Criminal Court and conflict transformation in Uganda: Views from the field”, *African Journal on Conflict Resolution*, Vol. 15, No. 2, 2015, 86.

¹¹⁸ J. MCKNIGHT, “Accountability in Northern Uganda: Understanding the Conflict, the Parties and the False Dichotomies in International Criminal Law and Transitional Justice”, *Journal of African Law*, Vol. 59, No. 2, 2015, 202.

¹¹⁹ ICC Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58, Case No. ICC-02/04-01-05-1_US-Exp (8 July 2005); The arrest warrants were unsealed on 13 October 2005; ICC Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest, Case No. ICC-02/04-01/05-52 (13 October 2005).

¹²⁰ L. HOVIL, “Challenging International Justice: The Initial Years of the International Criminal Court’s Intervention in Uganda”, *Stability: International Journal of Security and Development*, Vol. 2, No. 1, 2013, 6.

¹²¹ L. N. MALU, “The International Criminal Court and conflict transformation in Uganda: Views from the field”, *African Journal on Conflict Resolution*, Vol.15, No. 2, 2015,88.

¹²² K. TITECA and T. COSTEUR, “An LRA for Everyone: How Different Actors Frame the Lord’s Resistance Army”, *African Affairs*, Vol. 114, No. 454, 2014, 93.

During the course of writing this dissertation, Pre-Trial Chamber II of the ICC issued a decision, which confirmed the charges brought against Ongwen.¹²³ The opening of the trial is scheduled for December 6, 2016.¹²⁴

2.2. From innocent child to Brigade Commander

“Under conditions of tyranny it is far easier to act than to think.”

- HANNAH ARENDT

74. To, at least partially, understand how Ongwen evolved from an innocent child to a renowned perpetrator, it is important to emphasise the living conditions and the techniques used by the armed group he stayed in for almost his entire lifetime. The knowledge surrounding Ongwen is relatively scarce. To give a brief insight into his personal history and life patterns this part will, to the utmost extent, lean on literature largely composed out of interviews by authorities on the subject, such as ERIN BAINES and the JUSTICE AND RECONCILIATION PROJECT.

75. The war in northern Uganda started when the man, now known as Dominic Ongwen, was six years old and people still described him as a shy and gentle boy. At the age of ten, LRA rebels captured him during his walk from school to home. The young boy gave them a false name, as children were thought to do so in order to protect their family and villages from retaliation if anyone, should it occur, considered escaping.¹²⁵ In the beginning he was placed in the home of his *lapwony* ¹²⁶, Vincent Otti¹²⁷, where he for the first time was introduced into the complex and perverse ways of living of the rebels. Distinctive forms of persuasion and indoctrination were used in order to establish a certain commitment to the group and to turn the children into soldiers. They were thought to forget their old lives and were forced into a hard regime of physical labour, long marches and constant beatings to exhaust and disorient them.

¹²³ ICC Press Release, ICC Pre-Trial Chamber II confirms the charges against Dominic Ongwen and commits him to trial, ICC-CPI-20160323-PR1202, 23 March 2016 (<https://www.icc-cpi.int/Pages/item.aspx?name=pr1202>) (consulted 20 September 2016).

¹²⁴ Ibid.

¹²⁵ S. NOLEN and E. BAINES, “The making of a monster”, 2009, 2 (<http://www.theglobeandmail.com/news/world/the-making-of-a-monster/article20389116/?page=all>) (consulted 7 July 2016).

¹²⁶ Children that are too young to fight are generally placed in the home of a senior commander who takes the role of ‘lapwony’ or teacher.

¹²⁷ Vincent Otti was one of the five Commanders of the LRA indicted by the ICC. He was at one point second in command until he was executed as he was suspected to be disloyal and by the driving role he played in the Juba Peace Agreements.

They got lectured for hours on the rules and the harsh punishments for violations and disobedience thereof. Children got initiated into the LRA through a series of beatings and the witnessing of extreme violence. For example, when a child attempted to escape, the others were forced to kill him and sometimes they even had to taste the blood of that dead child.¹²⁸

76. To increase loyalty, abductees are taught that Kony has spiritual powers, which allows him not only to predict the future but also spy and read the minds of his fighters. Children learned to suppress and hide their thoughts and emotions because they were frightened Kony would find out and would order to kill them.¹²⁹ The LRA uses its political ideology to convince the children of the so-called legitimate cause they are fighting for, namely to free the Acholi people from the deliberate excluding and extermination of the Ugandan government in regard to other parts of the country. For children who originated from poor villages or refugee camps, it strongly enhances the belief that they will be rewarded when they help to overthrow the government.¹³⁰

77. In an interview with Nolen and Baines, MICHAEL WESSELLS states that children, especially a young boy like Ongwen that not possesses a strong skill of resistance yet, are in particular susceptible to this kind of indoctrination and are frequently confronted with a process of dissociation.¹³¹ Furthermore, it is easier for an adult male to become a father figure and for a boy to establish a far-reaching loyalty towards this surrogate father.¹³² When Ongwen was 14 years old his abilities to commit cruelty were already increased significantly and soon Kony would call him a “role model” for other child soldiers. In charge of field operations he is known to have carried out acts of brutality such as boil people alive, leading brutal abduction raids, etc.¹³³

¹²⁸ E. BAINES and JRP, “Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen”, *JRP Field Note 7*, 2008, 7-8.

¹²⁹ S. NOLEN and E. BAINES, “The making of a monster”, 2009, 3 (<http://www.theglobeandmail.com/news/world/the-making-of-a-monster/article20389116/?page=all>) (consulted 7 July 2016).

¹³⁰ Ibid.

¹³¹ The process of dissociating or ‘splitting’ means that people will cut themselves off from their prior normality and construct a new identity in favour of their new living conditions. A new state of normality will occur that is in accordance with this new world.

¹³² S. NOLEN and E. BAINES, “The making of a monster”, *The Globe and Mail*, 2009, 4 (<http://www.theglobeandmail.com/news/world/the-making-of-a-monster/article20389116/?page=all>) (consulted 7 July 2016)

¹³³ Ibid.

78. In just a few short years, Ongwen was promoted from field commander to a senior rank. As alleged Brigade Commander of the Sinia Brigade, he allegedly became part of “Control Altar”, the high command of the rebel group.¹³⁴ At some point, he became third (following the ICC) or fourth (following the Ugandan people) in command.¹³⁵ NOLES, BAINES and JRP mention several reasons for his rapid success and promotion within the armed group. First of all, he is perceived to be a determined fighter and a brilliant strategist. Secondly, loyalty is recognised as a critical factor for promotion. Respondents characterise Ongwen as: ‘quick to anger’, ‘a chameleon with mood swing’, ‘brave and inspirational fighter’, ‘devoted’, ‘fearless’, ‘courageous’, ‘role model’, ‘respectful and loyal’. This confirms that Ongwen was incredibly loyal to the group and his leader. In the LRA it is considered that the more you kill, the more loyal you are, making the two concepts of being a killer and being loyal intertwine. Thirdly, he occasionally just got “luck” by outliving a number of his superiors.¹³⁶ As this establishes his fierce loyalty to his leader, he also displayed signs of doubting the rebellion and his desire to go home. It is frequently recorded that at several points in his life, he was thinking about leaving the armed group.¹³⁷ Hence, until he surrendered in 2015, he was never actually willing or able to escape.

2.3. The dilemma surrounding Ongwen

79. It is clearly established that Ongwen was only a small child, as many others, when he got recruited as a soldier within the LRA ranks. In order to address the question of culpability of such persons, clarification of certain concepts is essential. As follows, it will be enlightened as to how the notions of ‘child soldier’, ‘child’ and ‘adult’ are recognised in international law and laid down in legal definitions. Furthermore, it is crucial to examine how accountability is perceived in this regard. Additionally, the special status of being victim and perpetrator will be introduced and covered more closely.

¹³⁴ ICC Question and Answers, Transfer of Dominic Ongwen to the ICC custody, last update 20 January 2015 (available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/ongwen-qa-20-01-2015-eng.pdf>) (consulted 10 October 2016).

¹³⁵ Ibid.

¹³⁶ S. NOLEN and E. BAINES, “The making of a monster”, 2009, 6-7 (<http://www.theglobeandmail.com/news/world/the-making-of-a-monster/article20389116/?page=all>) (consulted July 7, 2016); E. BAINES and JRP, “Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen”, *JRP Field Note* 7, 2008, 12-14.

¹³⁷ E. K. BAINES, “Complex political perpetrators: reflections on Dominic Ongwen”, *The Journal of Modern African Studies*, Vol. 47, No. 2, 2009, 176.

2.3.1. Child soldiers, what's in a name?

80. Every human being is vulnerable to superior force, however children are part of a group that in particular is susceptible to it.¹³⁸ Estimation suggests that approximately 300,000 children are engaged in armed conflicts worldwide.¹³⁹ For decades children are affected by war however, the extensive attention on child soldiers is a rather recent phenomenon.¹⁴⁰ This is usually explained by the increased use of children in direct participation in hostilities, rather than functioning as auxiliaries, and the changing perception of society on when childhood ends and adulthood begins.¹⁴¹ Notwithstanding the almost universal condemnation of the international community and the progress made to halt the involvement of children in armed conflict, it remains up to now an ongoing reality.¹⁴²

81. The term child soldier can, at first sight, be seen as a contradiction or oxymoron. While children normally should never be associated with warfare, it nonetheless often disrupts the lives of many of them.¹⁴³ Children are generally seen as people below the age of 18.¹⁴⁴ The definition used in international human rights law describes a *child* as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”¹⁴⁵ Meanwhile, international humanitarian law provides no clear definition of the term child. Although there is no express definition, the fourth Geneva Convention sets an age limit of fifteen as the end of childhood.¹⁴⁶ It is only with the arrival of two Additional Protocols in 1977, rules regulating the participation in hostilities of children and thus acting as soldiers came into existence.

¹³⁸ M. FROSTAD, “Child Soldiers: Recruitment, Use and Punishment”, *International Family Law, Policy and Practice*, Vol. 1, No. 1., 2013, 71.

¹³⁹ Coalition to stop the use of child soldiers and UNICEF, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, New York, Unicef, 2003, 3 (available at: https://www.unicef.org/emerg/files/option_protocol_conflict.pdf) (consulted on 15 July 2016).

¹⁴⁰ M. G. WESSELLS, “Children, Armed Conflict, and Peace”, *Journal of Peace Research*, Vol. 35, No. 5, 1998, 635-636.

¹⁴¹ M. HAPPOLD, “Child Soldiers in International Law: The Legal Regulation of Children’s Participation in Hostilities”, *Netherlands International Law Review*, Vol. 47, No. 1, 2000, 28; I. DERLUYN, W. VANDENHOLE, S. PARMENTIER and C. MEIS, “Victims and/or perpetrators? Towards an interdisciplinary dialogue on child soldiers”, *BMC International Health and Human rights*, Vol. 15, No. 28, 2015, 2.

¹⁴² United Nations, Report of the Secretary-General on Children and Armed Conflict, UN Doc. A/66/782-S/2012/261, 26 April 2012.

¹⁴³ M. A. DRUMBL, *Reimagining Child Soldiers in International Law and Policy*, Oxford, Oxford University Press, 2012, 1-3.

¹⁴⁴ According to the UN Convention on the Rights of the Child and customary law.

¹⁴⁵ Article 1 Convention on the Rights of the Child, 20 November 1989, *United Nations Treaty Series*, Vol. 1577, 3 (hereinafter referred to as Convention on the Rights of the Child).

¹⁴⁶ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *United Nations Treaty Series*, Vol. 75, 287; M. HAPPOLD, “Child Soldiers in International Law: The Legal Regulation of Children’s Participation in Hostilities”, *Netherlands International Law Review*, Vol. 47, No. 1, 2000, 28.

82. *Soldiers* or combatants are generally understood as members of regular state armed forces.¹⁴⁷ However, the entrance of irregular forces in the conduct of war is sufficiently increasing. While the Geneva Conventions of 1949 do not respectively address the involvement of children in armed conflict, the two Additional Protocols make some references to the use of children in hostilities. The body of laws and customs of war uses different thresholds for the protection of children in armed conflict. Article 77 (2) of AP I, which implies the presence of an international armed conflict, provides that: “Parties to the international conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities.”¹⁴⁸ Therefore, children under the age of fifteen cannot be recruited. Hence, there is no obligation to refuse their spontaneous enlistment. In the occurrence of a non-international armed conflict, AP II will be applied. Article 4 (3) AP II demands that: “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”¹⁴⁹ While AP I does not prohibit the acceptance of voluntary enrolment, this provision establishes the absolute principle of non-recruitment.

83. The Geneva Conventions and their Additional Protocols I and II took steps to codify legal obligations with regard to the use of children in armed conflict however, lacunae are still apparent. This rather limited protection is complemented by the almost universally ratified Convention on the Rights of the Child and its Optional Protocol. The Convention is a human rights treaty that applies in both times of war and peace and is acknowledged as the leading legal instrument in the world regarding children. Article 38 CRC enhances that: “State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”¹⁵⁰ The Optional Protocol on the Involvement of Children in Armed Conflict provides a much more comprehensive and in-depth framework.

¹⁴⁷ T. RUYSS and C. DE COCK, “Protected persons in international armed conflicts” in N.D. WHITE and C. HENDERSON, *Research Handbook on International Conflict and Security*, UK, Edward Elgar Publishing, 2013, 377.

¹⁴⁸ Article 77 Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, *United Nations Treaty Series*, Vol. 1125, 3.

¹⁴⁹ Article 4 (3) Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, *United Nations Treaty Series*, Vol. 1125, 609.

¹⁵⁰ Article 38 Convention on the Rights of the Child.

The age of direct involvement in hostilities is raised from fifteen to eighteen and moreover, States are required to take “all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities.”¹⁵¹ The provisions ensure that State Parties shall refrain from compulsorily recruiting persons under the age of 18¹⁵² and that the minimum age for voluntary recruitment will be raised to fifteen as set out in article 38, paragraph 3 CRC.¹⁵³ It also provides some safeguards in the occurrence of voluntary recruitment under the age of eighteen to make sure it is genuinely voluntary and the child is in no way forced or coerced.¹⁵⁴ In the ambit of non-state actors, the provision is more rigorous, requiring that “armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years”.¹⁵⁵

84. Additionally, all 174 Member States of the International Labour Organisation (ILO) adopted ILO Convention 182. Consequently, they commit themselves to prohibit and eliminate the worst forms of child labour.¹⁵⁶ This Convention is in particular important for two main reasons. Foremost, it is the first time the opportunity emerged to set an eighteen-year minimum age limit in relation to child soldiers as the term child in the Convention refers to all persons under the age of eighteen.¹⁵⁷ Moreover, in article 3 an enumeration can be found of the worst forms of child labour, whereas for the first time, child soldiering is legally recognised as such.¹⁵⁸ Meanwhile, it is settled that the recruitment or use of anyone under the age of fifteen into armed forces or armed groups is prohibited under customary international law. This is based on the premise that military service, even if voluntary, is always in the contrary of the best interest of a child. In this regard, child right advocates have argued for a ‘straight-18’ ban on children’s recruitment and use in hostilities.¹⁵⁹

¹⁵¹ Article 1 Optional Protocol to the Convention on the Rights of the Child of 1989 on the Involvement of Children in Armed conflict, 25 May 2000, *United Nations Treaty Series*, Vol. 2173, 222.

¹⁵² *Ibid*, Article 2.

¹⁵³ *Ibid*, Article 3(1).

¹⁵⁴ *Ibid*, Article 3(3).

¹⁵⁵ *Ibid*, Article 4.

¹⁵⁶ Article 1 Convention No. 182 of the International Labour Organisation concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (hereinafter ILO Convention No. 182), 1 June 1999, (available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>).

¹⁵⁷ Article 2 ILO Convention No. 182.

¹⁵⁸ Article 3, ILO Convention No. 182.

¹⁵⁹ M. HAPPOLD, “Child Soldiers: Victims or Perpetrators?”, *La Verne Law Review*, Vol. 29, 2008, 69-70.

85. As a reaction to the increased recruitment of children in direct combat, states came together in 1997 in Capetown to give a possible formulation of what should be understood under the concept *child soldiers*.¹⁶⁰ The follow-up Conference in Paris in 2007 led to the adoption of the Paris Principles, which states that child soldiers are not only those persons younger than 18 who engage in combat or take a direct part in hostilities but also includes, but is not limited to, children used as auxiliary for cooking, porters, messengers or sexual purposes.¹⁶¹ While the principles are a form of non-binding law, they are extremely influential in the strife to ban all recruitment and use of child soldiers. The term child soldier has since then been replaced with the umbrella term: *children associated with armed forces or armed groups*. In addition, a former child soldier can be understood as a person that initially was part of an armed group or armed force while under the age of eighteen, even if that person was older at the time he left the group or force.¹⁶²

86. The Rome Statute was the first treaty that included the enlistment, conscription and use of children under the age of fifteen in armed conflict, both by State and non-State actors, as a war crime and establishes individual criminal responsibility for the infringement thereof.¹⁶³ With its first judgment ever against THOMAS LUBANGA, the ICC drew attention to this issue by finding him guilty of the conscription of children under the age of fifteen.¹⁶⁴ While there is no general prohibition to prosecute child soldiers under international law, courts have been reluctant to do so. In this case a trend towards restorative justice and social rehabilitation seems more suitable.¹⁶⁵ Nonetheless, in the assessment of child soldiers and their accountability under the international criminal justice system it is important to apprehend the age of criminal responsibility. The ICC Statute refers to the exclusion of jurisdiction over persons under eighteen for crimes they committed at that time.¹⁶⁶

¹⁶⁰ Cape Town Principles and Best Practices on the recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa, 30 April 1997, (available at: [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf)).

¹⁶¹ Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007 (available at: <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>).

¹⁶² Leaving an armed group or armed force can either by release, demobilisation, escape or rescue.

¹⁶³ M. HAPPOLD, "The Age of Criminal Responsibility in International Law", in K. ARTS and V. POPOVSKI (eds.), *International Criminal Accountability and the Rights of Children*, The Hague, The Hague Academic Press, 2006, 69–84.

¹⁶⁴ ICC Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06 (14 March 2012), para. 1358.

¹⁶⁵ See Commitment 11 in Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007 (available at: <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>).

¹⁶⁶ Article 26 Rome Statute of the International Criminal Court.

87. As the LUBANGA CASE demonstrates, the recruitment and use of child soldiers is seen as a serious crime in international criminal law. Child soldiers that are removed from an armed group are therefore rightfully seen and treated as victims. However, not all child soldiers have the fortune to escape or being rescued and rehabilitated. This shows that, despite the fact that people like Ongwen are former child soldiers, their status as victim seems to disappear when they enter adulthood and they were unwilling or unable to escape the armed group. Therefore, Ongwen can in theory be held accountable before the ICC for atrocities committed when part of the armed group from the day he became eighteen.

2.3.2. Victim-Perpetrators, a new kind of evil in international criminal law

88. The purpose of the previous section has been to show that international law views child soldiers mainly as victims since their rights have been violated when they are illegally recruited and used to participate in hostilities. There seems however, no clear-cut answer to the question if a person like Dominic Ongwen is a victim, a perpetrator or both. Some people are convinced that he is still a victim because the government failed to protect him against the abduction into the LRA ranks. Nonetheless, others are persuaded by the opinion that, despite his abduction, he perpetrated an incredible amount of atrocities wherefore he should stand trial. Taking in regard these complexities, it can be suggested that he is both victim and perpetrator. The issue of such “victim-perpetrators” is most relevant in the pursuit for justice and the search to establish accountability. This difficult distinction and the diverse opinions on how to deal with these pertinent questions came explicitly clear during interviews in northern Uganda, enhancing the following quote:

“They (the people of northern Uganda) feel for him. They think often about Ongwen like their own child. Seeing Ongwen in the ICC, they see the picture of their own children. The most important thing is when Kony is there, than they will feel good. Not Ongwen who himself was abducted and went to the same experience as their own children. He is almost born in the LRA. He grew up in the bush and that’s why there are so much mixed feelings. This was our child. He was taken, survived and ultimately escaped. That is a challenge. They have the chicken thief, but not the real thief”. (Personal communication, Resident District Commissioner, northern Uganda)¹⁶⁷

¹⁶⁷ Personal communication Resident District Commissioner, northern Uganda, Lira District.

89. The labelling of a person as either ‘victim’ or ‘perpetrator’ is often an over-simplification of the reality and expresses a false dichotomy, placing them as opposites in order to characterise a person.¹⁶⁸ It tends to give the impression that both are discrete and homogenous groups that are in no way related to each other. While victims are often seen as ‘pure’ and ‘innocent’, perpetrators are associated with ‘evil’ and ‘guilt’.¹⁶⁹ With the term complex political victims, ERICA BOURIS tries to show that victims can also participate and engage in acts and discourses that victimise others. The concept makes it possible to recognise that victims have some degree of agency and responsibility. Hence, if someone engages in the victimisation of others it does not mean that one’s victim status is diminished by it. A uniform group of victims bearing the same responsibility does not exist, rather different degrees of responsibility and victimhood can be distinguished.¹⁷⁰ When the vulnerability of ordinary people, especially children, to persuasive powers will be made clear, it will show that a rigid distinction between innocent victims and evil perpetrators is hard to make.¹⁷¹

90. While thousands of children are forcibly taken and pressed into performing a range of dehumanising acts, they do however not all react in the same way. Ongwen can be seen as different from children that were forced to kill and abduct against their will but had no rank or remained only for a short time in the LRA. Hence, he is not exceptional and represents several people abducted at a young age, that stayed in an armed group over a long period of time and given command position within this group. The current retributive paradigm of ICL seems very narrow in perspective since it only highlights the criminal liability of perpetrators and does not differentiate on the different kind of perpetrators that may require special attention, such as former child soldiers. The focus in the further outset of this research will be on those former child soldiers that stayed in an armed group after becoming an adult and the potentially devastating results this socialisation and long-term exposure to violence can have, in particular on their moral and human development.

¹⁶⁸ T. GOVIER and W. VERWOERD, “How Not to Polarize “Victims” and “Perpetrators””, *Peace Review*, Vol. 16, No. 3, 2004, 371-372.

¹⁶⁹ E. BOURIS, *Complex Political Victims*, USA, Kumarian Press, 2007, 19-20.

¹⁷⁰ *Ibid*, 25-90.

¹⁷¹ T. GOVIER and W. VERWOERD, “How Not to Polarize “Victims” and “Perpetrators””, *Peace Review*, Vol. 16, No. 3, 2004, 375.

3. Victim-perpetrators and Individual Criminal Responsibility in International Criminal Law. A gap in literature and practice

3.1. Introduction

91. As explained in the previous chapter, (former) child soldiers often appear as both victim and perpetrator. The acts committed by them ask for some kind of justice, however what this should look like is unclear. Until now, former child soldiers have never appeared for an international criminal court or tribunal for the acts committed as an adult in an armed group. Currently, there is a lack of literature and case law to build a solid analysis of the accountability of such 'victim-perpetrators'. It is therefore the case against Ongwen has the potential to become highly influential in the further development of international law.

92. In the confirmation of charges hearing, the ICC's Pre-Trial Chamber II decided that there are substantial grounds to believe that Ongwen committed the crimes that were brought against him by the Prosecutor, hereby committing the case to trial.¹⁷² While the indictment against Ongwen comes forth as somewhat illogical in the pursuit of the ICC to prosecute *those most responsible*, he did reach the age of 18 at the time of the alleged crimes and can therefore be held individual criminal responsible according to article 26 of the Rome Statute. In order to be held individual criminal responsible, as part of the group that masterminded and ordered the attacks, the elements of the crime will have to be fulfilled. This dissertation will not go into the *actus reus* of the allegedly committed atrocities. Hence, when we presume that the acts indeed were perpetrated by Ongwen or occurred under his command, it is much more intriguing to examine potential complications with the requisite *mens rea*.

93. As mentioned in the previous chapters, the mental element forms a complex notion in international criminal law and a potential impairment is in particular difficult to prove. The literature surrounding Ongwen is rather limited and does not suggest that Ongwen has a specific mental disorder. However, it does reveal that his choices are highly regulated and restricted, due to the socialising within the LRA. These are factors that may limit his *mens rea* for the crimes.

¹⁷² ICC Pre-Trial Chamber II, Prosecutor v. Dominic Ongwen, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422-Red (23 March 2016), para. 157.

94. In this chapter, different factors will be analysed to demonstrate that the mental element, requiring knowledge and intent, can be partially impaired, especially the intent part, due to the stay in an armed group. This chapter examines the progression of a young abducted child into a willing soldier, involving several developmental phases. As we have discussed in the first chapter, the use of the concept “evil” to describe how people are capable of extreme violence and cruelty leads to a vague and often wrong idea with regard to the kind of perpetrators that commit international crimes. Most children who are raised in an environment of severe violence often experience or commit cruelties of the worst kind.¹⁷³ The repeated and chronic exposure of war during development can lead to long-term consequences in terms of physical and emotional health as well as on their moral socialisation and development.¹⁷⁴ The moral development is in particular relevant, since it is an important factor when trying to establish accountability.

95. Since the twentieth century, there exists a resurrection in biological theories of crime, where scholars from various disciplines attempt to search for specific genetic and neurological sources of deviant behaviour.¹⁷⁵ Through this recent development in neuroscience and psychiatry a new perspective on accountability can be raised. This chapter will try to elucidate how the psychological impact of child soldiering can have an effect on human behaviour as a potential risk exists for the development of a neurological disorder based on an empathy deficit. The presence of empathy erosion is intrinsically linked to appetitive aggression and may affect the culpability of people like Ongwen under the Rome Statute. This chapter argues that if this occurs, this should be taken into account when establishing criminal responsibility.

¹⁷³ E. SCHAUER and T. ELBERT, “The Psychological Impact of Child Soldiering” in E. MARTZ, *Trauma Rehabilitation After War and Conflict. Community and Individual Perspectives*, New York, Springer, 2010, 311-314.

¹⁷⁴ J. BOYDEN, “The Moral Development of Child Soldiers: What Do Adults Have to Fear”, *Peace and Conflict: Journal of Peace Psychology*, Vol. 9, No. 4, 2003, 343-345.

¹⁷⁵ B. SHNIDERMAN and C. A. SMITH, “Toward Justice: Neuroscience and Affirmative Defenses at the ICC”, *Studies in Law, Politics and Society*, Vol. 66, 2013, 88.

3.2. Towards a new perspective. Victim-perpetrator as a mitigating factor in establishing criminal responsibility

3.2.1. Psychosocial consequences of child soldiering

96. 'Psychosocial' underlines the intertwining relationship between psychological and social effects. Psychological effects dwell on the effects that affect the emotions, behaviour, thoughts, perceptions, understanding and learning ability. Social effects refer to the destruction of social facilities and relations due to death, family and community breakdown and damage to social values and practices.¹⁷⁶ The response to trauma of children and adults are slightly comparable, with one major exception. The exposure and responses to war related stressors interfere when children are still developing physically, emotionally, cognitively and socially. Therefore the consequences of internal and external stressors are much more far-reaching and affect coping mechanisms, identity formation, internalised standards of right and wrong, mechanisms for modulating aggressive impulses and neurobiological growth.¹⁷⁷

"I was abducted when I was 8 years old and came back in 2010. I had nightmares of fighting. I was beating myself on the walls, screaming, running. Watching the screen it was like I was looking at myself. Feelings came back of being tortured by carrying heavy loads." (Personal Communication, formerly abducted girl, 16 years old)¹⁷⁸

97. Most children have been forcibly recruited as soldiers in an armed group. When they fail to carry out their tasks, this often results in extreme forms of punishment. Regardless of their role within the group, violence becomes a daily feature. The precise psychological consequences of these horrible experiences are difficult to generalise because child soldiers do not form a homogeneous group.¹⁷⁹

¹⁷⁶ G. MACHEL, "The Impact of Armed Conflict on Children. A Critical review of progress made and obstacles encountered in increasing protection for war-affected children", *International Conference on war-affected children*, 2000, 24.

¹⁷⁷ J. A. SHAW, "Children Exposed to War/Terrorism", *Clinical Child and Family Psychology Review*, Vol. 6, No. 4, 2003, 238.

¹⁷⁸ Personal communication, formerly abducted person, northern Uganda, Barlonyo.

¹⁷⁹ M. G. WESSELLS, "Supporting the Mental Health and Psychosocial Well-Being of Former Child Soldiers", *Journal of the American Academy of Child and Adolescent Psychiatry*, Vol. 48, No. 6, 2009, 587.

Hence, while traumas subsequent to war vary in prevalence and intensity, there is a well-established commonality in psychological responses, regardless the nature of the trauma.¹⁸⁰ For instance, BLATTMAN and ANNAN make reference to the common symptom of reliving the events through nightmares and flashbacks.¹⁸¹ Others, such as SCHAUER and ELBERT, emphasise on the high levels of post-traumatic stress disorder, drug abuse and depression. Additionally, they make reference to dissociation and derealisation, anti-social behaviour and cognitive, educational and occupational impairment.¹⁸² MACHEL points out that separation anxiety, developmental delays, problems of withdrawal and anxious or aggressive behaviour are often seen in former child soldiers.¹⁸³ Furthermore, potential psychopathological manifestations and the urge for revenge are mentioned.¹⁸⁴ However, maybe the most dramatic impact is the loss of childhood when entering an armed group and the process of socialisation, as mentioned by JO BOYDEN.¹⁸⁵

98. The experiences of a child soldier and the consequences of socialisation in the armed group have, without any doubt, a significant psychological impact. Hence, common to almost all scholars and often dominating the field is the recognition of resilience of victims of childhood trauma¹⁸⁶ and the suggestion that the majority of child soldiers are not entirely lacking in moral capacity when leaving the armed group. Research on the disruption of children's physical, relational and social world in a context of war has increased tremendously in recent years. Contrary to the former, the focus on children's moral competence and development in a context of violence is rather new and still underdeveloped.¹⁸⁷

¹⁸⁰ J. A. SHAW, "Children Exposed to War/Terrorism", *Clinical Child and Family Psychology Review*, Vol. 6, No. 4, 2003, 238.

¹⁸¹ C. BLATTMAN and J. ANNAN, "The Consequences of Child Soldiering", *The Review of Economics and Statistics*, Vol. 92, No. 4, 2010, 883-884.

¹⁸² E. SCHAUER and T. ELBERT, "The Psychological Impact of Child Soldiering" in E. MARTZ, *Trauma Rehabilitation After War and Conflict. Community and Individual Perspectives*, New York, Springer, 2010, 321-343.

¹⁸³ G. MACHEL, "The Impact of Armed Conflict on Children. A Critical review of progress made and obstacles encountered in increasing protection for war-affected children", *International Conference on war-affected children*, 2000, 24.

¹⁸⁴ J. BARENBAUM, V. RUCHKIN and M. SCHWAB-STONE, "The psychosocial aspects of children exposed to war: practice and policy initiatives", *Journal of Child Psychology and Psychiatry*, Vol. 45, No. 1, 2004, 42-43.

¹⁸⁵ J. BOYDEN, "The Moral Development of Child Soldiers: What Do Adults Have to Fear", *Peace and Conflict: Journal of Peace Psychology*, Vol. 9, No. 4, 2003, 343-345.

¹⁸⁶ For example: T. S. BETANCOURT and K. T. KHAN, "The mental health of children affected by armed conflict: Protective processes and pathways to resilience", *International Review of Psychiatry*, Vol. 20, No. 3, 2008, 318-325; M.G. WESSELS, "Children, Armed Conflict, and Peace", *Journal of Peace Research*, Vol. 35, No. 5, 1998, 641.

¹⁸⁷ S. RAFMAN, "Where the Political and the Psychological meet: Moral Disruption and Children's Understanding of War", *International Relations*, Vol. 18, No. 4, 2004, 468.

Nevertheless, this study seems particularly relevant considering that children construct moral concepts and a sense of them as moral beings in the context of their everyday interactions with others.¹⁸⁸ Especially the possible long-term implications of these experiences for their future moral capacities lack a systematic review. Additionally, there exists little literature that includes the potential consequences on accountability of an adult that was a former child soldier.

3.2.2. Impact on human and moral development

"I and the public know what all schoolchildren learn, those to whom evil is done, do evil in return."

- W. H. AUDEN

99. As children are initially instructed and forced to commit atrocities, some report that in a later stage they actually began to enjoy killing. Because of the persistent violence and the compulsion to survive, children obey the demands and start to engage in extreme violence. Violent behaviour becomes to feel as normal, eventually leading to eager and willingly participate in the cruel acts.¹⁸⁹ According to the typology set out by SMEULERS, child soldiers can be seen as compromised perpetrators. As they become involved in international crimes by coercion and force or threats, children will adapt and do as they told. Hence, initially compromised perpetrators can sadly be transformed into far less reluctant participants.¹⁹⁰

100. Recent studies in the field of neuroscience and psychiatry have the tendency to explain human cruelty through the occurrence of an empathy deficit, caused by psychosocial trauma. This might lead to a much more satisfying explanation than the reference to such perpetrators as "evil". BARON-COHEN defines empathy as: "our ability to identify what someone else is thinking or feeling and to respond to their thoughts and feelings with an appropriate emotion".¹⁹¹ Human empathy is a psychological construct existing out of two elements, which produce emotional understanding. The first component is *cognitive* empathy, which is the intellectual/imaginative apprehension of another's mental state.

¹⁸⁸ C. WAINRYB, "And So They Ordered Me to Kill a Person': Conceptualizing the Impacts of Child Soldiering on the Development of Moral Agency", *Human Development*, Vol. 54, 2011, 274-276.

¹⁸⁹ M. DENO, "Coping with the trauma of war: Former child soldiers in post-conflict Sierra Leone", *International Social Work*, Vol. 53, No. 6, 2010, 795.

¹⁹⁰ A. SMEULERS, "Perpetrators of International Crimes: Towards a Typology" in A. SMEULERS en R. HAVEMAN (eds.), *Supranational criminology: towards a criminology of international crimes*, Antwerpen, Intersentia, 2008, 257.

¹⁹¹ S. BARON-COHEN, *The Science of Evil. On Empathy and the Origins of Cruelty*, New York, Basic Books, 2011, 33.

The second component is *emotional or affective* empathy, which means the capability of an emotional response to emotional responses of others.¹⁹² A level of empathy is a necessary condition for socially competent behaviour, because it consistently predicts pro-social behaviour and prevents harm to others.¹⁹³ Research shows that empathy is an adaptation with a specific neurocircuitry and a particular adaptive value, which can be disturbed by early trauma and environmental adversity.¹⁹⁴ It is well established that a lack of empathy is a key marker in several personality disorders and may facilitate aggressive behaviour. While the idea that an empathy deficit can possibly explain human cruelty is still rather new and highly controversial, an amount of research acknowledges that an empathy deficiency may be a neurological disability that affects human behaviour. First, we will take a closer look on how and why such an empathy deficit can arise.

101. The transition from childhood into adulthood plays a key role in the cognitive development of a human being. It includes the development of empathy and some sort of moral compass. However, the natural development can be disturbed by various factors, such as physical and psychological abuse. Suffering from abuse during these formative years forms a major risk factor for the development and persistence of mental health issues or disorders in adulthood and can alter the central nervous and neuroendocrine system.¹⁹⁵ When children are exposed to extreme violence, WESSELS introduces the regularly used technique of “splitting” as a defence mechanism to the brutality they witness.¹⁹⁶ A natural process of development involves integrating these splits, meaning accepting the self as good and bad parts. When a child however gets stuck at this splitting state, due to extreme forms of deprivation or maltreatment, it enters into a dissociative state.

¹⁹² S.G. SHAMAY-TSOORY, J. AHARON-PERETZ and D. PERRY, “Two systems for empathy: a double dissociation between emotional and cognitive empathy in inferior frontal gyrus versus ventromedial prefrontal lesions”, *Brain*, Vol. 132, 2009, 617-618; E. J. LAWRENCE, P. SHAW, D. BAKER, S. BARON-COHEN and A.S. DAVID, “Measuring empathy: reliability and validity of the Empathy Quotient”, *Psychological Medicine*, Vol. 34, No. 5, 2004, 911.

¹⁹³ R. WOLFER, K. S. CORTINA, J. BAUMERT, “Embeddedness and empathy: How the social network shapes adolescents’ social understanding”, *Journal of Adolescence*, Vol. 35, No. 5, 2012, 1295.

¹⁹⁴ D. J. STEIN, “Sadistic cruelty and unempathic evil: Psychobiological and evolutionary considerations” commentary in V. NELL, “Cruelty’s rewards: The gratifications of perpetrators and spectators”, *Behavioural and brain sciences*, Vol. 29, No. 3, 2006, 242.

¹⁹⁵ C. HEIM and C.B. NEMEROFF, “The Role of Childhood Trauma in the Neurobiology of Mood and Anxiety Disorders: Preclinical and Clinical Studies”, *Biological Psychiatry*, Vol. 49, No. 12, 2001, 1023-1024.

¹⁹⁶ S. NOLEN and E. BAINES, “The making of a monster”, 2009, 3, (<http://www.theglobeandmail.com/news/world/the-making-of-a-monster/article20389116/?page=all>) (consulted 7 July 2016).

This can lead to the idealisation of the caregiver and a grandiose view of one-self, while the bad experiences are isolated in a swamp of negative feelings, such as hate and anger.¹⁹⁷

102. The suffering endured by child soldiers can be considered as child abuse on a devastating scale. Research into the effects of early deprivation has shown that such environmental factors affect brain development, probably irreversible.¹⁹⁸ The repeated exposure to severe and traumatic stress has a deteriorating effect and is linked to empathic development.¹⁹⁹ Empathy can be seen as a cognitive emotion regulator. Research has proven that the use of specific cognitive emotion regulation strategies might make adolescents more vulnerable or resilient to a development of emotional and or behavioural problems in response to adverse stressors.²⁰⁰ The constant exposure to stress will lead to repeatedly “switch off” the areas of the brain that control empathy, which eventually can lead to empathy development being stopped or reversed/eroded. At this point someone becomes capable of dehumanising other people and turning other people into objects.²⁰¹

103. The theory of *empathy erosion* establishes a neurological basis for aggression. SIMON BARON-COHEN, a renowned specialist in developmental psychopathology, conducted extensive research on this. While the research in principle is constructed in relation to people with certain personality and psychopathic disorders, it tends for the most parts to imply on any appearance of cruelty. The key idea is that we all lie somewhere on an empathy spectrum, based on individual differences in the amount of empathy. With regard to the ability to show aggression and human cruelty, it is the low end of the spectrum, known as “zero degrees of empathy”, that is of particular interest.²⁰² Zero degree of empathy indicates that someone has no awareness of how they come across to others, how to interact with them or how to anticipate their feelings or reactions.²⁰³ According to Baron-Cohen, there exists a circuit in the brain that determines how much empathy each person has. This empathy circuit is located in separated parts of the brain, which interrelate to each other.

¹⁹⁷ S. BARON-COHEN, *The Science of Evil. On Empathy and the Origins of Cruelty*, New York, Basic Books, 2011, 82-84.

¹⁹⁸ Ibid, 77-88.

¹⁹⁹ E. SCHAUER and T. ELBERT, “The Psychological Impact of Child Soldiering” in E. MARTZ, *Trauma Rehabilitation After War and Conflict. Community and Individual Perspectives*, New York, Springer, 2010, 323-330.

²⁰⁰ K. AMONE-P’OLAK, N. GARNEFSKI and V. KRAAIJ, “Adolescents caught between fires: Cognitive emotion regulation to war experiences in Northern Uganda”, *Journal of Adolescence*, Vol. 30, No. 4, 2007, 666.

²⁰¹ S. BARON-COHEN, *The Science of Evil. On Empathy and the Origins of Cruelty*, New York, Basic Books, 2011, 32-38.

²⁰² Ibid, 32.

²⁰³ Ibid, 64.

Environmental or biological factors can cause the empathic circuit to malfunction.²⁰⁴ Zero degrees of empathy is mostly described in people with serious mental disorders where the same underlying empathy circuit in the brain is affected and therefore forming a high risk to impose suffer on themselves or others.²⁰⁵ While “Zero degrees” is a critical factor in committing cruelty, a dangerous and ‘criminogenic’ environment can not entirely determine the outcome. It forms an intrinsic relation with different genes and hormones that are associated with empathy.²⁰⁶ An empathy deficiency is therefore in itself not necessarily a danger, unless in a person with a predisposition to aggression or when in the ‘right’ environment. The “switching off” of the empathy system can be transient or permanent.²⁰⁷

104. Empathy depends in part on individual characteristics and in part on the social structure in which adolescents are embedded and exposed to specific influences.²⁰⁸ A complex interaction of genes and environment play an important role in determining whether violence and aggression may manifest. In line with the cycle of violence, early childhood abuse and a cruel environment facilitates the development of cruel behaviour. There exists a correlation between trauma, childhood aggression and adult crimes.²⁰⁹ The level of violence a child experiences, can influence his/her aggression. Abused children have significantly more chance to manifest more aggressive and problematic behaviour. This is in large part due to the models they receive from adults in their life. Children that are part of an armed group are used to see a tremendous amount of violence and become to internalise and therefore normalise it. The persistent exposure to human cruelty also affects their ability to reason and to develop a sense of morality. Young children are generally not capable to create an understanding of the world. This alters drastically when entering adolescence. Normally, they got a cue of what is right and wrong by their parents or another safe environment. Now, children abducted at a young age, will base their ideology on environmental conditions they got from commanders, who do not only expose them to violence but also teaches them to commit it, by using mental and physical manipulation.

²⁰⁴ S. BARON-COHEN, *The Science of Evil. On Empathy and the Origins of Cruelty*, New York, Basic Books, 2011, 41-63.

²⁰⁵ *Ibid*, 64-66.

²⁰⁶ *Ibid*, 159-160.

²⁰⁷ *Ibid*, 209-210.

²⁰⁸ R. WOLFER, K. S. CORTINA and J. BAUMERT, “Embeddedness and empathy: How the social network shapes adolescents’ social understanding”, *Journal of Adolescence*, Vol. 35, No. 5, 2012, 1296.

²⁰⁹ C. S. WIDOM, “The Cycle of Violence”, *Science*, Vol. 244, 1989, 160-165.

The exposure to such brutal and aggressive violence at such an early age, when children are still struggling to consolidate regulatory mechanisms to control and modulate aggression, may leave the child damaged.²¹⁰

105. It is demonstrated that combatants who participate more in violence, become appealed or even addicted to killing and experience aggression as more appetitive. This relates to a breakdown in control centres of the brain and a development of a hunting behaviour as a reward-driven mechanism.²¹¹ WEIERSTALL describes this as *appetitive aggression*, a type of human aggression normally restrained through civilian socialisation and learned morality.²¹² While reactive aggression occurs in response to a threat and is motivated by fear or distress, appetitive aggression inflicts harm with the sole purpose of experiencing violence-related enjoyment.²¹³ These forms of aggression differ with regard to behaviour and neurobiology/neuroendocrinology. In the situation of child soldiers the development to aggressive behaviour can in this part be seen as beneficial and an adaption to a hostile environment.²¹⁴

106. While there exists no data on empathy levels in those who experience appetitive aggression, we can assume that they would lean towards the low end of the empathy spectrum described by Baron-Cohen. The balance between on the one hand, the potential to behave aggressively and on the other hand control mechanisms for aggression, depends on the environment.²¹⁵ Children and adolescents who grow up in a cruel social environment that fosters violence and aggressive behaviour have a higher propensity towards appetitive aggression.²¹⁶

²¹⁰ J. A. SHAW, "Children Exposed to War/Terrorism", *Clinical Child and Family Psychology Review*, Vol. 6, No. 4, 2003, 241.

²¹¹ T. ELBERT, R. WEIERSTALL and M. SCHAUER, "Fascination violence: on mind and brain of man hunters", *European Archives of Psychiatry and Clinical Neuroscience*, Vol. 260, Suppl. 2, 2010, 101-105.

²¹² R. WEIERSTALL, R. HAER, L. BANHOLZE and T. ELBERT, "Becoming cruel: Appetitive aggression released by detrimental socialisation in former Congolese soldiers", *International Journal of Behavioral Development*, Vol. 37, No. 6, 2013, 505.

²¹³ R. WEIERSTALL, M. HISBERGER, D. KAMINER, L. HOLTZHAUSEN, S. MADIKANE and T. ELBERT, "Appetitive Aggression and Adaptation to a Violent Environment Among Youth Offenders", *Journal of Peace Psychology*, Vol. 19, No. 2, 2013, 139.

²¹⁴ R. WEIERSTALL, R. HAER, L. BANHOLZE and T. ELBERT, "Becoming cruel: Appetitive aggression released by detrimental socialisation in former Congolese soldiers", *International Journal of Behavioral Development*, Vol. 37, No. 6, 2013, 506.

²¹⁵ Ibid.

²¹⁶ Ibid, 510.

The early socialisation forms a crucial component. This process shapes future aggressive behaviour and aggression regulation. The earlier the disruption, the more chance combatants will resort to violence.²¹⁷

107. This leads us to say that the structure of social interactions can explain us something about human behaviour. While some children are maybe predisposed to these problems, it is unlikely that the relationship between a life of constant brutalisation, indoctrination and violence, apparent to that of child soldiers, and the appearance of psychological disorders are coincidental.²¹⁸ Many of these disorders impair one's ability to think rationally, which may prevent controlling or understanding the ramifications of their actions.

3.3. Where is diminished responsibility?

108. It is almost universally recognised that only those who have the capacity to act rationally can be held responsible for criminal acts.²¹⁹ Criminal justice systems are inherently based on the view that people are responsible agents who possess a freedom of will and can choose their course of action. When they step outside the limits of legal action, it becomes justified to impose blame and punishment on them. This coincides with the contrary, as we cannot blame people who do not have the ability to choose or control their actions. The difficulty lies in distinguishing and determining whether someone is responsible and sane or not responsible and insane. It is ultimately the Court that has to decide if the mental illness is severe enough for the accused to conclude that he acted irrational as to be non-responsible.²²⁰

109. In one of the interviews conducted in northern Uganda, it struck that one of the points of discussion after the screening of Ongwen's Pre-Trial hearing was: "Is he (Dominic Ongwen) having mental problems?".²²¹ The new development in neuroscience not only confirms that childhood experiences have lifelong effects but it also provides us with hard, biological support for the impact of these experiences.

²¹⁷ R. WEIERSTALL, R. HAER, L. BANHOLZE and T. ELBERT, "Becoming cruel: Appetitive aggression released by detrimental socialisation in former Congolese soldiers", *International Journal of Behavioral Development*, Vol. 37, No. 6, 2013, 510.

²¹⁸ N. BOOTHBY, "Child Soldiers and Mental Health" in D. J. CHRISTIE (eds.), *The Encyclopedia of Peace Psychology*, Vol. 1, UK, Wiley-Blackwell, 2012, 87.

²¹⁹ S. J. MOORE, "Psychopathy and Criminal Responsibility", *Neuroethics*, Vol. 1, No. 3, 2008, 205-206.

²²⁰ M. SCALIOTTI, "Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2", *International Criminal Law Review*, Vol. 2, No. 1, 2002, 16-17.

²²¹ Personal Communication, women's groups and former victims of the LRA, northern Uganda, Barlonyo.

This helps us to ask the right questions about the influence on adolescent development and the malleability of human behaviour, affecting the way in which we should legally respond. We frequently just assume that every child develops empathy. Hence, as presented above early developmental trauma causes the risk to lose empathy, which can lead to a breakdown of social relations and destructive behaviour towards themselves and others. The dysfunctions exhibited as a child soldier do not just disappear on the day when they become eighteen and according to the Rome Statute become legally criminal responsible.

110. While appetitive aggression, following socialisation in an armed group, is in itself not a mental disorder, the psychopathology can lay in the empathy deficiency itself. As Baron-Cohen suggests: “an empathy deficit is a potential neurological deficit that should be classified in the DSM”.²²² While it would strengthen the case if an empathy deficiency would currently be recognised as a personality disorder by the DSM, it is not required to claim a defence based on mental insanity before the ICC. We can argue that people like Ongwen lack free will, a notion that is inherent to establish criminal responsibility.

111. As discussed, article 31 (1) (a) of the Rome Statute requires a double standard test. It combines a cognitive (“right or wrong”) and volitional (“irresistible impulse”) test, which means that the defendant must have an excuse for (1) not obliging the unlawfulness or nature of his conduct as a result of a mental disease or defect and (2) an excuse to be unable to use will-power to control acts as a result of a mental disease or defect. While an empathy deficiency can probably fit as such a disease or defect that influences his/her judgment or his/her control over the actions, it is far less clear if this results in the necessary destruction of a person’s capacity. The Statute currently requires this high standard of destruction, rather than an impairment of ability. When this is not the case, a person cannot effectively raise the mental incapacity defence. However, this should not mean that a person as such should be held completely criminal responsible for his acts. This is where diminished responsibility could enter the playground and offer a more suitable solution.

²²² S. BARON-COHEN, *The Science of Evil. On Empathy and the Origins of Cruelty*, New York, Basic Books, 2011, 193-196.

4. Diminished responsibility as a possible new defence mechanism in International Criminal Law

4.1. Advantages of diminished responsibility as a new defence mechanism

102. In the overall criminal law system, the mental element is considered a prerequisite for holding a person criminally responsible for the crimes he or she has committed. If this mens rea is absent or severely diminished due to a mental disturbance, an offender may neither be held blameworthy nor may he be punished for his wrongdoing.²²³ This concept of minimal mental competency for defendants forms a benchmark of a just and fair trial. The institutionalisation of international criminal law coincides with a growing concern for both procedural and substantial fairness of criminal proceedings.²²⁴ Grounds for excluding criminal responsibility serve this fundamental fairness and are an essential component of a culture of legality.²²⁵

103. Some cases, such as Ongwen's, show that an interaction between social, psychological and biological factors can result in a mental health disorder and can lead to committing the most gruesome atrocities. As maybe not all of these factors may amount to exculpatory evidence, they can be the roots of criminal behaviour and therefore relevant when establishing accountability of the perpetrator. With the increased neuroscientific evidence that demonstrates the biological underpinnings to psychological phenomena, it is likely that defendants on trial at the ICC will attempt to mitigate their culpability or excuse their conduct with defences based on neurological material supported by expert witnesses. Therefore ICL should, similarly to domestic criminal law and proceedings, adapt and respond to the substantial developments made in the field of neurobiology, psychology and psychiatry.²²⁶ Allowing expert evidence to determine guilt before the Court is therefore crucial. While establishing responsibility is not a scientific question, this particular discipline can provide guidance and insight in the decision, whether someone is responsible for his actions or not.

²²³ P. BAL and F. KOENRAEDT, "Criminal law and mentally ill offenders in comparative perspective", *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 219-220.

²²⁴ A. B. SHNIDERMAN and C. A. SMITH, "Toward Justice: Neuroscience and Affirmative Defenses at the ICC", *Studies in Law, Politics and Society*, Vol. 66, 2013, 90.

²²⁵ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 335.

²²⁶ D. RADOSAVLJEVIC, "Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, No. 1, 2011, 49.

104. Diminished responsibility as a ground wherefore an offender can be held only partially responsible for his wrongdoing and can only be complete or partially subjected to criminal punishment is recognised in different municipal systems. Recognising this defence allows more forms of mental illness to be submitted under a legal classification.²²⁷ If neuroscience, as a foundation upon which a diminished responsibility defence can be constructed, would not be allowed in the ICC system it probably would constrain the jurisprudence of justice at the international level in respect to the evolving notion of free will and responsibility. A prohibition on such a defence can over time lead to a divergence between the national and international legal structures, possibly dramatically so international systems provide a lesser guarantee for full defences than municipal systems.²²⁸ In a setting where there exists a strong pressure to prosecute and punish, the interests of a fair trial, equality of arms and quality of justice would demand the inclusion of a diminished responsibility defence, potentially based on neuroscientific evidence.²²⁹

4.2. Possible obstacles and counterarguments

105. Diminished responsibility as a new defence mechanism can present various challenges to the current system of international criminal proceedings. In order to provide a complete and accurate view on the subject, the following part includes argumentation extracted from legal doctrine that is hesitant to the inclusion of such a specific defence for international crimes. Certain counterarguments will be highlighted in this part, others will only be addressed briefly at this point of the inquiry, in light of the upcoming chapter that will contain certain counterarguments set forth in the context of the limited tools and case law of the different criminal courts and tribunals.

106. The most common and obvious argument for the avoidance of a diminished responsibility defence seems to be that such a plea is anticipated as inappropriate and inadequate in the scope of international crimes, given their scale and gravity, and the alleged leniency of this defence.

²²⁷ P. BAL and F. KOENRAEDT, "Criminal law and mentally ill offenders in comparative perspective", *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 228.

²²⁸ A. B. SHNIDERMAN and C. A. SMITH, "Toward Justice: Neuroscience and Affirmative Defenses at the ICC", *Studies in Law, Politics and Society*, Vol. 66, 2013, 91-92.

²²⁹ D. RADOSAVLJEVIC, "Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, No. 1, 2011, 39.

There exists a general tendency to approach offenders who have committed the worst atrocities as less than human and in extension a denial that they could be victims of an illness, either physically or mentally.²³⁰ This idea reinforces when calling upon the vision of the Court to only deal with top-level leaders and commanders. According to extensive debates, it appears difficult to conceive that such persons would be left in charge and take such a prominent role if they were in fact partially or completely legally insane.²³¹

107. Secondly, a great difficulty lies in the ambivalence of lawmakers and jurists towards formulating separate and distinct defences. Moreover, there exists a great deal of disagreement among those in favour of such steps on which particular defences and their specific elements to encounter.²³² The fact that international law borrows both from common law and civil law systems particularly complicates this defence because of the substantial differences in the various domestic legal regimes. Furthermore, the legal background of judges can influence the interpretation of this defence and create inconsistencies and tensions within the court or tribunal. Accordingly, the use of this defence by international criminal courts raises questions about how to restrain the norm-creating authority under the general principles of law as defined in the Statute.²³³

108. A third and more imminent aspect of adding the possibility of a diminished responsibility defence is the procedural and evidentiary complexities this encompasses. The incorporation and interpretation of methodologies and psychiatric evidence is frequently examined with ambivalence and will be undoubtedly a difficult encounter.²³⁴ Hence, this concern will be discussed in-depth in the upcoming part of this inquiry.

109. The fourth argument contains the lack of consequences of a successful plea and questions the sanctions that are currently available in the international criminal law system. At present, the Court is only able to sentence an accused to imprisonment and does not foresee any verdict for an accused to be institutionalised in a kind of mental hospital.

²³⁰ J. TOBIN, "The psychiatric defence and international criminal law", *Medicine, Conflict and Survival*, Vol. 23, No. 2, 2007, 112.

²³¹ M. SCALIOTTI, "Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2", *International Criminal Law Review*, Vol. 2, No. 1, 2002, 26.

²³² P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 319.

²³³ *Ibid.*

²³⁴ D. RADOSAVLJEVIC, "Scope and Limits of Psychiatric Evidence in International Criminal Law", *International Criminal Law Review*, Vol. 13, No. 5, 2013, 1013.

In order to have a functioning defence of diminished responsibility, the establishment of a psychiatric institution seems to be necessary in order to be capable of dealing with highly traumatised and disturbed perpetrators.²³⁵ According to some scholars, the absence of a system for involuntary commitments not only threatens the credibility of international prosecutions but as well the culture of legality.²³⁶ This will be further elucidated in the second part of this dissertation.

110. In a fifth and last counterargument, the neglect of such a defence can be subscribed to the fear of legal embarrassment.²³⁷ Certain scholars are anxious that by introducing such a complex defence as a partial excuse for individual criminal responsibility controversy will arise, such as it is the case in some municipal legal systems, and a negative public perception will dominate the work of the Court. It will be perceived that if a defendant possibility escapes legal sanction by reason of a mental illness, he or she has duped the Court. This can potentially implicate the credibility of an already fragile system of international prosecution.²³⁸

²³⁵ S. JANSSEN, "Mental condition defences in supranational criminal law", *International Criminal Law Review*, Vol. 4, No. 1, 2004, 85-96.

²³⁶ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 334.

²³⁷ J. TOBIN, "The psychiatric defence and international criminal law", *Medicine, Conflict and Survival*, Vol. 23, No. 2, 2007, 112.

²³⁸ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 319.

5. Preliminary conclusion

111. Investigating and understanding the psychology of those who commit the most heinous atrocities improves our understanding why people commit these crimes and allows us to design an appropriate legal response. The case of Ongwen illustrates that he was an ordinary child that transformed into adulthood under extraordinary circumstances. Abducted as a young boy, he was forced to commit the most gruesome crimes. On a certain moment in his life, he started to embrace the ideology of the armed group he stayed in for almost his entire life and carried out wilfully their wishes, at some point becoming a ruthless perpetrator. He became the exact image of his oppressors and was rewarded for it. However, this should not disregard the fact that he was once a victim himself. Crimes committed by such persons cry out for justice, however it is far from clear what this means in this particular context. Therefore they present not only an ethical or moral challenge but also a legal one.

112. In the last two decades, international law and policies searched for an adequate way in order to protect children from the involvement in armed conflict. In different areas of law, we can find applicable instruments that strive to accomplish this goal. In spite of the legislative improvements to protect children from the use and recruitment in hostilities, the fact remains that it still occurs. Their effective participation poses a complex dilemma, in particular at the end of the war. The accountability of child soldiers, or former child soldiers that stayed in the armed group, remains controversial and the question arises if they should be held responsible for their actions and if so, what the appropriate modalities are.

113. Criminal tribunals have made numerous efforts to achieve a balance between respecting the rights of the defendants and the needs of the victims. Hence, while the model of international criminal law is moving towards a more victim-centred approach, the focus on retribution stays still strong. This retributive model is in particular ill suited for the kind of perpetrators that are victims themselves. It highlights criminal liability of perpetrators without making a distinction between the different kinds of wrongdoers.

114. Different scholars argue that the main perpetrators of international crimes are not the appropriate beneficiaries of rehabilitation.²³⁹ While this seems to be understandable at some point, it disregards the fact that all perpetrators have rights for the more reason of being an offender standing on trial and the fact that rehabilitation as goal of ICL focuses on all perpetrators equally. Every person has the right to be treated as a human, regardless the crimes they have committed. When establishing responsibility, personal circumstances and particular situations should be taken into account, in order to achieve their eventual successful reintegration in society.

115. Due to the function he fulfilled in the rebel movement, Ongwen will have to stand trial before the ICC for the crimes he committed in their ranks. Victimisation in this context seems to be vanished completely, which brings us to the question regarding responsibility of such persons. While it is clear that children can indeed be remarkably resilient to the psychosocial impact of their involvement in the armed group, a minority does not bear up so well and in extreme cases, profound changes in child soldier's personality are documented due to indoctrination, impressed ideologies and forced acceptance of perverse codes of conduct and moral behaviour.²⁴⁰ It is assumed that what someone experiences and practices on a regular basis, may achieve normative value. This means that if young people lack the ability to place moral meaning to violence, the danger exists that children who engage in violence over a long period of time are likely to lose the ability to empathise with others and start to internalise violent behaviour as a normal practice. It is the assumption that such behaviour becomes entrenched and cannot be revoked.²⁴¹ Accordingly, a psychosocial trauma can potentially cause a temporary or long-lasting empathy deficit. This dissertation argues that due to the significant psychological impact of being a child soldier, the status of victim-perpetrator should be considered as a mitigating factor in establishing responsibility for crimes they committed as an adult. Hence, it seems that enhancing psychological and neuroscientific evidence to demonstrate a lack of culpability leaves the Court with a difficult choice between the substantive and procedural rights of the defendant as opposed to the needs of victims.

²³⁹ R. CRYER et al., *An Introduction to International Criminal Law and Procedures*, Cambridge, Cambridge University Press, 2014, 28-29.

²⁴⁰ N. BOOTHBY, "Child Soldiers and Mental Health" in D. J. CHRISTIE (eds.), *The Encyclopedia of Peace Psychology*, Vol. 1, UK, Wiley-Blackwell, 2012, 2.

²⁴¹ J. BOYDEN, "The Moral Development of Child Soldiers: What do Adults Have to Fear", *Peace and Conflict: Journal of Peace Psychology*, Vol. 9, No. 4, 2003, 348.

II. An analysis of diminished responsibility and its current feasibility in International Criminal Law

116. Subsequent to the formulation of the desirability of diminished responsibility as a new defence mechanism in international criminal law, this part will feature the concept's current feasibility in this particular branch of law. The addition of mental incapacity as a defence to exclude criminal responsibility in the Rome Statute relies on an ancient principle, acquired from domestic legal systems. An inquiry into the legal framework and case law of the different international criminal tribunals allows us to make a reasonable assessment of the current status of this principle.

117. In the first chapter, we will make an analysis of the different tools the various international tribunals possess in relation to mental insanity and diminished responsibility defences and how they have been used in the past. Furthermore, some of the implications and possible difficulties relating to this defence will be considered more closely, in particular procedural and evidentiary concerns and the unclear consequences of a successful plea. Lastly, a preliminary conclusion will be made as to the current practical possibilities for diminished responsibility as a defence mechanism in the Rome Statute.

1. Mental incapacity and diminished responsibility at the international criminal tribunals

1.1. Introduction

118. The defense of insanity or mental incapacity is rooted in national criminal law systems, where it has been accepted for many centuries.²⁴² In contrary, before the entrance of the Rome Statute, the different traditional criminal law defences were controversial, not to say ambiguous, under international criminal law. Defences for international crimes were a rather unstructured and incomplete compilation from the different domestic legal traditions.²⁴³ Pleas related to the mental capacity of the accused are quite frequently encountered but rarely successful in the practice of major international criminal proceedings.²⁴⁴ Hence, already in 1921 the Supreme Court of the German Reich (*Reichsgericht*) partly acquitted Major BENNO CRUSIUS for ordering his subordinates to kill, rather than take prisoners of war during World War I, based on the defendant's psychological disturbance. It appeared from expert testimonies that he suffered from a mental breakdown due to the general wartime experience and the losses his unit endured the days before the alleged criminal act. Therefore, the *Reichsgericht* excluded him from being criminally responsible. Hence, with regard to another case that happened only a few days before, the Supreme Court only recognised his mental state as a mitigating factor.²⁴⁵

119. This example highlights the possibility of a war criminal, offering insanity or diminished responsibility as a defence is not new. This chapter will provide an in-depth analysis of the legal framework and case law of the several international criminal tribunals in relation to mental insanity and diminished responsibility. In order to set out a historical correct evolution of this defence, we will start with the trials in Nuremberg and end with the establishment of the International Criminal Court, analysing the ICTY in between. This inquiry will neither discuss the Tokyo Tribunals nor the ICTR due to lack of sufficient legal material, cases and comments on this issue.

²⁴² P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 318.

²⁴³ M. SCALIOTTI, "Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2", *International Criminal Law Review*, Vol. 2, No. 1, 20-21.

²⁴⁴ K. AMBOS, *Treatise on International Criminal Law. Volume I: Foundations and General Part*, Oxford, Oxford University Press, 2013, 319.

²⁴⁵ Ibid.

1.2. The mental insanity defence and proceedings following World War II

120. The clear emphasis on rejecting defences, rather than defining them, became already apparent in the early years of international criminal law. In the aftermath of mass atrocities committed during World War II, governments of the Allied nations were persuaded to hold trials for Germans and their collaborators in order to hold them accountable for the role they played in the horrors of the Nazi era.²⁴⁶ While first the idea arose to implement large-scale executions, the Allied leaders chose to hold these individuals accountable through a fair process that furthers the ends of justice, retribution and deterrence.²⁴⁷ The Nuremberg Charter, which established the International Military Tribunal²⁴⁸, made no attempt in codifying possible permissible defences. While mental insanity is entirely absent in this Charter, it does mention the exclusion of a defendant's opportunity to depend on immunity following an official capacity or the obedience to superior orders, allowing only the latter as a mitigation of punishment when the Tribunal determines that justice so requires.²⁴⁹ While excluding two particular defences in the Charter, mental insanity formed one of the main pleas invoked by the accused.²⁵⁰ An interesting case in this regard is that of Rudolf Hess, who appeared before the IMT.

121. As part of the Nazi regime, RUDOLF HESS got indicted for the common plan or conspiracy, crimes against the peace, war crimes and crimes against humanity. Consequently, he had to stand trial at the IMT. Hess joined the Nazi party in 1920 and became one of Hitler's closest confidants. In 1933 he was appointed Deputy to the Führer and 6 years later Hitler himself officially announced him as 'successor designate to the Führer' after Göring (one of his co-defendants). As Deputy he was the top man in the Nazi Party and was responsible for all party matters. He even had the authority to make decisions in Hitler's name. In support of Hitler's plans and as his closest confidant, he became an 'informed and willing participant' in German aggression against Austria, Czechoslovakia, Poland, Denmark, The Netherlands and Belgium.²⁵¹

²⁴⁶ A. CASSESE, L. BAIG, M. FAN, P. GAETA, C. GOSNELL and A. WHITING (eds.), *Cassese's International Criminal Law. Third Edition*, Oxford, Oxford University Press, 2013, 255.

²⁴⁷ C. A. SMITH, *The Rise and Fall of War Crimes Trials. From Charles I to Bush II*, New York, Cambridge University Press, 2012, 86.

²⁴⁸ Also referred to as the "Nuremberg Tribunal".

²⁴⁹ Article 7 and 8 Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945.

²⁵⁰ W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute. Second Edition*, Oxford, Oxford University Press, 2016, 637.

²⁵¹ IMT, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1947, 69-70.

122. During his trial, the defence counsel filed a motion for an examination by an expert with regard to Hess' mental competence and capacity to stand trial. The defence counsel argued that the defendant declared that: "he has completely lost his memory since a long period of time" and indicated that his client showed "signs of mental derangement" and "an absence of mental clarity".²⁵² The Tribunal appointed a commission of experts to examine if Hess was able to take part in the trial. After observation and examination, the commission concluded in its report that the defendant has "a psychopathic personality" and suffers from "delusion and paranoid notions", which led to several suicide attempts. Additionally, they mentioned "hysterical tendencies which lead to the development of a diverse range of symptoms, including amnesia". Despite the aforementioned, they decided that Hess was not insane in the strict sense.²⁵³ A report of the prisoners' psychologist confirmed that there was no indication of insanity at the time of the activities, for which he had been indicted, neither at the moment when he stands on trial.²⁵⁴

123. Following the examination and reports on the condition of the defendant, the tribunal decided that Hess should stand trial and that no efficient arguments were made to postpone the case. The Tribunal argued in its judgement that: "there is nothing to show that he does not realise the nature of the charges against him or is incapable of defending himself. There is no suggestion that Hess was not completely sane when the acts charged against him were committed".²⁵⁵ Although the defence only raised insanity regarding the fitness to stand trial, the judgment seems to imply recognising the insanity defence, however rejecting it in this particular case. The Tribunal found the defendant guilty and sentenced him to life imprisonment.²⁵⁶

124. Three defendants were acquitted at Nuremberg, none of them because they plead an admissible defence.²⁵⁷ While the trial of the major Nazi war criminals in Nuremberg definitely was an important event considering the development of ICL, there is often little attention for the extensive work done by the so-called subsequent proceedings²⁵⁸ before the NMTs.²⁵⁹

²⁵² IMT, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1947, 155-156.

²⁵³ Ibid, 159-165.

²⁵⁴ Ibid, 166-167.

²⁵⁵ Ibid, 284.

²⁵⁶ Ibid, 285 and 365.

²⁵⁷ W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute. Second Edition*, Oxford, Oxford University Press, 2016, 637.

²⁵⁸ Formally known as the "Trials of War Criminals before the Nuremberg Military Tribunals".

²⁵⁹ L. DOUGLAS, "From IMT to NMT. The Emergence of a Jurisprudence of Atrocity" in K. C. PRIEMEL and A. STILLER (eds.), *Reassessing the Nuremberg military tribunals: transitional justice, trial narratives, and historiography*, New York, Berghan Books, 2012, 277-278.

While the NMTs fail to distinguish between justifications, excuses and failure-of-proof defences and they ignored the issue surrounding the burden of proof when a defence is raised, they are in particular interesting for their detailed discussion of a number of defences. Unfortunately, mental insanity was not examined.²⁶⁰ Hence, it appears that on the level of sentencing, differences were being made based on the defendant's position in the Nazi hierarchy and whether the individual was convicted for criminal membership or not. The tribunal starts to use mitigating and aggravating factors, one of them personal circumstances, to justify a reduced sentence.²⁶¹

125. Accordingly, it can be concluded that the Nuremberg Trial was foremost guided by the incentive to punish major war criminals rather than establishing a coherent set of rights for the accused. The lack of attention towards the defendant slightly differed due to the case law provided by the NMTs. By taking into account personal circumstances of the defendant when sentencing, the fundamental guarantees of fairness seem to get a greater role in the procedure of ICL. Hence, this is still limited and only applies to the stage of sentencing, not with regard to establishing criminal responsibility.

1.3. Mental insanity and diminished responsibility at the International Criminal Tribunal for the former Yugoslavia

1.3.1. The ICTY Statute and Rules of Procedure and Evidence

126. The pattern towards the lack of codification of possible defences was persistently taken over by the different ad hoc tribunals.²⁶² In 1993, an international war crimes tribunal was set up by the UNSC in response to the demand of the international community to end widespread violations of IHL in the former Yugoslavia.²⁶³ When the ICTY was established, the ICTY Statute was in itself silent on potential defences.

²⁶⁰ K. J. HELLER, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, New York, Oxford University Press, 2011, 299.

²⁶¹ *Ibid*, 313-316.

²⁶² W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute. Second Edition*, Oxford, Oxford University Press, 2016, 637.

²⁶³ L. F. SPARR, "Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy", *Journal of the American Academy of Psychiatry and the Law*, Vol. 33, No. 1, 2005, 59.

Hence, in a report of 1993, which embodies the intent of the drafters of the Statute, the UN Secretary General commented that: “the tribunal itself will have to decide on the various personal defences which may exclude a person of individual criminal responsibility, such as minimum age and mental incapacity, based on general principles of law recognised by all nations”.²⁶⁴ It was interpreted that when a defence was applicable under general principles of law, the possibility should exist to derive it also under the Statute.²⁶⁵ The first step in the formation of a normative base of mental insanity and diminished responsibility as a defence was taken when the ICTY recognised the latter in its RPE. While the RPE can be overridden by the Statute, the tribunal has to fall back on these RPE for guidance when an issue is not addressed by the Statute.²⁶⁶

127. First, it should be noted that the defence of mental incapacity has to be distinguished from that of diminished responsibility since the ICTY system, similar to that of the ICC, only refers to the latter defence in its RPE.²⁶⁷ The defence of diminished responsibility falls within the ambit of Rule 67 (B)(i)(b) ICTY RPE. This rule refers to a mental disease and articulates that: “as early as reasonably practicable and in any event prior to the commencement of the trial, the defence shall notify the Prosecutor of its intent to offer any special defence, including that of diminished or lack of mental responsibility”.²⁶⁸ This rule implicitly recognises the insanity defence and the plea of diminished responsibility while calling up the defendant to reveal their ‘intent to offer’ these defences. This obligation also includes providing the tribunal with the necessary details, such as the potential witnesses that they intend to use for this defence.²⁶⁹ Hence, the RPE do not identify specific elements or parameters of this special defence so it remains unclear out of this rules what is meant by “diminished or lack of mental responsibility”.²⁷⁰ The first formulation of practical content was given by the ICTY judgment in the “Čelebići Camp” case, when a plea of diminished responsibility was raised.

²⁶⁴ United Nations Security Council, Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN. Doc. S/25704, 3 May 1993, para. 58.

²⁶⁵ S. YEE, “The Erdemovic Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia”, *Georgia Journal of International and Comparative Law*, Vol. 26, No. 2, 1997, 287.

²⁶⁶ J. TOBIN, “The psychiatric defence and international criminal law”, *Medicine, Conflict and Survival*, Vol. 23, No. 2, 2007, 114.

²⁶⁷ G. J. A. KNOOPS, *Defenses in Contemporary International Criminal Law. Second Edition*, Leiden, Martinus Nijhoff Publishers, 2008, 140.

²⁶⁸ In June 1995, the same formation was adopted by the ICTR in Rule 67 (A)(ii)(b) ICTR RPE.

²⁶⁹ K. AMBOS, *Treatise on International Criminal Law. Volume I: Foundations and General Part*, Oxford, Oxford University Press, 2013, 319.

²⁷⁰ L. F. SPARR, “Personality Disorders and Criminal Law: An International Perspective”, *Journal of the American Academy of Psychiatry and the Law*, Vol. 37, No. 2, 2009, 170.

1.3.2. Relevant case law

A. The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo

128. The first concrete application of reduced mental capacity as a “special defence” can be found in the ICTY’s “ČELEBIĆI CAMP” JUDGMENT from November 1998. The initial indictments, issued on 19 March 1996, contained charges for grave breaches of the Geneva Convention and violations of the laws and customs of war against three Bosnian Muslims (Landžo, Mucić and Delić) and one Bosnian Croat (Delalić). During several months in 1992, the accused allegedly took control over villages in the Konjic municipality, located in central Bosnia-Herzegovina, which were largely composed of a Bosnian Serb population. Captured Serbs were held in a prison camp in Čelebići, where they were killed, tortured, sexually assaulted and otherwise subjected to cruel and inhuman treatment. Esad Landžo was only nineteen when he was a guard at Čelebići Camp and was charged with *inter alia* wilful killing and murder, torture, causing great suffering and cruel treatment.²⁷¹

129. Already at the early stages of the trial the defence lawyers of the young camp guard raised the special defence of *diminished or lack of mental responsibility*, as recognised in the ICTY RPE, in response to the charges that were brought against the defendant. At first, his attorneys argued that he suffered from diminished responsibility due to Post-Traumatic Stress Disorder as confirmed by initial psychiatric evaluation. Hence, subsequent evaluations weighted the defendant’s abnormality of mind more towards a personality disorder, which ultimately became the basis for his defence.²⁷² During trial all psychiatric experts, with the exception of the prosecutions’, noted that Landžo suffered from one or more mental disorders that “putatively diminished his responsibility” at the time when the crimes were committed.²⁷³ Hence there was no agreement on the specific diagnose. During the course of proceedings, the Trial Chamber ruled that it would not define the elements of diminished responsibility under Rule 67 (B)(i)(b) ICTY RPE before the final judgment.²⁷⁴ This decision already reflects the difficulties and ambivalence of recognising and defining such defences and their specific elements.

²⁷¹ ICTY, Initial indictment in Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21 (19 March 1996).

²⁷² L. F. SPARR, “Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy”, *Journal of the American Academy of Psychiatry and the Law*, Vol. 33, No. 1, 2005, 60.

²⁷³ L. F. SPARR, “Personality Disorders and Criminal Law: An International Perspective”, *Journal of the American Academy of Psychiatry and the Law*, Vol. 37, No. 2, 2009, 170.

²⁷⁴ *Ibid*, 171.

130. In its final judgment, the Trial Chamber first confirmed that a plea of diminished responsibility has to be distinguished from a plea of insanity. While both pleas are founded on an “abnormality of mind”, the plea of insanity requires that the accused “at the time of commission of the criminal act, is unaware of what he is doing or incapable of forming a rational judgment as to whether such an act is right or wrong”. This diverges from the plea of diminished responsibility that is based on the premise that “despite recognising the wrongful nature of his actions, the accused, on account of his abnormality of mind, is unable to control his actions”.²⁷⁵ In addition the Trial Chamber established a two-part test in relation to the diminished responsibility component, which in large parts is based on the English Homicide Act. On the one hand, an accused has to suffer from an “abnormality of mind”. On the other hand this abnormality of mind should have “substantially impaired” the ability of the accused to control his or her actions at the time of the alleged acts.²⁷⁶ Furthermore, they acknowledge that the defence is more likely to be accepted if there is evidence of mental abnormality.²⁷⁷ The Trial Chamber ruled that in pursuant to Rule 67 (B)(i)(b) ICTY RPE, it is the accused that must bear the burden of proof and that the standard of proof is by a “balance of probabilities”.²⁷⁸

131. Even though a reference was made to English law, the Trial Chamber affirmed that diminished responsibility forms a complete defence under Rule 67 (B)(i)(b) ICTY RPE. The Trial Chamber accepted this because the Rule appears to suggest such a full defence as the words “without qualification or limitations” are used.²⁷⁹ In the case presented, the Chamber accepted that Landžo indeed suffered from an “abnormality of mind” at the time of the acts, however rejected the claim of the diminished responsibility defence because it failed to prove the second requirement, namely the substantial impairment of the ability to control his action.²⁸⁰ Hereby, the Trial Chamber seems to implicitly recognise that a personality disorder qualifies as an “abnormality of mind”. However, they failed to describe which precise disorders, that were mentioned in the testimony of expert witnesses, were decisive in their judgment neither did they confirm if Landžo had a personality disorder or just pathologic personality traits, as the prosecution expert concluded.²⁸¹

²⁷⁵ ICTY Trial Chamber, Prosecutor v. Zejnil Delalić et al., Judgement, Case No. IT-96-21-T (16 November 1998), para. 1156.

²⁷⁶ Ibid, para. 1162-1172.

²⁷⁷ Ibid, para. 1170.

²⁷⁸ Ibid, para. 1172.

²⁷⁹ Ibid, para. 1164.

²⁸⁰ Ibid, para. 1186.

²⁸¹ L. F. SPARR, “Personality Disorders and Criminal Law: An International Perspective”, *Journal of the American Academy of Psychiatry and the Law*, Vol. 37, No. 2, 2009, 171-172.

132. Landžo was found guilty, however in pronouncing judgement the Chamber did cite his mental condition as a mitigating factor to reduce his sentence.²⁸² By referring to the accused's personality traits as a mitigating factor, it might indicate that the Trial Chamber used the expert testimonies even though the evidence did not reach the level of abnormality of mind to a specific psychiatric diagnosis. In accordance to this approach, the Tribunal can use any evidence of an offender's mental condition, even if it does not satisfy the element of psychiatric disorder in the mental incapacity test.²⁸³

133. In 2001 Landžo, as could be expected, appealed his conviction and sentence. First, he disputed that the Trial Chamber made an error in law, violated several principles of law and denied the appellant a fair trial because the Trial Chamber refused to define the special defence of diminished mental responsibility when it was first raised.²⁸⁴ The Appeals Chamber rejected this argument stating that it is within the right of the Trial Chamber to rule upon issues "when it is appropriate and convenient in the exercise of its discretion".²⁸⁵ Furthermore, the appellant submitted that this "special defence" should be available in international law because it is generally accepted as providing a faire and balanced defence and is relied upon in many domestic law jurisdictions (referring to the Homicide Act in England) and by the Rome Statute adopted in 1998. Therefore it should be available as a complete defence.²⁸⁶

134. Contrary to the Trial Chamber, the Appeals Chamber rejected this argument. The Appeals Chamber held that "there is no reference to any defence of diminished mental responsibility in the Tribunals' Statute" and that the description of "diminished mental responsibility as a special defence in Rule 67 (B)(i)(b) ICTY RPE is insufficient to constitute as such". In addition they refer to article 15 of the ICTY Statute to enhance the fact that judges cannot create new defences.²⁸⁷ For example, the Appeals Chamber examined the English Homicide Act and concluded that according to the latter, if the mind is substantially impaired, the charge of murder can be reduced to manslaughter. However, this is not a complete defence but merely a partial one.²⁸⁸

²⁸² ICTY Trial Chamber, Prosecutor v. Zejnil Delalic et al., Judgement, Case No. IT-96-21-T (16 November 1998), para. 1283-1284.

²⁸³ L. F. SPARR, "Personality Disorders and Criminal Law: An International Perspective", *Journal of the American Academy of Psychiatry and the Law*, Vol. 37, No. 2, 2009, 172.

²⁸⁴ ICTY Appeals Chamber, Prosecutor v. Zejnil Delalić et al., Judgement, Case No. IT-96-21-A (20 February 2001), para. 573.

²⁸⁵ Ibid, para. 577.

²⁸⁶ Ibid,, para. 574.

²⁸⁷ Ibid, para. 583.

²⁸⁸ Ibid, para. 585.

Furthermore they argue that the ICC Statute provides that a defendant shall not be criminally responsible if, at the relevant time, he or she “suffers 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”. According to the Appeals Chamber this is not the same as any partial defence of diminished mental responsibility because it requires a destruction of the defendant’s capacity and not merely a partial impairment, in order to lead to an acquittal. Moreover, they argue that there is no express provision in the Rome Statute that deals with partial impairment of mental capacity.²⁸⁹ As such, the Chamber acknowledged that: “diminished mental responsibility does not constitute either a partial or a complete defence”. Instead they accepted that diminished mental responsibility may be more relevant as a mitigating in sentencing.²⁹⁰ Subsequent to the fact that there are no mandatory sentences nor appropriate lesser offences, the Appeals Chamber concluded that the defendant’s diminished mental responsibility is relevant to the sentence to be imposed, however it is not to the establishment of guilt or innocence of the accused.²⁹¹

135. Regarding the imposed sentence, the appellant had put forward several circumstances, such as “immature and fragile personality” and “harsh environment of the conflict as a whole”, which were considered by the Trial Chamber when sentencing. Landžo argued that the Trial Chamber had failed to properly take these mitigating factors into account when providing a sentence, leading to an unjust and manifestly excessive punishment.²⁹² The Appeals Chamber noted that the Trial Chamber is entitled to both accept some mitigating factors and otherwise reject some. It concluded by arguing that, even if the Trial Chamber rejected the defence of diminished responsibility, it nevertheless specifically considered the evidence provided by the numerous mental health experts as mitigating factors to establish an appropriate sentence.²⁹³ Landžo was ultimately convicted to 15 years of imprisonment.

²⁸⁹ ICTY Appeals Chamber, *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-A (20 February 2001), para. 587.

²⁹⁰ *Ibid*, para. 588.

²⁹¹ *Ibid*, para. 590.

²⁹² *Ibid*, para. 827-829.

²⁹³ *Ibid*, para. 837-841.

B. The Prosecutor v. Mitar Vasiljević

136. A second case that is brought before the Trial Chamber and is related to the subject is the one against MITAR VASILJEVIĆ. In this case, the Tribunal was called upon to try the accused, who was a member of a paramilitary unit, called the “White Eagles”, in Visegrad, located in south-eastern Bosnia and Herzegovina. Vasiljevic was charged with several counts of crimes against humanity and violations of the laws and customs of war, including aiding and abetting, extermination, inhumane acts, persecution and murder.²⁹⁴ The defendant argued that as an alternative defence, any sentence that is imposed should be mitigated due to the fact that during the Drina River incident he was suffering from diminished responsibility.²⁹⁵ One of the defence experts argued that the accused was psychotic and endured a psychological crisis during 1992.²⁹⁶ Another forensic psychiatrist, called by the defence, attributed that the accused had a pre-disposition to depressive psychosis. In her view, the pre-psychotic stage reduced his responsibility significantly for the acts committed “due to his impaired capacity to comprehend the possible consequences of his deeds”.²⁹⁷ Several other witnesses provided arguments for the accused’s psychotic disorder, which made him incapable of understanding the consequences of his acts.²⁹⁸

137. Hence, the Trial Chamber rejected this evidence and only accepted the deposition provided by the expert witness of the Prosecutor.²⁹⁹ She concluded that the accused was not suffering from any mental disease or defect, which would have affected accountability during the period of time when the crimes he is charged with, occurred.³⁰⁰ The Trial Chamber first recognised that diminished responsibility is only relevant to the sentence and is not a defence that would lead to the acquittal of the accused, hereby confirming the Čelebići Appeals judgment.³⁰¹ Secondly, the Trial Chamber held that the defence of diminished mental responsibility is only admissible when there is an “impairment of the accused’s capacity to appreciate the unlawfulness or the nature of his conduct” or “in case of an impairment to control his conduct in order to conform to the requirements of the law”.³⁰²

²⁹⁴ ICTY, Indictment in Prosecutor v. Mitar Vasiljević, Case No. IT-98-32 (30 October 2000).

²⁹⁵ ICTY Trial Chamber II, Prosecutor v. Mitar Vasiljević, Judgement, Case No. IT-98-32-T (29 November 2002), para. 280.

²⁹⁶ Ibid, para. 284.

²⁹⁷ Ibid, para. 286.

²⁹⁸ Ibid, para. 287.

²⁹⁹ Ibid, para 289.

³⁰⁰ Ibid, para 292.

³⁰¹ Ibid, para. 282.

³⁰² Ibid, para. 283.

Lastly, the Trial Chamber reaffirmed the evidentiary standard set forth by the Appeals Chamber in the “Čelebići Camp” judgment, which settled that the accused bears the onus of providing, on the balance of probabilities, the evidence that he or her, at the time of the incident, was suffering from diminished mental responsibility.³⁰³ Ultimately, the Trial Chamber decided that it was “not satisfied that the accused has established on the balance of probabilities that, at the time of his participation in the Drina River incident, he was suffering from a diminished mental responsibility”³⁰⁴ and sentenced him to imprisonment for 20 years.³⁰⁵

1.3.3. Interpretation and analysis of the development made by the ICTY RPE and case law

138. The absence of a mental insanity and diminished responsibility defence in the ICTY Statute has led to a reliance on the RPE of the Tribunal in order to invoke this particular defence. The content of Rule 67 (B)(i)(b) ICTY RPE is very narrow, making the possibilities to use it expansively wide. Due to the absence of parameters in the former Rule, the concept of “diminished mental capacity” caused enormous confusion and repeated controversy at trial. This resulted in continuous attempts of clarification by the Trial and Appeals Chambers of the Tribunal.

139. The “Čelebići Camp” case emanated in the first judgment ever that dealt with the reduced mental capacity defence as described in the previous mentioned provision. Therefore it can be considered as a landmark case with regard to the interpretation of this “special defence” under the ICTY RPE. In succeeding cases where similar issues have been raised, there has been referred to the judgment of the Appeals Chamber, hereby setting it as a potential precedent for future cases at the Tribunal or possibly other international courts or tribunals. However, despite the evolution made by the tribunal, a lack in successful cases by a constant refusal to accept this defence leads us to say that the actual effectiveness of this defence remains rather unclear.

140. While conducting an analysis of the case law, it stands out that the tribunal accepts that diminished mental responsibility can form a possible mitigating factor when establishing an appropriate sentence.

³⁰³ ICTY Trial Chamber II, Prosecutor v. Mitar Vasiljević, Judgement, Case No. IT-98-32-T (29 November 2002), para. 282.

³⁰⁴ Ibid, para. 295.

³⁰⁵ Ibid, para. 309.

However, on the other hand we can see that while the defence repeatedly made submissions of this particular defence, the Tribunal effectively considering it in mitigating the sentence is extremely limited. Hence, it is even more doubtful if it can be used as a defence in establishing a lesser degree of responsibility or can lead to an acquittal of the defendant. Several difficulties connected to this particular defence were highlighted during the different proceedings before the Tribunal.

141. Foremost, the Tribunal does not provide in any guidelines or qualifications regarding the exact meaning of “abnormality of mind”, leaving the actual content of this concept wide open. Subsequently, by requiring to prove the destruction of the presumption of mental sanity as an obligatory element of the defence and the general reluctance of the Tribunal to accept testimonies of witness experts makes it almost impossible for such a defence to succeed. Hence, as judges have been relying on these testimonies for the possible mitigation of sentence, it can be argued that there exists a tendency towards appreciating certain statements made by expert witnesses. Additionally, when the defence could in fact prove the aforementioned requirements, the consequences of the successful claim of diminished responsibility remain unsettled, which leaves a great amount of arbitrariness on behalf of the Tribunal. Slightly optimistic, we can conclude that the tribunal, to some extent, has led the way in developing a more compassionate level of legal reasoning regarding the defendant that suffers from a mental illness. However, this is still very limited and only concerns the sentencing stage, not when establishing criminal responsibility of the accused.

1.4. Mental insanity, diminished responsibility and the International Criminal Court

1.4.1. Drafting the provisions of the Rome Statute and the Rules of Procedure and Evidence

142. From June 15 to July 17, 1998, the UN General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court³⁰⁶, to finalise and adopt a convention leading to the establishment of an International Criminal Court. Earlier in 1995, the Preparatory Committee was created to review the Draft Statute presented by the International Law Commission.

³⁰⁶ Also referred to as the “Rome Conference”.

Over a period of 15 weeks, between 1996 and 1998, they came together in order to prepare a “widely acceptable consolidated” text.³⁰⁷ This extensive preparatory work had a significant impact on the negotiations during the Rome Conference and the success thereof. The Rome Conference eventually resulted in the final adoption of the Rome Statute by a majority of 120 votes out of 160 participating States.³⁰⁸ Due to its novel nature and lack of legal precedent, particular attention to the wording of the provisions regarding mental insanity and diminished responsibility is necessary in order to elucidate the intent and interpretation of the drafters. This will help to avoid an uncritical adoption of the provisions drafted during the Rome Conference and the pursuance of discovering the possibilities to extend the current grounds for excluding criminal responsibility.

A. All roads lead to Rome. The Draft Statute of the International Law Commission and the Preparatory Committee

143. The Draft Statute set up by the International Law Commission, which served as a starting point of the creation of the Rome Statute, does not contain provisions dealing with defences.³⁰⁹ While the Commission did consider the matter during the preparation of the “Code of Crimes against the Peace and Security of Mankind” in 1991, the commentary demonstrates that the opinions of the different participating members were too diverse, making it merely impossible to reach an agreement on a detailed list of defences. Some members formed the opinion that certain categories of crimes covered by the Code did not admit defences. Others held that some traditional law concepts should be made applicable.³¹⁰ When no further advancements were made, they confined by this in the text of 1996 stating that: “The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime”.³¹¹

³⁰⁷ R. S. LEE “Introduction. The Rome Conference and Its Contributions to International Law” in R. S. LEE (eds.), *The international Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, 2-4.

³⁰⁸ *Ibid*, 13.

³⁰⁹ W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute. Second Edition*, Oxford, Oxford University Press, 2016, 638.

³¹⁰ United Nations General Assembly, *Report of the International Law Commission to the General Assembly on the work of its forty-third session*, Yearbook of the International Law Commission, Vol. II, Part Two, *UN Doc. A/CN.4/SER.A/1991/Add.I* (part 2), 1991, 100-101.

³¹¹ United Nations General Assembly, *Report of the International Law Commission to the General Assembly on the work of its forty-eight session*, Yearbook of the International Law Commission, Vol. II, Part Two, *UN Doc. A/CN.4/SER.A/1996/Add.I* (Part 2), 1996, 39.

144. As a defence, “diminished mental capacity” first appeared as a suggestion by the Ad Hoc Committee in 1995 in its list of possible defences.³¹² In 1996, during the early sessions of the Preparatory Committee, some concern was expressed over adopting an overly generalised approach to defences. Several delegations insisted that the list of defences should not be exhaustive. Hence, others worried that this would lead to legislative power of the Court.³¹³ In its Report, the earlier mentioned diminished mental capacity defence, led to two different proposals, renamed to “insanity/diminished mental capacity” and “mental disorders”. The first paragraph of the first proposal was meant to exclude criminal responsibility when a person is *legally insane* resulting either from a “mental disease” or “mental defect”. This seems to mean an enlargement in the scope of the different relevant mental disorders.³¹⁴ This specific mental state has to result in “lacking substantial capacity to appreciate the unlawfulness of the conduct or to the requirements of the law”.³¹⁵ The second paragraph concerns diminished mental capacity and concludes that: “where a person does not lack substantial capacity of the nature and degree mentioned in paragraph 1, but such capacity is nevertheless substantially diminished at the time of the person’s conduct, the sentence shall (may) be reduced”. It is not clear of such a reduction in sentence would be obligatory or optional. During the discussion it was questioned if such a defence should be included and which specific consequences a successful defence would have (acquittal or detainment in a mental facility). Furthermore, it was argued that such a defence should only be available for some type of crimes.³¹⁶

145. While the second proposal entered under the title “mental disorders”, it presented similar conditions compared to the first one. The first paragraph refers to the exclusion of criminal responsibility if a person suffers from a “mental or neuropsychic disorder that destroyed his judgment or his control over his actions” at the moment the acts occurred. The second paragraph refers to the same mental state, however at the time of the acts only “altered the person’s judgment or impeded his control without destroying such judgment or control”.

³¹² United Nations General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, Official Records, Fiftieth Session, Supplement No. 22, *UN Doc. A/50/22*, 1995, 95.

³¹³ United Nations General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Official Records, Vol. I, Fifty-first Session, Supplement No. 22, *UN Doc. A/51/22*, 1996, para. 204.

³¹⁴ M. SCALIOTTI, “Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2”, *International Criminal Law Review*, Vol. 2, No. 1, 23.

³¹⁵ United Nations General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Official Records, Vol. I, Fifty-first Session, Supplement No. 22, *UN Doc. A/51/22*, 1996, *UN Doc. A/51/22*, 1996, 97.

³¹⁶ *Ibid.*

In this case the person will remain criminally responsible, however the Court will take such circumstances into account when sentencing and in determining the regime under which this sentence will be served.³¹⁷

146. The final draft was adopted during the session held in December 1997. The article regarding the grounds for excluding responsibility resembles the current formulation of article 31 and its first 2 paragraphs, however several remarks and footnotes are included with regard to the special defences.³¹⁸ A proposal introduced by Argentina³¹⁹ entered the Draft Statute during this session and was later submitted to the Rome Conference. Although it differed in wording, this draft provision was similar to the one in proposal 1, paragraph 1 of the 1996 Report. Article 31 (1) (a) of the Draft Statute articulates that: “In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person’s conduct, the person suffers from a mental disease or defect that destroys that 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”.³²⁰ The threshold of the required incapacity seems to have been raised, since it has to *destroy* the capacity and not merely result in lacking capacity. Furthermore, the unlawfulness of the conduct should constitute a sort of error of law due to insanity, whereas the nature of the conduct should invoke a more general form of awareness of one’s actions.³²¹

B. The Rome Conference

147. Throughout the diplomatic Conference in Rome, the defence of insanity was not the central subject of discussion and the text adopted in the draft version was essentially left unchanged. During negotiations the United States of America submitted a paper on the urge of a single provision for the issues governed by the four articles relating to defences.

³¹⁷ United Nations General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Official Records, Vol. I, Fifty-first Session, Supplement No. 22, *UN Doc. A/51/22*, 1996, *UN Doc. A/51/22*, 1996, 97.

³¹⁸ United Nations General Assembly, Decisions taken by the Preparatory Committee at its session held from 1 to 12 December 1997, *UN Doc. A/AC.249/1997/L.9/Rev.1*, 1997, 16-19.

³¹⁹ *Ibid.*

³²⁰ Article 31 (1) (a) United Nations General Assembly, Final report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Final Act, Official Records, *UN. Doc. A/CONF. 183/2/Add. 1*, 16 April 1998, 57.

³²¹ M. SCALIOTTI, “Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2”, *International Criminal Law Review*, Vol. 2, No. 1, 2002, 24.

In search for a consensus, the Coordinator proposed a footnote to the clause allowing the Court to accept unwritten defences but that “some delegations expressed the view that this paragraph gave too much latitude to the Court”.³²² Hence, this had no influence on the precise wording of the insanity defence.

148. The issue of diminished responsibility arose when the Syrian delegation challenged the expression “the capacity to control his or her conduct to conform to the requirement of law”.³²³ Syria argued that a mental defect should not be sufficient to exclude criminal responsibility and that the defence only should apply in a case of obvious and total insanity. Syria asked to delete this part of the subparagraph, a change that would be difficult to accept for other delegations according to the Coordinator of the Working Group.³²⁴ Following this objection, a footnote was included, explaining that the word “law” is meant to refer to article 21 of the Statute. Finally, the Plenary of the Diplomatic Conference adopted the draft provision on mental insanity and it became article 31 (1) (a) of the Rome Statute.

C. Post-Rome activities

149. After the Rome Conference, the Preparatory Commission was in charge to develop certain “Elements of Crime” and the “Rules of Procedure and Evidence”. Similar to the preparation of the Draft Statute, defences played a diminished role. The Elements of Crimes abstained in making the grounds for excluding criminal responsibility as articulated in the Statute to be more concrete.³²⁵ The RPE only contains a limited amount of procedural regulations on when and how grounds of excluding criminal responsibility can be raised. Hence, regarding the determination of sentence, Rule 145 (2) (a) (i) ICC RPE includes “substantially diminished mental capacity” as a mitigating circumstance. This minor role of defences is equally adopted in the Regulation of the Court.

³²² United Nations, Working Group on General Principles of Criminal Law, *Proposal by the United States of America for single provision covering issues currently governed by Articles 31 to 34*, Committee of the Whole, UN Doc. A/CONF. 183/c.1/WGGP/L.2, 16 June 1998.

³²³ United Nations General Assembly, *Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, 2 July 1998, 3; M. SCALIOTTI, “Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2”, *International Criminal Law Review*, Vol. 2, No. 1, 2002, 10.

³²⁴ United Nations General Assembly, *Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, 2 July 1998

³²⁵ A. ESER, “Grounds for excluding criminal responsibility” in TRIFFERER, O. (eds.), *Commentary on the Rome Statute of the International Criminal Court. Second Edition*, München, Beck, 2008, 867.

1.4.2. Analysis and interpretation on the evolution made by the establishment of a permanent International Criminal Court

150. First of all it has to be noted that, while other exclusionary grounds underwent several modifications in the course of constituting the Rome Statute, the wording of article 31 (1) (a) remained unchanged since the Draft Statute of the Preparatory Commission.³²⁶ According, to SALAND, who was one of the drafters of article 31, this article in general was difficult to encounter because of the conceptual differences between the various legal systems.³²⁷ Hence, the fact that this article is titled “Grounds for Excluding Criminal Responsibility” shows the avoidance of preferring one municipal legal system over the other. With this provision the Rome Statute adopts the well-established national principle of mental insanity. This can *an sich* be seen as a well-applauded advancement in international criminal law, particularly in terms of the rights of the defendant. However, the lack of clarity in the formulation of this provision overshadows this initial optimism and leads to a strong reservation in considering the effectiveness of this defence. The subsequent paragraphs attempt to identify several legal difficulties that potentially can arise as a result of the vague and blurry concepts that are used.

151. The drafters of the Statute have chosen to adopt the expression “mental disease or defect” to describe the relevant mental disorder necessary for a successful insanity plea. By using the term “mental disease” they choose to embrace a wide definition, which clearly supports the idea of avoidance and reluctance towards a detailed definition of the required mental state. With the incorporation of “mental defect” they further expand the range of potentially applicable mental disorders. At this moment, it is impossible to know which types of diseases or defects are sufficient to raise this defence and if for example personality disorders will fall within the scope of such a disease or defect. Additionally, article 31 (1) (a) of the Statute places emphasis on this “mental disease or defect” to “destroy” a person’s capacity to either appreciate the unlawfulness or nature of the acts or to control these acts. Clearly, this requirement is highly excessive and difficult to prove, since the inexactitude of for example, psychology and psychiatry, makes it difficult to make a distinct line between a partial impairment and a complete destruction.³²⁸ Questions were raised how to act accordingly if some mental disease only alters one part of the individual’s mind and leaves the others unaffected.

³²⁶ M. SCALIOTTI, “Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2”, *International Criminal Law Review*, Vol. 2, No. 1, 2002, 24.

³²⁷ P. SALAND, “International Law Principle” in R. S. LEE (eds.), *The International Criminal Court: the making of the Rome Statutes – issues, negotiations, results*, The Hague, Kluwer Law International, 1999, 206.

³²⁸ A. B. SHNIDERMAN and C. A. SMITH, “Toward Justice: Neuroscience and Affirmative Defenses at the ICC”, *Studies in Law, Politics, and Society*, Vol. 66, 2013, 105.

The theory that has been followed laid down that a person's mental disorder at the time of the conduct is not sufficient, but there should exist a link of cause and effect between the mental disorder and the conduct. Hence, this theory provokes lot of tension in the literature.³²⁹

152. Diminished responsibility has not been included as a defence in the Rome Statute. As two proposals in the Report of the Preparatory Commission mentioned diminished responsibility as a ground for mitigating punishment, they have since then been deleted. Yet, while the Statute is silent on a defence based on a diminished mental capacity, the ICC RPE explicitly mentions a "substantially diminished mental responsibility" with regard to punishment. Rule 145 (2) (a) (i) ICC RPE articulates that although "the circumstances fall short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity" can be taken into account as a mitigating factor in sentencing. Hence, again it is guessing what the concept of "substantially diminished capacity" restrains. Neither the Rome Statute nor the RPE seems to recognise a diminished mental capacity as a possible mitigating factor in establishing criminal responsibility.

153. Mental insanity is considered a complete defence. It is not clear if successfully raising this defence can have other outcomes than acquittal. In addition, the Statute is, yet again, silent regarding certain procedural obligations in case this defence is raised, especially on the required burden of proof. These issues will be further elaborated in the following chapter

³²⁹ M. SCALIOTTI, "Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility – Part 2", *International Criminal Law Review*, Vol. 2, No. 1, 2002, 27.

2. Implications and possible difficulties with regard to the mental insanity and diminished responsibility defence

2.1. Procedural and evidentiary concerns

154. Mental insanity and diminished responsibility are in particular unique among the limited range of recognised defences, because these cases rely heavily on the incorporation of a distinct field of technical knowledge, namely (forensic) psychiatry.³³⁰ Consequently, mental health professionals will undoubtedly play a significant role as experts in international criminal proceeding to gather and evaluate evidence that is necessary to determine whether a claim of insanity or diminished responsibility is rightful or not.³³¹ Psychiatric evidence is frequently examined with hesitation, although international tribunals have sporadically shown willingness to review expert evidence from forensic psychiatrists when this is considered “in the interest of justice”.³³² Hence, there exists a tangible fear towards the differences of opinion that can arise. This can already be observed in the Čelebići Camp case where five different psychiatrists were unable to come to a congruent diagnosis.

155. The framework of international prosecution systems covers a significant role for experts in the admissibility and presentation of evidence. Both the prosecution and the defence have the right to bring on their own expert witnesses and cross-examine the witnesses presented by the opposite side.³³³ The ICC and ICTY are empowered to appoint their own independent mental health professionals. For example, Rule 74 *bis* of the RPE of the ICTY states that: “A Trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused. In such a case, unless the Trial Chamber otherwise orders, the Registry shall entrust this task to one or several experts whose name appear on a list previously drawn up by the Registry and approved by the Bureau”.

³³⁰ P. KRUG, “The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation”, *The American Journal of International Law*, Vol. 94, No. 2, 2000, 322.

³³¹ J. TOBIN, “The psychiatric defence and international criminal law”, *Medicine, Conflict and Survival*, Vol. 23, No. 2, 2007, 120.

³³² Rule 73 *ter* (F) ICTY Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (as amended 13 May 2015), *UN Doc. ITR/3/REV.1*, 29 June 1995 (hereinafter ICTY RPE); D. RADOSAVLJEVIC, “Scope and Limits of Psychiatric Evidence in International Criminal Law”, *International Criminal Law Review*, Vol. 13, 2013, 1013.

³³³ Article 67 (1) (e) Rome Statute of the International Criminal Court; Rule 94 *bis* ICTY RPE; Rule 98 ICTY RPE; Rule 85 (A) and (B) ICTY RPE.

This emphasises the principle of equality of arms, which forms one of the most important features of a fair and just trial. It enhances the idea that each party must be afforded a reasonable opportunity to present its case in conditions that not place one at a disadvantage, or as opposed, in one's adversary.³³⁴ Hence, the degree to which the courts can and should rely on their own court-appointed experts and how these interact with the experts of the different parties remain unclear. Similarly, the criteria and process of selection of mental health professionals in this particular list are not properly set out.³³⁵ Since the courts need those mental health professionals to assess technical psychiatric testimony, it is likely that the court-appointed experts will play a prominent role in the factual determinations of the case.³³⁶

156. The embracement of an open system of evidence presentation results in a broad admissibility of evidence. The courts are currently authorised to admit all relevant evidence deemed to have "probative value".³³⁷ Hence, complexities surrounding the validity and interpretation of psychiatric evidence still exist.³³⁸ This becomes especially interesting when considering the contribution of the emerging field in neuroscience, which researches the impact of mental disorders on the decision-making of an individual, to forensic psychiatry in order to evaluate the defendant's criminal responsibility.³³⁹ Since some time, the psychiatric community has made tremendous evolution in transforming a number of behaviours into medical conditions. The previously mentioned emerging field of science will develop this work further when shedding light on biological and pathological explanations for human behaviour.³⁴⁰ This neuroscientific evidence is most frequently addressed when trying to establish diminished responsibility.

³³⁴ D. RADOSAVLJEVIC, "Scope and Limits of Psychiatric Evidence in International Criminal Law", *International Criminal Law Review*, Vol. 13, 2013, 1016.

³³⁵ J. TOBIN, "The psychiatric defence and international criminal law", *Medicine, Conflict and Survival*, Vol. 23, No. 2, 2007, 120.

³³⁶ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 323.

³³⁷ Article 69 (4) Rome Statute of the International Criminal Court; Rule 70 (G) and Rule 89 (C) ICTY RPE.

³³⁸ D. RADOSAVLJEVIC, "Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, 2011, 39.

³³⁹ G. MEYNEN, "A neurolaw perspective on psychiatric assessments of criminal responsibility: Decision-making, mental disorder, and the brain", *International Journal of Law and Psychiatry*, Vol. 36, No. 2, 2013, 93-95.

³⁴⁰ A. B. SHNIDERMAN, "The Devil's Advocate: Using Neuroscientific Evidence in International Criminal Trials?", *Brooklyn Journal of International Law*, Vol. 38, No. 2, 2013, 665-666.

157. The Prosecutor is obliged to investigate incriminating and exonerating circumstances equally when assessing criminal responsibility under the Statute.³⁴¹ The fundamental principle of “presumption of innocence” holds the general rule that it is to the prosecution to prove the guilt of the accused, beyond a reasonable doubt.³⁴² The normative base of international criminal prosecutions does not address the specific allocation of the burden of proof when this particular defence is raised. Article 67 (1) (i) of the Rome Statute provides the accused the right “not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal”.³⁴³ This protection suggests that the prosecution, rather than the defence, has to discharge the burden once this particular defence has been raised. Hence, this runs contrary to what the Trial Chamber of the ICTY holds in the Čelebići Camp case. Relying on English law, they ruled that diminished responsibility is an affirmative defence that requires the accused to bear the burden of proof “on the balance of probabilities”. It can thus be seen that if a specific mental health defence is raised, the burden of proof is reversed.³⁴⁴

158. Further problems can arise in regard to the necessary quantum of evidence for special defences. The RPE of the ICC and ad hoc tribunals are silent as to the specific criteria and minimal standards of evidential weight. The decision to not define concepts such as “mental disease or defect” as found in the Rome Statute, results that symptoms or behaviour that would satisfy to reach the burden of proof are unqualified. This leaves the type and quantum of evidence required for special defences in hands of judges, which decide the latter on a case by case basis.³⁴⁵ The unclear wording in article 67 (1) (i) makes un-doubtedly room for several interpretations and discussions. Once the accused presented the evidence on a defence that is raised by him, it may be submitted that either the prosecutor is left with the burden of persuasion or a lesser quantum of evidence is required for the accused.

159. Some authors express several concerns in regard to this procedural and evidentiary framework for the mental insanity defence due to potential implications on efficiency, administration of justice and fundamental fairness to the parties.

³⁴¹ Article 54 Rome Statute of the International Criminal Court; A. ESER, “Grounds for excluding criminal responsibility” in O. TRIFFERER (eds.), *Commentary on the Rome Statute of the International Criminal Court. Second Edition*, München, Beck, 2008, 567.

³⁴² Article 66 Rome Statute of the International Criminal Court.

³⁴³ Article 67 (1) (i) Rome Statute of the International Criminal Court.

³⁴⁴ D. RADOSAVLJEVIC, “Scope and Limits of Psychiatric Evidence in International Criminal Law”, *International Criminal Law Review*, Vol. 13, 2013, 1017.

³⁴⁵ *Ibid*, 1018-1019.

They anticipate on the difficulty for judges that will be called upon to evaluate conflicting testimonies with different perspectives on the mental state of the accused. Due to the use of different concepts and different diagnostic classification systems in the municipal systems, this can ultimately lead to trials falling back to a battle of experts.³⁴⁶

2.2. Ambiguous consequences of a successful plea

160. When some form of mental incapacity is established, the different national legal systems provide one or more possible consequences. It can lead to a complete defence, a partial defence in which the defendant will be found guilty of a lesser crime than the one the accused was charged with or a mitigation in punishment.³⁴⁷ The ICTY's judgment in the Čelebići Camp case provides little guidance on the consequences of a successful plea in international criminal law proceedings. Likewise, rule 67 (B)(i)(b) ICTY RPE is silent on this question. While article 31 (1) (a) of the Rome Statute clearly implies to consider mental insanity as a complete defence, it is not certain to whether a successful defence can result in other consequences than the acquittal of the defendant.

161. In addition, the recognition of the mental incapacity defence in international law at this point does not co-exist with the development of some system for the medical disposition, either of persons that are acquitted on the basis of mental insanity or in case an offender's sentence is reduced based on a reduced capacity, but who are deemed to constitute a danger to society.³⁴⁸ Article 77 of the Rome Statute, which summons the applicable penalties that can be imposed by the Court, does not provide for a special verdict that results in for example, the institutionalisation of the accused in a mental hospital. JANSSEN notices accurately that if a person would go scot-free, it would certainly make any judge that is confronted with a defence that is based on any form of mental incapacity, reluctant to accept it.³⁴⁹ Subsequently, this means that when a defendant would successfully raise diminished responsibility and the defendant's sentence would be reduced, the Court cannot claim a special regime of imprisonment that is linked to obligatory mental health treatment.

³⁴⁶ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 32-325; A. B. SHNIDERMAN, "The Devil's Advocate: Using Neuroscientific Evidence in International Criminal Trials?", *Brooklyn Journal of International Law*, Vol. 38, No. 2, 2013, 691-692.

³⁴⁷ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 328.

³⁴⁸ *Ibid*, 335.

³⁴⁹ S. JANSSEN, "Mental condition defences in supranational criminal law", *International Criminal Law Review*, Vol. 4, No. 1, 2004, 85.

Hence, even if the Court would be able to impose involuntary commitments, a coordination of that commitment effort with medical and legal authorities of domestic systems would be necessary. SCHABAS has in this case suggested that the public health authorities of the Netherlands would be expected to take the appropriate and necessary measures.³⁵⁰ It is crucial that any system of medical disposition has to apply international human rights standards that govern the rights of persons, which are involuntarily committed based on mental health grounds.³⁵¹

³⁵⁰ W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute. Second Edition*, Oxford, Oxford University Press, 2016, 641.

³⁵¹ For example: UN General Assembly Resolution on The Protection of persons with mental illness and the improvement of mental health care; United Nations General Assembly, Resolution 119, UN doc. A/RES/46/119, 17 December 1991.

3. Preliminary conclusion

162. The adoption of the Rome Statute is the result of long and wide-ranging negotiations among numerous stakeholders. While an extensive advancement is made in adopting both procedural and substantive due process rights, an accused is currently unable to invoke diminished mental capacity, as opposed to a complete destruction of one's mental capacity, as a defence before the Court. This particular defence is not included in the Statute nor is it incorporated in the jurisprudence of the ad hoc tribunals, which treats any such claim only as a mitigation of sentence.

163. At this point, it is unclear which "mental disease or defect" is required to plea a successful insanity defence. Furthermore, the use of the term "destroyed" instead of "partially destroyed" seems to leave little room for considering diminished responsibility as a defence within the Rome Statute. The absence of this particular defence is often rationalised by leaning on procedural and evidentiary difficulties. Hence, these concerns seem to be misplaced when considering the overall system of international criminal law. Defences serve to ensure that an accused benefits not only from a fair trial in the procedural sense, but also one that is fair in a substantive sense.

164. Notwithstanding the presence of contextual and procedural difficulties, diminished responsibility as a defence is still possible by taking resort to paragraph 3 of article 31 of the Rome Statute. Since diminished responsibility is a defence common to most domestic legal systems, the possibility should exist to derive this particular defence before the Court. Two of these reduced capacity defences, one continental and one common law variant, will be discussed in the next part of this inquiry in order to make a comprehensive analysis of which system would be most desired and achievable in international criminal law.

III. The approach of national systems towards diminished responsibility as a defence mechanism

165. The intention of the second part of this inquiry was to demonstrate the current feasibility of diminished responsibility as a defence mechanism in international criminal law. The answer remains inconclusive but is rather negative and dissatisfied. It appears that this is mainly due to the Court's avoidance of dealing with this imminent question. As mental insanity or diminished responsibility at the moment have never been raised before the Court, it tries to refrain itself of a potentially large number of difficulties. Hence, this does not take away the significance of such defence mechanism for international crimes as illustrated in the first part of this dissertation. Many authors have expressed their concerns about the current limited and unclear possibilities for offenders suffering from a mental illness before international criminal courts and tribunals. This however, did not lead to extensive attempts of formulating constructive solutions for its many challenges, the most prevailing ones being the actual meaning of concepts such as mental disease or defect and the destruction thereof, the procedural and evidentiary issues and the unknown consequences of using this defence successfully.

166. This part will try to discover how domestic legal systems deal with perpetrators suffering from a mental disorder. In an introductory chapter a clarification will be made on how national legal systems can be used in order to help the Court deal with the inevitable question. Secondly, an examination will be conducted of two existing domestic models, namely that of England and The Netherlands, and their approach, particularly when finding reduced mental capacity.

1. Introduction

167. As a new supranational criminal code, the Rome Statute contains elements from both civil and common law jurisdictions and provides an unprecedented system of criminal rules and procedures.³⁵² Already during the Rome Conference the differences in doctrinal concepts and thinking of the various domestic regimes became apparent. This resulted in leaving some of the provisions in the Statute and RPE very broad with limited guidelines, in particular the mental insanity defence. While diminished responsibility currently finds no basis in the existing grounds for excluding criminal responsibility in the Rome Statute, article 31 (3) of the Statute refers to the consideration of such a defence when this can be derived from applicable law set forth in article 21 of the Statute. According to article 21 of the Rome Statute the ICC can draw from different legal sources when it is in itself not able to provide answers due to ambiguous or absent formulation.³⁵³ In particular, article (21) (1) (c) articulates that: “the Court shall apply general principles of law derived by the Court from national laws of legal systems of the world”. This allows us to make a comparative analysis between various municipal systems in order to tackle essential issues relating to the unsettled and limited maturity of the affirmative defences in the Rome Statute.³⁵⁴ Hence, it has to be noted that Judge ADRIAN FULFORD in the ICC LUBANGA JUDGMENT stressed that: “while article 21 permits to derive from general principles of criminal law, the Court should, in accordance to resorting to principles of major legal systems to which national systems belong, take awareness into account that none of these systems were intended to deal with international crimes”.³⁵⁵

168. Over time, domestic legal systems have established several versions of the mental insanity and diminished responsibility defence, which differ not only in conceptual basis but also in consequences when finding absent or reduced mental capacity.³⁵⁶ As follows they do not contain a uniform regulation but are split in many different systems.

³⁵² S. JANSSEN, “Mental condition defences in supranational criminal law”, *International Criminal Review*, Vol. 4, 2004, 83.

³⁵³ W. A. SCHABAS, *An Introduction to the International Criminal Court. Fourth edition*, Cambridge, Cambridge University Press, 2011, 206-207.

³⁵⁴ *Ibid*, 209.

³⁵⁵ ICC Trial Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Adrian Fulford, Case No. ICC-01/04-01/06-2842 (14 March 2012), para 10.

³⁵⁶ L. F. SPARR, “Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy”, *Journal of the American Academy of Psychiatry and the Law*, Vol. 33, No. 1, 2005, 64.

The two major legal systems that are traditionally distinguished are the one prevailing in common law countries and those obtained in civil law countries.³⁵⁷ The following chapter will concentrate on two jurisdictions, namely that of England and The Netherlands. The English criminal law system can perhaps be seen as “the most common-law of all common-law systems” and is particularly characterised by a pragmatic legal style relying substantially on precedents set by case law.³⁵⁸ While German law is often considered as “the prototype of Roman Law”, this inquiry will lean on the Dutch system instead as the strong doctrine-driven practice. The specific choice to include the system of The Netherlands is based on personal preference, their status as international role model for its treatment practices and facilities for mentally ill offenders³⁵⁹ and the desire to diverge from typical comparative analysis in legal doctrine.

169. This selection of countries makes it possible to compare different legal cultures in their approach to the mental insanity and diminished responsibility defence. Notwithstanding the hesitation of some judges, comparing both systems is a useful and compelling analytical tool in order to determine if the defendant can derive a specific diminished responsibility defence and if the ICC in its course of action could act in accordance with one of those two models.

³⁵⁷ A. CASSESE, L. BAIG, M. FAN, P. GAETA, C. GOSNELL and A. WHITING (eds.), *Cassese's International Criminal Law. Third Edition*, Oxford, Oxford University Press, 2013, 6.

³⁵⁸ K. J. HELLER and M. D. DUBBER, “Introduction: Comparative Criminal Law” in K. J. HELLER and M. D. DUBBER (eds.) *The Handbook of Comparative Criminal Law*, California, Stanford University Press, 2011, 8; J. GUNN, “Criminal and civil law for the psychiatrist in England and Wales” in J. GUNN and P. TAYLOR (eds.), *Forensic Psychiatry: Clinical, Legal and Ethical issues. Second Edition*, U.S., CRC Press, 2014, 19.

³⁵⁹ P. BAL and F. KOENRAEDT, “Criminal law and mentally ill offenders in comparative perspective”, *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 220.

2. The English and Dutch approach towards mental disordered offenders

2.1. An introduction to the relationship between the two domestic legal systems and the Rome Statute

170. The Rome Statute itself does not contain a specific obligation on States to implement the different provisions of the Statute in national legislation. While the Statute does require certain commitments for co-operation within its framework, this primarily relates to matters of investigatory, executory and trial procedure.³⁶⁰ Hence, one of the main features of the ICC, namely the principle of complementarity, implies a certain need for national implementation especially of the substantive criminal offences. Equally important as the incorporation of the ICC crimes in the domestic legal order is the applicability of general principles, provided in Part 3 of the Statute. For the purpose of this inquiry, it is necessary to investigate whether municipal jurisdictions, in particular with regard to mentally ill offenders, have enhanced the international standards or whether they are inclined to apply more lenient or stricter standards in their national provisions when dealing with international crimes.

171. England, as part of The United Kingdom, signed the Rome Statute on 30 November 1998 and ratified it on 4 October 2011. The Statute is implemented in the International Criminal Court Act of 2001, which entered into force September 1, 2001.³⁶¹ Section 51 of the ICC Act 2001 ensures that ICC crimes may effectively be prosecuted at the national level.³⁶² Hence, the definitions of particular crimes need to operate in a broader framework of general principles of liability and defences. The UK has in this part decided not to adopt the general part as provided in the Statute and relies instead on the corresponding principles of domestic law.³⁶³ Apprehending domestic criminal law in this context means that certain defences available in the Rome Statute are not integrated in domestic law and the system instead relies on existent defences as defined in municipal rules of law.³⁶⁴

³⁶⁰ D. TURNS, "Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States" in D. MCGOLDRICK, P. ROWE and E. DONELLY (eds.), *The Permanent International Criminal Court: Legal And Policy Issues*, Oxford, Hart Publishing, 2004, 338.

³⁶¹ *Ibid*, 343-344.

³⁶² R. CRYER, "Implementation of the International Criminal Court Statute in England and Wales", *The International and Comparative Law Quarterly*, Vol. 51, No. 3, 2002, 739.

³⁶³ *Ibid*, 740; Two exceptions have been made with regard to intention, as defined in article 30 Rome Statute of the International Criminal Court and command responsibility.

³⁶⁴ R. CRYER, "Implementation of the International Criminal Court Statute in England and Wales", *The International and Comparative Law Quarterly*, Vol. 51, No. 3, 2002, 740.

172. Following the signing in 1998, The Netherlands ratified the Rome Statute on July 18, 2001.³⁶⁵ As the Host State of the ICC, a distinction has to be made between the duties of the Netherlands as an “ordinary State Party” and the duties as the “Host State”.³⁶⁶ In order to ensure that the crimes contained in the Rome Statute are also criminalised in the Netherlands, changes have been made to the Dutch Criminal Code and the International Criminal Act of 2003 was enacted.³⁶⁷ The government of The Netherlands argues that interpreting the principle of complementarity as to the provisions of part 3 of the Statute would be fully applied in the prosecution of ICC crimes in Dutch jurisdiction, goes to far and therefore rejects it.³⁶⁸ Similar to England, the Dutch criminal system will therefore rely on its own defence mechanisms established in domestic criminal law when dealing with offenders of international crimes.

173. The remaining part of this chapter concerns various aspects of the legal and practical arrangements made by the English and Dutch criminal law system regarding mentally ill perpetrators. This will allow us to place both systems next to one another in order to determine the relevant differences and similarities.

2.2. Substantive and Procedural criminal law in England and The Netherlands concerning mentally disordered offenders

2.2.1. Rationale for punishment and the conditions for criminal accountability

174. Similar to international criminal law, domestic legal systems aim to achieve different goals when punishing offenders for the crimes they have committed. The various purposes of sentencing in England can be found in the Criminal Justice Act, section 142, which refers to “the punishment of offenders, reduction of crime, reform and rehabilitation of the offender, the protection of the public and making of reparation by offenders”.³⁶⁹

³⁶⁵ A. CINAR and S. VAN NIEKERK, Implementation of the Rome Statute in The Netherlands, 2007, 2 (available at: <http://papers.ssrn.com/sol3/papers.cfm?>).

³⁶⁶ G. SLUITER, “Implementation of the International Criminal Court in the Dutch Legal Order”, *Journal of International Criminal Justice*, Vol. 2, No. 1, 2004, 161.

³⁶⁷ A. CINAR and S. VAN NIEKERK, Implementation of the Rome Statute in The Netherlands, 2007, 1 (available at: <http://papers.ssrn.com/sol3/papers.cfm?>).

³⁶⁸ G. SLUITER, “Implementation of the International Criminal Court in the Dutch Legal Order”, *Journal of International Criminal Justice*, Vol. 2, No. 1, 2004, 165-166.

³⁶⁹ Section 142 Criminal Justice Act 2003.

Following section 143, the court must consider “the offender’s culpability in committing the offence”, when it considers the seriousness of any offence.³⁷⁰ According to EASTON and PIPER the Criminal Justice Act confirms the idea of modern retributivism, characterised by a focus on the mode of punishment and the principle of proportionality when sentencing.³⁷¹

175. One of the fundamental principles underlying Dutch criminal law is the one of “no punishment without guilt”. The notion ‘guilt’ refers to the personal culpability of an offender, which forms the yardstick of criminal responsibility. Retribution, which often dominated the Dutch criminal law system and was long regarded as the ultimate justification and aim of sentencing, has become a secular principle.³⁷² The idea of prevention became highly influential over the years, leading to current theories of criminal law and sentencing that are based on a mixed model that incorporates retribution as well as consequentialist notions.³⁷³ Hence, with regard to the execution of sentences, article 2, section 2 Pbw articulates that it has to be “as much as possible, in preparation for the return of the offender to society”, clearly emphasising the principle of re-socialisation and rehabilitation of the offender.³⁷⁴

176. It is set that the concepts of culpability and blameworthiness of the accused are important features when punishing the offender. In order to have a clear vision on the role of culpability and its relation to the mental insanity and diminished responsibility defence, it is essential to understand the necessary requirements to be held criminally liable in the different national regimes. As the general starting point, criminal liability in England is constructed on the presence of two basic conditions, namely the *actus reus* (physical act) and the *mens rea* (mental state). In English criminal law a distinction can be made between *common law crimes*, where the definition can be found in decisions of the court, and *statutory crimes*, where the definition is settled in the Statute and as it is interpreted in decided cases.³⁷⁵ To establish the *actus reus*, each crime must be looked at individually in order to determine what must be proved.³⁷⁶ As a working definition, ALLEN describes the *actus reus* as “all the elements of the definition of the offence, except those which relate to the mental element”.³⁷⁷

³⁷⁰ Section 143 Criminal Justice Act 2003.

³⁷¹ S. EASTON and C. PIPER, *Sentencing and Punishment. The Quest for Justice. Fourth edition*, USA, Oxford University Press, 2016, 63-64.

³⁷² P. BAL and F. KOENRAADT, “Dutch Criminal Law and Procedure: a bird’s eye view” in F. KOENRAADT, A. MOOIJ and J. VAN MULBREGT (eds.), *The Mental Condition in Criminal Law. Forensic Mental Health Assessment in a Residential Setting*, Amsterdam, Dutch University Press, 2007, 16.

³⁷³ Ibid.

³⁷⁴ Article 2, section 2 Penitentiare beginselenwet, 18 June 1998.

³⁷⁵ M. J. ALLEN, *Textbook on Criminal Law. Twelfth Edition*, UK, Oxford University Press, 2013, 20.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

177. Generally, it is a precondition for criminal liability that the defendant is a person with sufficient capacity, meaning that the person acted according to his or her own free will, intentionally and for rational reason (*mens rea*).³⁷⁸ In English law, the definition of each crime must be examined separately in order to determine the mental state that is required. The words ‘intention’, ‘knowledge’, ‘wilfulness’ or ‘recklessness’, in relation to the conduct, are often used.³⁷⁹ However, scholars frequently describe these concepts as ‘ambiguous’ or ‘vague’ regarding their exact meaning. ALLEN suggests that *mens rea* imports a “notion of culpability or moral blameworthiness on the part of the offender” and are often required for offences that are “more serious than those that may be committed with negligence or for which liability is strict”.³⁸⁰ Furthermore, the idea exists that a third element is necessary as well, namely the absence of a valid defence.³⁸¹ In order to be held responsible it is to the prosecutor to prove that both the *actus reus* and *mens rea* are present in each particular case.³⁸²

178. When establishing criminal responsibility, the Dutch legal system departs from applying the principle of legality, meaning that no act is punishable than those under a pre-existing provision of criminal law (*nullum crimen/nulla poena sine lege principle*).³⁸³ The classification used in the DCC distinguishes between crimes (*misdrifven*), which are from a more serious nature and misdemeanours (*overtredingen*), apprehended as far less serious.³⁸⁴ In order to be found criminally liable a three-part structure is used. First, it will be examined if the offence description, which generally consists of an *actus reus* (conduct part) and *mens rea* (subjective element), is present.³⁸⁵ The different definitions of crimes all contain elements relating to the mental condition of the perpetrator either in the form of intent (*opzet, dolus*) or negligence (*schuld, culpa*).³⁸⁶

³⁷⁸ A. ASHWORTH and J. HORDER, *Principles of Criminal Law. Seventh Edition*, Oxford, Oxford University Press, 2013, 137; S. ALLNUT, A. SAMUELS and C. O'DRISCOLL, “The insanity defence: from wild beasts to M’Naghten”, *Australasian Psychiatry*, Vol. 15, No. 4, 2007, 293.

³⁷⁹ M. J. ALLEN, *Textbook on Criminal Law. Twelfth Edition*, UK, Oxford University Press, 2013, 58.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*, 125.

³⁸² R. J. TERRILL, *World Criminal Justice Systems: A Comparative Survey. Eighth Edition*, USA, Anderson Publishers, 2012, 68.

³⁸³ Article 1 Dutch Criminal Code, 3 March 1881.

³⁸⁴ Book II and III Dutch Criminal Code, 3 March 1881.

³⁸⁵ E. GRITTER, “The Netherlands” in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 255.

³⁸⁶ P. BAL and F. KOENRAADT, “Dutch Criminal Law and Procedure: a bird’s eye view” in F. KOENRAADT, A. MOOIJ and J. VAN MULBREGT (eds.), *The Mental Condition in Criminal Law. Forensic Mental Health Assessment in a Residential Setting*, Amsterdam, Dutch University Press, 2007, 17.

179. The first form of culpability, namely intent, includes that the offender acts willingly and knowingly as well as in the awareness of a high degree of probability.³⁸⁷ As the second form, negligence refers to both conscious and unconscious negligence. The former is present when the offender is aware of the considerable and unjustifiable risks that the consequences exist or will result from the committed act, but assumes on unreasonable grounds that it will not materialise. Unconscious negligence refers to the situation that, while the offender was not aware of the risk, he should have been aware of it (carelessness or thoughtlessness).³⁸⁸ The degree of a person's culpability depends on the state of mind of the offender.³⁸⁹ When the offence description is fulfilled, the conduct is presumed to be unlawful (*wederrechtelijkheid*) and the offender blameworthy or culpable (*verwijtbaarheid*). As the former elements form a general condition of criminal liability, their presumption can be contradicted when there exists a justificatory or excusatory defence.³⁹⁰

2.2.2. Mental insanity, diminished responsibility and the required burden of proof

180. First, it is essential to demonstrate how both the English and Dutch system threat and define different grounds to exclude criminal responsibility. Additionally, clarification is needed on the necessary requirements that can partially or completely exclude criminal responsibility of the offender, as a result of the presence of a mental disturbance. English criminal law uses the term *defences* and does not make, or at least does not apply, a clear differentiation between justifications of the criminal act and the mere excuses of the actor.³⁹¹ This does not however mean that they don't recognise certain differences between defences. Hence, the common law distinction between justification and excuse does not involve legal consequences and is somewhat interchangeable.³⁹² People who are insane within the legal definition can use this as a general defence for not being criminally liable.³⁹³

³⁸⁷ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 71-72.

³⁸⁸ Ibid.

³⁸⁹ P. BAL and F. KOENRAADT, "Dutch Criminal Law and Procedure: a bird's eye view" in F. KOENRAADT, A. MOOIJ and J. VAN MULBREGT (eds.), *The Mental Condition in Criminal Law. Forensic Mental Health Assessment in a Residential Setting*, Amsterdam, Dutch University Press, 2007, 16.

³⁹⁰ E. GRITTER, "The Netherlands" in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 255.

³⁹¹ K. AMBOS, "Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections", *Maastricht Journal of European and Comparative Law*, Vol. 12, No. 2, 2005, 182.

³⁹² A. ESER, "Justification and Excuse", *The American Journal of Comparative Law*, Vol. 24, No. 4, 1976, 621.

³⁹³ M. DAVIES, H. CROALL and J. TYRER, *Criminal Justice: An Introduction to the Criminal Justice System in England and Wales. Third Edition*, UK, Pearson Education Limited, 2005, 43.

181. The Criminal Code of the Netherlands contains a number of provisions regarding *defences*. A distinction between justification and excuses has not been made in the DCC as in both cases the offender is not criminally liable. Hence, such distinction has been developed in criminal law doctrine. Currently, the prevailing view is that *justifications* concern the lawfulness of an act. In case they are present the violation of the law does not constitute a criminal offence.³⁹⁴ *Excuses* on the other hand concern the blameworthiness of the offender meaning that the violation of the law still constitutes a criminal offence however, cannot be blamed on the offender who committed the offence. Defences may be invoked with respect to all crimes, without excluding one.³⁹⁵ Insanity (*ontoerekeningsvatbaarheid*) constitutes as an excuse defence.

182. It is clear that mental insanity in both English and Dutch criminal law systems can be a ground to exclude criminal responsibility, whether it forms a defence or an excuse respectively. Hence, this exclusion requires different features and has diverse consequences in both legal regimes.

183. A standardised legal approach to mental insanity in the English criminal law system traces back to the so-called M'NAGHTEN RULES, formulated by the English House of Lords in 1843.³⁹⁶ According to these rules every person is to be presumed as sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary has been proved.³⁹⁷ To establish a defence on the grounds of insanity, it must clearly be established that at the time of committing the acts, the accused must suffer from such a defect of reason, from a disease of mind, making it impossible to know the nature and quality of the act he committed *or* in case he did know, he did not know what he was doing was wrong.³⁹⁸

184. The first substantive element of this test holds the determination of a “defect of reason from a disease of mind”. Under the Mental Health Act of 1983, a system based on 4 classifications is used (mental illness, psychopathic disorder, mental impairment or a severe mental impairment) to determine whether someone falls under the scope of the general concept of mental disorder, which is used to indicate a disease of mind.³⁹⁹

³⁹⁴ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 71-72.

³⁹⁵ *Ibid.*

³⁹⁶ P. BAL and F. KOENRAEDT, “Criminal law and mentally ill offenders in comparative perspective”, *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 223.

³⁹⁷ F. MEMON, “Legal theory and case law defining the insanity defence in English and Welsh Law”, *The Journal of Forensic Psychiatry & Psychology*, Vol. 17, No. 2, 2006, 237.

³⁹⁸ *Ibid.*

³⁹⁹ Section 35 Mental Health Act 1983; P. BAL and F. KOENRAEDT, “Criminal law and mentally ill offenders in comparative perspective”, *Psychology Crime & Law*, Vol. 6, No. 4, 2000, 223.

The Mental Health Act of 2007 changed the definition and holds that mental disorder means “any disorder or disability of the mind”.⁴⁰⁰ Secondly, the M’Naghten test requires that evidence has to show that the mentally disturbed offender, due to his mental disorder, must not have been able to understand the nature and quality of his actions *or* to know that his actions were (morally) wrong. It is often criticised that it is more a defence of “knowing”, rather than “feeling” and therefore likely to be restricted to abnormal mental states characterised by serious cognitive impairment and where delusions cause a defect of reasoning.⁴⁰¹ The insanity covered by the M’Naghten rules forms a complete defence and can only lead to an acquittal if the certain state of mind is established.⁴⁰²

185. The aforementioned rules require the presumption of sanity to be refuted in order to have a successful defence. The defence of insanity can be raised either by the defence or the prosecution.⁴⁰³ Following this interpretation, the rule seems to suggest that all parties have an interest in avoiding a general verdict regarding an insane defendant.⁴⁰⁴ It is the defendant that bears the burden of proof discharged on the balance of probabilities.⁴⁰⁵ This reverse burden of proof is seen as an anomaly in common law defences. Hence, when the requirements are met, the jury will find the defendant “not guilty by reason of insanity”, which counts as a “special verdict”.⁴⁰⁶

186. Aside from the complete mental insanity defence, the English Homicide Act of 1957 includes the particular defence of diminished responsibility if the defendant is suffering from an “abnormality of the mind that substantially impairs one’s culpability”.⁴⁰⁷

⁴⁰⁰ Section 1 Mental Health Act 2007.

⁴⁰¹ J. GUNN, A. RIDLEY and K. RIX, “Psychiatric reports for legal purposes in England and Wales” in J. GUNN and P. TAYLOR (eds.), *Forensic Psychiatry: Clinical, Legal and Ethical issues. Second Edition*, USA, CRC Press, 2014, 165.

⁴⁰² P. BAL and F. KOENRAEDT, “Criminal law and mentally ill offenders in comparative perspective”, *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 228.

⁴⁰³ A. LOUGHNAN, “‘Manifest Madness’: Towards a New Understanding of the Insanity Defence”, *The Modern Law Review*, Vol. 70, No. 3, 2007, 390.

⁴⁰⁴ *Ibid*, 392.

⁴⁰⁵ *Ibid*, 395.

⁴⁰⁶ Law Commission, *Criminal Liability: Insanity and Automatism. A Discussion Paper*, 23 July 2013, 5 (available at: http://www.lawcom.gov.uk/wp-content/uploads/2015/06/insanity_discussion.pdf).

⁴⁰⁷ Section 2 Homicide Act 1957.

This partial defence has been revised by the Coroners and Justice Act 2009 and now allows the charge against a defendant for murder to be reduced to manslaughter, if “the offender suffered from an abnormality of mental functioning and this substantially impaired his ability to understand the nature of the conduct, to form a rational judgment and to exercise self-control”.⁴⁰⁸ It is not yet clear if the replacement to “abnormality of mental functioning” instead of “abnormality of mind” will bring different results in court and the burden of proof lays in this case again on the defence.⁴⁰⁹ Furthermore, this particular defence seems only possible for murder, leaving other crimes out of the occasion. This is based on the fact that only murder is subjected to a mandatory sentence.⁴¹⁰ This doctrine is essentially a form of punishment mitigation by reducing the grade of the offence in homicide cases.⁴¹¹

187. Article 39 of the DCC articulates that: “anyone who commits an offence for which he cannot be held responsible by reason of a defective development or mental defect disorder or mental disease is not criminally liable”.⁴¹² The examination of the claim of insanity follows, similar to the establishment of criminal liability, three stages. First, the question is raised if a *mental disorder*, as described in article 39 DCC, was present during the moment of committing the crime.⁴¹³ The Dutch legislator refrained from a specification of the necessary defect or disease, embracing a wide scope of applicable disorders and leaving expert witnesses not too much restricted in their examination and advice.⁴¹⁴ Secondly, there has to be a *causal relation* between the mental disorder and the committed crimes. Thirdly, it has to be established if the influence of the disorder on the commitment of the act is a reason for not holding someone criminal accountable.⁴¹⁵ As there seems not to exist a legal standard or criterion in order to determine insanity, this leaves the court with a broad margin of appreciation.

⁴⁰⁸ Section 52 Coroners and Justice Act 2009; L. F. SPARR, “Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy”, *The Journal of the American Academy of Psychiatry and the Law*, Vol. 33, No. 1, 2005, 64.

⁴⁰⁹ J. GUNN, A. RIDLEY and K. RIX, “Psychiatric reports for legal purposes in England and Wales” in J. GUNN and P. TAYLOR (eds.), *Forensic Psychiatry: Clinical, Legal and Ethical issues. Second Edition*, USA, CRC Press, 2014, 163.

⁴¹⁰ P. KRUG, “The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation”, *The American Journal of International Law*, Vol. 94, No. 2, 2000, 330.

⁴¹¹ L. F. SPARR, “Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy”, *The Journal of the American Academy of Psychiatry and the Law*, Vol. 33, No. 1, 2005, 65.

⁴¹² Article 39 Dutch Criminal Code, 3 March 1881.

⁴¹³ E. GRITTER, “The Netherlands” in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 266.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

188. According to TAK this means that in practice, a person is not to be held responsible for his criminal conduct if “at the time of the conduct, the person lacks, as a result of a mental defect, disorder or disease, substantial capacity to appreciate the wrongfulness of his conduct or bring the conduct into conformity with the requirements of the law”.⁴¹⁶ Some scholars, such as VAN MARLE, stress the importance of the notion ‘free will’ to explain the relation between a mental disturbance and the committed act.⁴¹⁷ When assessing if the offender can be held responsible or not, the Court makes use of reports done by psychiatrists.⁴¹⁸ Ultimately, it will be the judge, relying on the psychiatrists’ arguments, who decides on the relevant criterion for legal responsibility in a particular case.⁴¹⁹

189. In The Netherlands, the area between full responsibility and non-responsibility is referred to as “diminished responsibility” and forms the most direct example of partial responsibility and the correlative punishment.⁴²⁰ Although, diminished responsibility due to a mental condition does not have an explicit normative base in the DCC, it can be deduced from article 37a, paragraph 2 which states that: “the judge can refrain from imposing a sentence, even if he concludes that the offender, who suffers from developmental deficiency or pathological disturbance, can be held accountable for his actions”.⁴²¹

190. Following the above-mentioned, we can assume that the mental disturbance must be one of the factors that led to the offence and the stronger the connection, the lower one’s responsibility. Currently, a scale of five grades of accountability is used, distinguishing between undiminished responsibility, somewhat diminished responsibility, diminished responsibility, severely diminished responsibility and irresponsibility. These grades cannot be found in criminal law itself, but are evolved in practice.⁴²² There exists a sort of consensus on the meaning of the two extremes, mainly fully responsible and not responsible, while the three grades in the middle are far harder to distinguish.⁴²³

⁴¹⁶ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 74.

⁴¹⁷ H. VAN MARLE, “Forensic Psychiatric Services in the Netherlands”, *International Journal of Law and Psychiatry*, Vol. 23, No. 5-6, 2000, 527.

⁴¹⁸ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 74.

⁴¹⁹ S. RADOVIC, G. MEYNEN and T. BENNET, “Introducing a standard of legal insanity: The case of Sweden compared to The Netherlands”, *International Journal of Law and Psychiatry*, Vol. 40, 2015, 46.

⁴²⁰ L. F. SPARR, “Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy”, *Journal of the American Academy of Psychiatry and the Law*, Vol. 33, No. 1, 2005, 66.

⁴²¹ Article 37a, paragraph 2 Dutch Criminal Code, 3 March 1881; P. BAL and F. KOENRAEDT, “Criminal law and mentally ill offenders in comparative perspective”, *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 222.

⁴²² H. VAN MARLE, “Forensic Psychiatric Services in the Netherlands”, *International Journal of Law and Psychiatry*, Vol. 23, No. 5-6, 2000, 527.

⁴²³ *Ibid.*

This distinction in gradation is drawn in relation to the intensity of the role that is played by the mental disturbance in conducting the criminal offense.⁴²⁴ While these 5 grades have been used for decades, the DUTCH ASSOCIATION FOR PSYCHIATRY published a guideline for forensic psychiatric evaluation in criminal cases, proposing to reduce the five grades to only three grades. This guideline argues that there is no evidence for any scale whatsoever and establishes that as the two extremes are clear, there is a middle-area for defendant's, namely diminished or partial responsibility.⁴²⁵

191. In the Dutch variant, mental insanity and diminished responsibility form a ground to excuse criminal conduct and therefore denies the blameworthiness for an unlawful act. In its verdict, the court will therefore first discuss any such claims before assessing other exculpatory claims.⁴²⁶ The criminal system in the Netherlands is founded on the inquisitorial procedure, meaning that it is to the prosecutor to provide the evidence.⁴²⁷ It is then to the criminal courts to investigate the merits of the charge. Therefore, we cannot speak of a burden of proof regarding the plea or acceptance of a general defence. When the offender raises a defence in court, it is for the court to investigate the claim and to decide whether it accepts it or not. In this case they rely on the likelihood (*aannemelijkheid*) of the claimed circumstances as the standard of acceptance.⁴²⁸

2.2.3. Diagnostic considerations. The role of mental health experts and the applicability of neuroscience based evidence in criminal proceedings

192. As mentioned before, this particular defence sets aside an important role for forensic mental health experts in the examination of a defendant's mental state. This examination can contribute to the establishment of the defendant's criminal responsibility and determine if the mental state of the offender can be seen as a ground for excluding responsibility or reducing punishment.

⁴²⁴ L. F. SPARR, "Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy", *Journal of the American Academy of Psychiatry and the Law*, Vol. 33, No. 1, 2005, 66.

⁴²⁵ Nederlandse Vereniging voor Psychiatrie, *Richtlijn psychiatrisch onderzoek en rapportage in strafzaken*, Utrecht, De Tijdstroom, 2012, 64-65.

⁴²⁶ E. GRITTER, "The Netherlands" in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 257.

⁴²⁷ G. MEYNEN, "Legal Insanity and Neurolaw in the Netherlands: Developments and Debates" in S. Moratti and D. Patterson (eds.), *Legal Insanity and the Brain. Science, Law and European Courts*, North America, Hart Publishing, 2016, 139.

⁴²⁸ E. GRITTER, "The Netherlands" in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 257.

This psychiatric assessment precedes the judgment of the court on the legal guilt and punishment of the defendant.⁴²⁹ Accordingly, research in the department of neuroscience has advanced increasingly regarding the understanding and causes of human behaviour. This makes it a potential practical tool in a legal context, particularly when assessing accountability.⁴³⁰

193. Already in the M’Naghten case, important issues were raised in relation to whether or not medical practitioners have the ability to judge the mental state of an individual at the time the acts were committed.⁴³¹ The Criminal Procedure Rules, which govern the admission of expert evidence, identify the duty of the expert to help the court on different matters “within the area of expertise”.⁴³² The court is able to subject the defendant to psychiatric evaluations during pre-trial and can even order an involuntary treatment, *a proprio motu* or after a motion of the prosecutor or the defence, for offenders charged with crimes that can lead to imprisonment. The former is only possible when a physician suggests in writing that such hospitalisation is necessary.⁴³³ On occasion, psychiatrists will have to appear in court, as it cannot decide to send a patient to a hospital unless oral evidence of a psychiatrist is provided. In criminal cases it often appears that the prosecutor discredits the psychiatrist, who appears for the defendant, as part of a strategy to obtain a conviction.⁴³⁴ Hence, in a majority of cases the psychiatric report will have little legal impact on the verdict, but will play a bigger role on disposal. The court may use this psychiatric report in both the relation to recommendation in the form of medical disposal or in sentence mitigation.⁴³⁵

⁴²⁹ Article 37a, paragraph 2 Dutch Criminal Code, 3 March 1881; P. BAL and F. KOENRAEDT, “Criminal law and mentally ill offenders in comparative perspective”, *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 236.

⁴³⁰ L. KLAMING and B. J. KOOPS, “Neuroscientific Evidence and Criminal Responsibility in the Netherlands” in T. M. SPRANGER (eds.), *International Neurolaw. A Comparative Analysis*, Berlin Heidelberg, Springer, 2012, 227.

⁴³¹ S. ALLNUT, A. SAMUELS and C. O’DRISCOLL, “The insanity defence: from wild beasts to M’Naghten”, *Australasian Psychiatry*, Vol. 15, No. 4, 2007, 293.

⁴³² Rule 19.2 Criminal Procedure Rules 2015.

⁴³³ J. C. BECK, “Forensic Psychiatry in Britain”, *The Bulletin of the American Academy of Psychiatry and the Law*, Vol. 23, No. 2, 1995, 252.

⁴³⁴ *Ibid*, 168.

⁴³⁵ J. GUNN, A. RIDLEY and K. RIX, “Psychiatric reports for legal purposes in England and Wales” in J. GUNN and P. TAYLOR (eds.), *Forensic Psychiatry: Clinical, Legal and Ethical issues. Second Edition*, USA, CRC Press, 2014, 164.

194. According to a study conducted by CATLEY and CLAYDON, neuroscientific evidence appears well established by those accused of criminal offences and several cases can be identified where this particular evidence has been used in the English courtrooms.⁴³⁶ It even seems that the extent of usage is currently increasing.⁴³⁷ The range of uses of this particular evidence is diverse, including the establishment of lacking mens rea and the entitlement to mental condition defences.⁴³⁸ This study shows that when defendants successfully appeal conviction based on neuroscientific evidence, the latter is nearly always central to their success.⁴³⁹

195. In Dutch criminal proceedings expert witnesses have a special status. Both the examining judge and the trial judge can order, however are not obliged to, the residential observation and assessment of the defendant's degree of responsibility and the need for treatment. During the maximum of seven weeks multidisciplinary reports are made to establish if there is a link between a possible mental disorder and the commission of the crime.⁴⁴⁰ Most of the experts are court-appointed, leading to a limited discretion for the defence to call experts of their own choice in order to get a second opinion. The underlying rationale seems to be that this will avoid clashes between different expert opinions from the prosecution and the defence. The number of forensic mental health experts and their professional background is laid down in Dutch criminal law. For example, one of the prerequisites to be appointed as a forensic psychiatrist or psychologist is following the specialist training offered by several institutions in order to comprehend the developing standards for a report format and quality control. When the report seems insufficient, these experts can be asked to testify in the courtroom to provide adequate answers.⁴⁴¹ Hence, it is ultimately the judge who decides on the presented evidence.

⁴³⁶ P. CATLEY and L. CLAYDON, "The use of neuroscientific evidence in the courtroom by those accused of criminal offenses in England and Wales", *Journal of law and the Biosciences*, Vol. 2, No. 3, 2015, 510.

⁴³⁷ Ibid, 543

⁴³⁸ Ibid, 510-511.

⁴³⁹ Ibid, 521.

⁴⁴⁰ P. BAL and F. KOENRAEDT, "Criminal law and mentally ill offenders in comparative perspective", *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 236.

⁴⁴¹ P. BAL and F. KOENRAEDT, "Dutch Criminal Law and Procedure: a bird's eye view" in F. KOENRAEDT, A. MOOIJ and J. VAN MULBREGT (eds.), *The Mental Condition in Criminal Law. Forensic Mental Health Assessment in a Residential Setting*, Amsterdam, Dutch University Press, 2007, 30-31.

196. Although the amount of cases is not exactly known, neuroscientific evidence in the assessment of criminal responsibility has already entered the courtroom in the Netherlands. In some cases, the expert witness, being a behavioural neurologist, did not find brain damage or no sufficient connections between the brain damage and the behaviour that led to commit the criminal act. Hence, in other cases a link between brain damage and the committed act was established and influenced the court's decision on the degree of responsibility.⁴⁴²

2.2.4. A successful plea, what now?

197. Successfully raising a defence of mental insanity or diminished responsibility has distinct consequences. The insanity defence covered by the M'Naghten rules forms a complete defence and can only lead to a special verdict of the jury that enhances an acquittal if the certain state of mind is established. As opposed, the diminished responsibility defence is, in case of a successful plea, limited to reducing the charge of murder to manslaughter. Contrary to murder, which carries a mandatory life sentence, manslaughter has a wide range of existing sentencing options, namely imprisonment, psychiatric hospital or probation.⁴⁴³ The common law position towards the "special verdict" has tremendously been altered by the Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991 as since then the court has had several choices of disposition following a verdict of not guilty by reason of insanity.⁴⁴⁴ The term 'disposal' is used to describe the different ways the court can deal with such an offender and includes the possibility of: an absolute discharge, a supervision order and the detainment in a hospital, potentially with the restriction to not be released before permission is given by the Secretary of State.⁴⁴⁵

198. When in extreme cases it is established that the defendant has not acted intentionally, Dutch courts will acquit the defendant. Hence, an acquittal (*vrijspraak*) is restricted to defendants who lack "any insight in the effects and consequences of one's behaviour".⁴⁴⁶

⁴⁴² Examples of some cases can be found in: L. KLAMING and B. J. KOOPS, "Neuroscientific Evidence and Criminal Responsibility in the Netherlands" in T. M. SPRANGER (eds.), *International Neurolaw. A Comparative Analysis*, Heidelberg, Springer, 2007, 235-243.

⁴⁴³ J. C. BECK, "Forensic Psychiatry in Britain", *The Bulletin of the American Academy of Psychiatry and the Law*, Vol. 23, No. 2, 1995, 251.

⁴⁴⁴ *Ibid*, 250.

⁴⁴⁵ Law Commission, Criminal Liability: Insanity and Automatism. A Discussion Paper, 23 July 2013, 5 (available at: http://www.lawcom.gov.uk/wp-content/uploads/2015/06/insanity_discussion.pdf).

⁴⁴⁶ E. GRITTER, "The Netherlands" in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 257-258.

In practice, the court will usually find some form of insight, which might lead to either a discharge (*ontslag van alle rechtsvervolging*) or a conviction.⁴⁴⁷ When assessing the grade of responsibility, judges can take into account the effect of a sanction, meaning that they will bear in mind the treatability (*mate van behandelbaarheid*) of an offender.⁴⁴⁸

199. The Dutch Criminal Code sets out different types of sentences (*straffen*) and non-punitive orders or measures (*maatregelen*) that can be imposed on the offender. As penalties are aimed at punishing and general prevention, non-punitive orders are created in order to protect society and can be imposed on an accused, even where criminal responsibility is absent.⁴⁴⁹ The rules are very general and do not limit the court in choices on the type and severity of sanctions. The court will decide on a case by case basis, giving Dutch judiciary a wide discretion over sentencing. Two of the non-punitive orders are in particular interesting in this context namely, the order for placement in a psychiatric hospital and the TBS (*terbeschikkingstelling*) order. TBS forms one of the most severe safety measures and can be imposed on offenders, who suffer from a mental illness and are considered a risk factor for society. In this case, the individual will remain in a high security, forensic psychiatric facility until the risk of recidivism is vanished.⁴⁵⁰ However, as TBS can be imposed on both persons that are partially criminal responsible or irresponsible, the psychiatric hospitalisation is only possible when the defendant is found completely insane.⁴⁵¹ Article 37 a, section 1 DCC establishes that the placement in a psychiatric hospital is only possible when the offender forms a danger to the self, the other or the general security.⁴⁵²

200. When establishing some form of diminished responsibility, the Netherlands follow a two-track system, as it offers the possibility of cumulating criminal punishment and measures.⁴⁵³ According to the Dutch Criminal Code a prison sentence will be executed before the measures of entrustment. In extraordinary cases, they can be executed simultaneously.⁴⁵⁴

⁴⁴⁷ E. GRITTER, "The Netherlands" in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 257-258.

⁴⁴⁸ C. KELK, "De plaats van de toerekeningsvatbaarheid in ons strafrecht" in A. W. M. MOOIJ en F. KOENRAADT (eds.), *Toerekeningsvatbaarheid*, Arnhem, Gouda Quint, 1990, 29.

⁴⁴⁹ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 111.

⁴⁵⁰ G. MEYNEN, "Legal Insanity and Neurolaw in the Netherlands: Developments and Debates" in S. Moratti and D. Patterson (eds.), *Legal Insanity and the Brain. Science, Law and European Courts*, North America, Hart Publishing, 2016, 140.

⁴⁵¹ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 118-119.

⁴⁵² Article 37a, section 1, 2° Dutch Criminal Code.

⁴⁵³ P. BAL and F. KOENRAEDT, "Criminal law and mentally ill offenders in comparative perspective", *Psychology, Crime & Law*, Vol. 6, No. 4, 2000, 229.

⁴⁵⁴ Ibid.

Despite diminished responsibility due to a mental disorder can be combined with a measure, a long-term prison sentence can be upheld if the court feels the need to keep the offender outside of society for a long time in order to protect the latter.⁴⁵⁵

⁴⁵⁵ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 132.

3. Preliminary Conclusion

201. It is settled that the English and Dutch legal system apply a different *modus operandi* when it comes to dealing with mentally disordered offenders. Unlike the provisions in the Rome Statute, which set unrealistic high burdens and make it almost impossible to raise an affirmative defence successfully, both municipal regimes provide in a two-tiered system when it comes to finding some form of mental incapacity.⁴⁵⁶ In case a total absence of mental capacity can be established, they offer a complete defence. As opposed, more distinctive consequences are found when reduced capacity has been proven. While both systems differ in the necessary requirements and procedural rules, it nonetheless offers distinct tools to effectively use these defences. This illustrates the guarantee and value towards these defences in domestic legal systems. The defendant standing trial before the International Criminal Court will have the opportunity, relying on article 31 (3) of the Rome Statute, to raise a diminished responsibility defence as provided in the two discussed national jurisdictions.

202. As illustrated in the previous chapter, depending on the implementation method regarding the Rome Statute at the national level, two defendants accused of the same crime can face inconsistent outcomes. This can lead to the part where an accused before the international criminal court cannot apprehend mental incapacity due to the high burdens and the lack of a diminished responsibility defence, while defendant's for international crimes who are standing trial in national jurisdictions, possibly can raise one of the defences successfully. This would without questions lead to the disturbing idea where international criminal law foresees less fundamental guarantees than municipal criminal proceedings. Therefore it seems valid to consider which system would be most appropriate for transformation to the international level.

⁴⁵⁶ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 330.

IV. Lessons learned from domestic law. The possible transference of national features regarding diminished responsibility into the Rome Statute

203. The aim of the previous chapter was to provide insight in how two domestic legal systems, namely the English and Dutch one, deal with offenders who suffer from a mental illness in criminal law proceedings, in order to illustrate the possibilities for the defendant to derive a diminished responsibility defence, based on article 31 (3) of the Statute, before the ICC. Both municipal systems clearly recognise a system, which diverges from the all-or-nothing approach that only recognises completely sane or insane offenders. Diminished responsibility requires both a mental condition and impairment, however one that does not rise to the level of a full mental incapacity justifying a complete release from criminal responsibility.⁴⁵⁷ Hence, this part will try to examine which features of the reduced mental capacity defences are most optimal for a possible transference and implementation in the Rome Statute in order to contribute to a more comprehensive and clear regulation regarding mentally disordered offenders in the Statute and RPE of the Court. Taking into account time and space limitations this part will only scrutinise the main features of the two solutions that will be proposed.

⁴⁵⁷ P. KRUG, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *The American Journal of International Law*, Vol. 94, No. 2, 2000, 329.

1. The open texture of article 31 (1) (a) of the Rome Statute and Rule 145 (1) ICC RPE

204. A first option would be to introduce the English version of diminished responsibility into the Rome Statute. As previously set out, English criminal law adopts the theory that both *actus reus* and *mens rea* have to be present and a defence has to be absent in order to be held criminally liable. The English system provides in diminished responsibility as a defence by reducing the charge of murder to manslaughter.⁴⁵⁸

205. The definition constructed in the Coroners and Justice Act 2009 requires that the offender suffered from an abnormality of mental functioning, which must originate from a recognised medical condition. Furthermore, this abnormality must have substantially impaired the offender's ability to understand the nature of the conduct, to form a rational judgment and to exercise self-control.⁴⁵⁹ The reference to a recognised medical condition serves to state precisely what aspects of a defendant's functioning must be impaired in order for the defence to succeed.⁴⁶⁰ It also allows medical expert opinions to be introduced and given further weight within clear trial parameters. A "substantial impairment" in this case merely implies the impairment that is more than minimal. It holds the "state of mind so different from that of ordinary human being that the reasonable man would term it abnormal and covering all cognitive aspects, from perception to rationality and willpower".⁴⁶¹ The courts in England have even accepted that in exceptional circumstances, personality or psychiatric disorders might be caused by external environmental factors rather than inherent factors and can be applied in this defence.⁴⁶² This seems at first sight a valid option characterised by clear boundaries.

206. However, when implementing the English variant, certain consequences have to be taken into account. For one, the heading of article 31 of the Rome Statute refers to grounds for *excluding* criminal responsibility. This means that, if this version of diminished responsibility would be captured as a defence under this article, a successful defence would have the same consequences as a complete lack of mental capacity, most probably an acquittal.

⁴⁵⁸ Homicide Act 1957.

⁴⁵⁹ Section 52 Coroners and Justice Act 2009.

⁴⁶⁰ D. RADOSAVLJEVIC, "Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute", *European Journal of Crime, Criminal law and Criminal Justice*, Vol. 19, No. 1, 2011, 42.

⁴⁶¹ Court of Criminal Appeal, *R. v. Byrne* (1960), 2 QB 396, 44 Cr App R 246, 403.

⁴⁶² See for example, paranoid psychosis; Court of Criminal Appeal, *R v. Sanderson* (1994), 98 Cr App R 325.

Furthermore, it is questionable if the English perception on proportionality, based on the perceived gravity of the crime, would be transferable to international crimes. This anticipates the idea that a hierarchy within the category of core crimes can be made. As the Statute already limits the jurisdiction of the Court for “the most serious crimes of concern to the international community as a whole”, it seems challenging to find lesser offences or establish a hierarchy under the different core crimes.⁴⁶³ However, in the ERDEMOVIĆ JUDGMENT of the ICTY’s Appeals Chamber, two judges made an application to this proposition. Judge McDONALD and VOHRAH made the hypothesis that international crimes are arranged in a hierarchy based on moral gravity. Both judges determined that the accused had not received the proper warning that a plea of guilty to one count of crimes against humanity would result in a more stringent punishment than a guilty plea to a war crime.⁴⁶⁴ According to this opinion, crimes against humanity are distinct and stand above the crime of genocide and war crimes. A third consequence is based on the rationale of this reduced level of responsibility since it specifically desires to avoid harsh mandatory sentences for murder. Hence, this forms no direct issue in the international system since no mandatory sentences are provided.⁴⁶⁵ According to case law this philosophy does however not longer hold, as courts are allowing a generous approach towards this defence.⁴⁶⁶ As the adoption of this variant of diminished responsibility would entail several doctrinal and practical complexities, it would allow to raise diminished responsibility as a partial defence before the Court.

207. In the criminal law proceedings of The Netherlands a person can only be found criminally responsible when the elements of a crime are proved, the crime is unlawful and the person is blameworthy. Diminished responsibility can be derived from article 37a, paragraph 2 of the DCC and forms a mitigating factor when punishing the offender. This system resembles the one used in the regulation of the ICC as it understands mental insanity as a form of excluding criminal responsibility and diminished responsibility only as a mitigating factor when sentencing. While the drafters of the Statute were clearly inspired on the continental model, certain modifications would still have to be made when implementing the Dutch model.

⁴⁶³ P. KRUG, “The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation”, *The American Journal of International Law*, Vol. 94, No. 2, 2000, 331.

⁴⁶⁴ ICTY Appeals Chamber, Prosecutor v. Drazen Erdemović, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A (7 October 1997), para. 19-25.

⁴⁶⁵ P. KRUG, “The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation”, *The American Journal of International Law*, Vol. 94, No. 2, 2000, 331.

⁴⁶⁶ D. RADOSAVLJEVIC, “Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, 2011, 40.

208. Before making arguments for the transference of the Dutch variant into the Rome Statute, two preliminary observations have to be made. While diminished incapacity can be derived from the DCC, it is foremost developed by legal doctrine. Therefore, it will be necessary to implement the features that are provided in this doctrine. Secondly, as the diminished responsibility forms a mitigating factor when sentencing, implementing the Dutch system would probably be most effective when completely revising the insanity defence.

209. In a first step, the term “mental disease or defect” in article 31 (1) (a) would have to be replaced by the wording “defective development or mental defect disorder or mental disease”.⁴⁶⁷ This definition would not make an extensive attribution to the clearness of this concept. Hence, this has to be seen in the rationale that Dutch legislators wanted to give wide discretion towards the mental health sector. Article 39 DCC does not provide in a legal standard for insanity. According to legal doctrine however, it is established that at the time of the conduct, the person has to lack, as a result of a mental defect, disorder or disease, substantial capacity to appreciate the wrongfulness of his conduct or bring the conduct into conformity with the requirements of the law.⁴⁶⁸ Similar to the Rome Statute, it requires both a cognitive and volitional test, which would make the transference of such a definition rather simple. Hence, the biggest adjustment will be by substituting the words “destroys the persons capacity” by “lacks substantial capacity”. Replacing this wording would definitely broaden the scope of applicability and give defendants the opportunity to actually raise this defence, whether successful in the end or not.

210. To establish the responsibility of the defendant, The Dutch legal doctrine adopted a five grade scale, which makes it possible not only to differentiate between fully responsible and not responsible, but also between three grounds of diminished responsibility. The intensity of the particular mental condition will play a key factor. The transference of this grade system can potentially form an asset in international criminal proceedings as the degree of accountability not only relates to the mental capacity of the defendant but also enhances the influence and intensity of the role of this mental state on the criminal conduct. This makes it possible that when a less serious disturbance had a greater impact on the offenders conduct his accountability is far more diminished than a person who suffers from a more serious illness, which had lesser influence on the conduct.

⁴⁶⁷ Article 39 Dutch Criminal Code, 3 March 1881.

⁴⁶⁸ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 74.

Implementing a similar scale would certainly allow people to be held accountable for actions, which resemble the offender's real blameworthiness.

211. This analysis shows that, while maybe not the most ideal models for international crimes, comparative studies could lead to the clear recognition of a reduced mental capacity in the Statute of the Court within strict parameters. For example, relying on the English model, a partial diminished responsibility defence can be effectively introduced. On the other hand, a complete revision of the insanity defence based on the Dutch model would sufficiently increase the rights of the defendant who suffers from a particular mental condition.

2. Evidentiary complexities surrounding the validity and interpretation of psychiatric evidence and the required burden of proof

212. Alongside the inadequate wording of the affirmative defences in the Rome Statute, several evidentiary concerns can be noted, mainly regarding the difficulties characterising psychiatric evidence and the allocation of the burden of proof. The current absence of clearly defined legal standards, especially concerning the distribution of the burden of proof when a defence is raised, leads to uncertainty and can therefore endanger the rights of the defendant. The comparative analysis made in the previous part of this dissertation can help to find a suitable solution regarding this lack of precision.

213. It is undeniable that this defence involves a difficult relationship between the law and the mental health sector. While forensic psychiatrists play an important role in the two domestic systems, it is ultimately the judge or jury that will decide. However, as the primary objective of these witness experts is to explain behaviour, and where possible, justify it, it would be unreasonable in the interest of fair trial to deny the accused the opportunity to rely on all relevant and reliable evidence that may exclude his or her responsibility, including neuroscientific evidence. In some cases it can provide a new source of important evidence and it is firm to say that as scientific understanding increases, the role of neuroscience to inform and influence legal decision making will increase.⁴⁶⁹ Therefore, the Court should acknowledge this evolution.

214. The allocation of the burden of proof is an important feature to guard the principle of the presumption of innocence. In the English criminal law system the burden of proof when raising this defence is allocated on the accused. Furthermore, it enhances the “balance of probabilities” as the appropriate standard of proof.⁴⁷⁰ The ICTY already confirmed the leniency towards this system by applying the same approach in the ČELEBIĆI CAMP JUDGMENT. The Tribunal argued that diminished responsibility forms “a special defence that is apart from the general defences open to accused persons and is peculiar to the accused in the circumstances of a given case.

⁴⁶⁹ P. CATLEY and L. CLAYDON, “The use of neuroscientific evidence in the courtroom by those accused of criminal offenses in England and Wales”, *Journal of law and the Biosciences*, Vol. 2, No. 3, 2015, 544.

⁴⁷⁰ Law Commission, *Criminal Liability: Insanity and Automatism. A Discussion Paper*, 23 July 2013, 172 (available at: http://www.lawcom.gov.uk/wp-content/uploads/2015/06/insanity_discussion.pdf).

Accordingly, the facts relating to a special defence raised by the accused are those peculiarly within his knowledge and established by him".⁴⁷¹ Hence, by the current lack of jurisprudence of the ICC it remains unsettled if the Court will make the same interpretation and approach in its cases. According to RADOSAVLJEVIC this burden of proof is not *per se* in breach of the fair trial rights underlined in article 6 (2) of the ECHR.⁴⁷² However, regarding the same human rights standards this implies that a clear evidentiary burden should be set and the equality of arms between the rights of the defendant and the prosecution should be guaranteed at all times.⁴⁷³

215. It might be meaningful to distinguish between the burden of production and the burden of persuasion. When implementing the initial burden of going forward with evidence (the burden of production), in relation to the issue of lack of responsibility due to mental insanity, is placed on the defendant, it should require no more than raise reasonable doubt.⁴⁷⁴ Once the defendant has met this burden of proof it must be determined which party has to fulfil the burden of persuasion. ROBINSON argues in this context that giving the overwhelming pressure on international courts and tribunals to reach convictions, placing the persuasive burden on the accused should be avoided as it may imply an unspecified and discretionary presumption of guilt.⁴⁷⁵ Taken this into regard, the proper solution would probably be to lay the burden of persuasion in hands of the prosecution. While it can be stated that since it is in the accused's interest in excusing or mitigating his responsibility he or she is in the best position to justify this defence. Hence, placing the burden of proof on the defendant could mean additional obstacles to apply this defence successfully.

⁴⁷¹ ICTY Trial Chamber, Prosecutor v. Zejnil Delalić et al., Judgement, Case No. IT-96-21-T (16 November 1998), para. 1158.

⁴⁷² D. RADOSAVLJEVIC, "Scope and Limits of Psychiatric Evidence in International Criminal Law", *International Criminal Law Review*, Vol. 13, No. 5, 2013, 1017.

⁴⁷³ D. RADOSAVLJEVIC, "Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, No. 1, 2011, 41-42.

⁴⁷⁴ D. RADOSAVLJEVIC, "Scope and Limits of Psychiatric Evidence in International Criminal Law", *International Criminal Law Review*, Vol. 13, 2013, 1017; M. SCALIOTTI, "Defences before the international criminal court: Substantive grounds for excluding criminal responsibility – Part 1", *International Criminal Law Review*, Vol. 1, No. 1, 125.

⁴⁷⁵ D. ROBINSON, "The Identity Crisis of International Criminal Law", *Leiden Journal of International Law*, Vol. 21, No. 4, 2008, 929.

216. In the Dutch variant the prosecution carries the burden of proof, investigating both incriminating and exonerating circumstances.⁴⁷⁶ The judge can play an active role by ordering further investigations during trial and will eventually decide on this particular defence according to the “likelihood” of the circumstances.⁴⁷⁷ This resembles the content of article 54 (1) (a) and 67 (1) (i) of the Rome Statute. Bearing in mind that the Office of the Prosecutor forms an independent and separate organ of the Court, it may be assumed that it is its duty to investigate and present exculpatory evidence, even if this can lead to the partial or complete absolution of the defendant.⁴⁷⁸

⁴⁷⁶ P. J. P. TAK, *The Dutch criminal justice system*, The Netherlands, Wolf Legal Publishers, 2008, 105.

⁴⁷⁷ E. GRITTER, “The Netherlands” in A. REED, M. BOHLANDER, N. WAKE and E. SMITH (eds.), *General Defences in Criminal Law. Domestic and Comparative Perspectives*, New York, Routledge, 2016, 257.

⁴⁷⁸ Article 42 Rome Statute of the International Criminal Court.

3. Lack of disposition measures in the Rome Statute

217. The Rome Statute does not explicitly provide in the consequences of a successful plea of mental insanity or diminished responsibility. According to article 77 of the Statute, the Court does not provide in a “special verdict” that can lead to other penalties than imprisonment. This suggests that a person who raises one of these defences will either walk free or end up in jail, without any special treatment. It must be remarked that in the absence of a clear normative base setting out other potential measures in case of mental illness, such as involuntary commitment in a psychiatric hospital, the Court will probably not give a proper consideration of this defence despite their obligation to do so.⁴⁷⁹

218. Both the English and Dutch criminal system provide special measures in case it is proved that the offender suffered from a mental illness. This confirms the idea that classical punishment of imprisonment in this case is not the appropriated and adequate solution. While different in structure, both models can provide a solution to the shortcomings in the Rome Statute as they both, next to dangerousness of the offender, embrace rehabilitation as an important feature. However, as KRUG mentions, even if a normative base for an involuntary commitment would be implemented in the international system, they still have to cooperate with national systems and medical authorities.⁴⁸⁰ States play a key role in the enforcement of sentencing and should therefore all be equally invested to pursue this goal.

⁴⁷⁹ P. KRUG, “The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation”, *The American Journal of International Law*, Vol. 94, No. 2, 2000, 334.

⁴⁸⁰ *Ibid*, 354.

4. Preliminary conclusion

"Laws are not invented, they grow out of circumstances"

- AZARIAS

219. This quote perfectly describes the point we have reached in this inquiry. Although the ICC forms a hallmark of improvement for the ICL regime, the effectiveness of its rules, especially regarding mentally ill offenders, are at this moment uncertain. This is partly due to the fact that jurisprudence lags behind. While most domestic legal systems have faced and dealt with this issue, the international system seems likely only now to be challenged with affirmative defences.

220. The application of diminished responsibility as some form of defence in domestic legal systems establishes the fact that the full destruction of one's mental capacity is more a rarity. This means that if a diminished mental capacity cannot be used as an adequate defence before the Court, it is difficult to see how any form of defence, based on the mental capacity of the defendant, can be used in the future. Therefore, the Court should deal with this emergent issue and the difficult decisions that accompany them soon, rather than later. In order to do so, the ICC can rely on domestic legal regimes to explore which features or systems form the best fit regarding international crimes.

Conclusion

221. As most scholars confirm, there is probably no other feature of criminal law that is more controversial and subject to so much criticism than the defence based on the mental capacity of the offender. It often reflects the tense and sometimes problematic relationship between psychology, psychiatry, and in recent addition neuroscience, and the law. A legal defence based on a medical conception is often difficult to manage, as law practitioners and mental health professionals do not seem to speak the same language. Aside from this, there seems to exist a tendency to interpret affirmative defences as showing too much leniency towards the accused. This perception becomes even stronger when offenders of the most heinous crimes try to rely on such defences before an international criminal court or tribunal.

222. With the indictment against former child soldier Dominic Ongwen, currently standing trial at The Hague, a new kind of perpetrator, taking the form of both victim and perpetrator, has entered international criminal law proceedings. When investigating the psychology of those offenders, in order to administer an appropriate legal response, it appears that the existence of a mental deficit, which potentially prevents these individuals to control or understand the consequences of their actions, is not unconceivable. However, not reaching the high burdens of the insanity defence provided in the Rome Statute, this diminished mental capacity should be taken into account by the Court when establishing accountability of the defendant.

223. At this point, a specific diminished responsibility defence is absent in both the Statute and RPE of the Court. The analysis of case law of the different international tribunals does not establish more clarity in this regard and seems to consider a diminished mental capacity only as a mitigating factor when sentencing. When relying on the experience of domestic legal regimes, it is apparent that both systems provide in a regulation, however different in form and consequences, for offenders who suffer from a reduced mental capacity. To answer the research question if a diminished responsibility defence at this moment can be raised, potentially successful, before the International Criminal Court is doubtful and currently remains unsettled.

224. However, by examining the different provisions of the Court, examining the goals international criminal law aims to achieve and making a comparative analysis with domestic law, this dissertation will conclude by acknowledging that it would not be unreasonable to implement a specific diminished responsibility defence in the Rome Statute and the ICC RPE.

It would, at least, in no way be incompatible with the ICC objectives to punish war criminals, advocate for victims and avoid future violations. Indeed, a more comprehensive and interdisciplinary justice method that strives not only to establish accountability and end impunity but also promotes rehabilitation and reconciliation of offenders, while recognising the rights of the accused, would instead be welcomed and favoured in international criminal law proceedings. Notwithstanding the amount of evidentiary and procedural complexities that is associated with this defence, it is both morally and legally defensible to plea for an introduction of diminished responsibility as a defence mechanism in international criminal law when strict legal parameters are set.

Dutch Summary

Wat als een kind, op jonge leeftijd ontvoerd en gerekruteerd als kindsoldaat in één van de meest gewelddadige rebellenbewegingen ter wereld, één van de meest beruchte oorlogsmisdadigers wordt van de laatste eeuw? En wat als datzelfde kind, ondertussen een volwassen persoon, wordt vervolgd door het Internationaal Strafhof in Den Haag voor dezelfde misdaden waarvan hij tegelijkertijd het slachtoffer is?

De vervolging van voormalig kindsoldaat Dominic Ongwen doet momenteel heel wat stof opwaaien binnen de internationale gemeenschap en zet de ogen scherp gericht naar het Internationaal Strafhof. Voor de eerste keer zal een voormalig kindsoldaat verantwoording moeten afleggen voor een internationaal strafhof voor de misdaden die hij heeft begaan als volwassen lid van de rebellenbeweging die hem destijds inlijfde als kindsoldaat. Deze unieke situatie brengt heel wat interessante vragen met zich mee. Hoe zal het Internationaal Strafhof omgaan met dergelijke personen die zowel als dader en slachtoffer kunnen aanzien worden? Waar past zo'n persoon in het bestaande internationaalrechtelijk kader en kan zo iemand überhaupt strafrechtelijk verantwoordelijk worden gehouden voor de misdaden die hij heeft gepleegd? Het is duidelijk dat deze vragen niet enkel morele of ethische dilemma's met zich meebrengen, maar ook moeilijkheden van juridische aard.

De voor u liggende masterproef bestaat uit vier onderdelen en onderzoekt de mogelijkheid voor een verminderde strafrechtelijke verantwoordelijkheid voor individuen met een dubbele status, namelijk dat van slachtoffer en dader, in internationaal strafrechtelijke procedures. Een eerste onderdeel kaart de maatschappelijke relevantie van deze zoektocht aan. Alvorens met de eigenlijke analyse van start te gaan, worden enkele relevante principes en doelstellingen eigen aan het internationaal strafrecht nader toegelicht. Een duiding van begrippen zoals strafrechtelijke verantwoordelijkheid, het mentaal element en mogelijke verdedigingsmechanismen is noodzakelijk in de opbouw van de theoretische uiteenzetting die later volgt. Vervolgens wordt de zaak van Dominic Ongwen als pedagogisch hulpmiddel ingeschakeld om bepaalde moeilijkheden aan te kaarten en de maatschappelijke vraag naar antwoorden te illustreren. Verder beargumenteert dit onderdeel dat de psychosociale effecten, ten gevolge van het functioneren als kindsoldaat, significante gevolgen kan hebben voor de algemene en morele ontwikkeling van een individu.

Deze observatie is cruciaal in de these die volgt aangezien ze potentieel kan leiden tot de manifestatie van een psychologische stoornis die de controle over gedragingen aanzienlijk verminderd. Hieruitvolgend stellen we vast dat het aangewezen zou zijn voor een dader-slachtoffer om zijn verminderde mentale capaciteit in te roepen voor het Internationaal Strafhof, ter verdediging van de gepleegde misdaden. In een laatste hoofdstuk worden zowel de voordelen als de tegenkantingen en terughoudendheid vanuit de doctrine aangetoond ten opzichte van dergelijk verdedigingsmechanisme.

Het tweede onderdeel van deze verhandeling legt de nadruk op de huidige haalbaarheid van het inroepen van verminderde strafrechtelijke verantwoordelijkheid als mogelijke verdediging in het internationaal strafrecht. Een analyse van bestaande regelgeving en rechtspraak van internationale tribunalen kan mogelijks helderheid brengen en aantonen hoe eerder met dit concept is te werk gegaan. Verder biedt dit onderdeel een uiteenzetting van de behandeling van een verminderde mentale capaciteit tijdens de voorbereidende werken van het Statuut van Rome. Waar dit eerst werd voorzien als aanleiding tot strafvermindering, werd dit concept uiteindelijk achterwege gelaten tijdens de Conferentie van Rome. Tenslotte kaart dit onderdeel twee obstakels aan die het succesvol inroepen van een verdediging gebaseerd op een mentale stoornis kunnen tegenhouden. Enerzijds zijn er de moeilijke relatie tussen forensisch deskundigen en juristen en de onduidelijkheid inzake bewijslast. Anderzijds geldt op dit moment een grote onzekerheid over de uitkomst van een succesvolle verdediging. Het dringt zich op te concluderen dat de kans om een verminderde strafrechtelijke verantwoordelijkheid in te roepen binnen de bestaande regeling voorzien in het Statuut van Rome moeilijk wordt.

Echter, artikel 31 paragraaf 3 van het Statuut van Rome voorziet in de mogelijkheid om verdedigingsmechanismen in te roepen voor het International Strafhof die eigen zijn aan nationale rechtssystemen. Om de implicaties hiervan te onderzoeken, zal het derde deel van deze thesis een rechtsvergelijkende studie maken met Engeland en Nederland. Een grondige uiteenzetting van beide nationale systemen zal de benadering ten opzichte van individuen met een mentale stoornis in strafrechtelijke procedures duidelijk maken. Losstaand van het feit dat beide modellen verschillen in regelgeving en gevolgen bij het vaststellen van een verminderde mentale capaciteit, valt het op dat beide landen voorzien in een systeem waarbij hier rekening wordt mee gehouden.

In een vierde en laatste deel wordt een evaluatie *de lege ferenda* gemaakt. Op basis van de twee nationaal strafrechtelijke systemen zal naar potentiële oplossingen worden gezocht om de rechten van de verdediging zoveel mogelijk te waarborgen én antwoorden te voorzien op de obstakels die voorheen zijn aangekaart.

Samengevat kunnen we stellen dat deze masterproef de noodzaak aankaart voor een efficiënte en adequate regeling in internationaalrechtelijke strafprocedures met betrekking tot individuen die leiden aan een verminderde mentale capaciteit. Na het analyseren van de bestaande regelgeving, de verschillende doelstellingen die het internationaal strafrecht nastreeft en het maken van een rechtsvergelijkend onderzoek kunnen we vaststellen dat een verminderende strafrechtelijke verantwoordelijk *in se* niet haaks staat op de rechten van slachtoffers of op de doelstelling een einde te stellen aan straffeloosheid. Integendeel, wanneer een verminderde mentale capaciteit aanleiding kan geven tot een verdedigingsmechanisme binnen strikt vooropgestelde parameters zou dit de rechten van de verdediging aanscherpen en de huidige onzekerheid in internationale procedures wegwerken. Verder zorgt het voor een evolutie in de aandacht naar rehabilitatie en resocialisatie van de dader, doelstellingen die kenmerkend zijn voor heel wat nationale jurisdicties.

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