

SOME PSYCHOLOGICAL AND LAW FEATURES OF THE INSANITY DEFENCE IN WAR CRIMES TRIALS IN EUROPE

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In trials against war criminals, the defendants often plead not guilty by reason of insanity in an effort to avoid assuming responsibility for the charged acts. The paper discusses the history of the insanity defence and some factors that might explain why war crimes are committed. The authors concentrate primarily on the psychological elements of insanity and the reasons for extreme violence appearing at the individual level. Persons charged with war crimes often use post-traumatic stress disorder as the basis for an insanity defence. The authors also consider insanity from the perspective of international criminal law. By explicitly and precisely defining insanity, the Rome Statute moved away from the general provisions employed by the Nuremberg Tribunal, while at the same time making a clear distinction between insanity and incapacity for trial. Insanity may be a complete defence resulting in exclusion of the criminal act and exclusion of the offender's culpability.

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I. INTRODUCTION

According to Power¹, the 20th century saw more massacres in military conflicts than any previous century. What is more, the 20th century will allegedly be remembered as the period of history giving rise to a new form of aggression – genocide.² These kinds of claims might not be entirely true, however, as acts of extreme violence most likely have existed throughout history, but they have remained, compared to modern history standards, poorly or even not at all documented in chronicles. Today, genocide is defined as a series of acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. It can either signify killing the members of these groups or causing bodily and mental harm to them.³

Why and how could such destructiveness have developed in the human race? As argued by psychologist Ervin Staub⁴, the primary root of all human evil is the frustration of satisfying basic human needs and the development of destructive ways for satisfying these needs. Staub identifies extreme destructiveness as disproportionately (unexpectedly) intense destructiveness considering the prevailing social conditions prior to its outbreak. The frustration of satisfying basic human needs – such as the need for safety, a positive self-image and autonomy – will give rise to scapegoating, or the practice of blaming another group for the causes of dissatisfaction. There are many reasons why the frustration of satisfying basic human needs can develop, such as a lack of material goods, political turmoil and in-group conflicts, which may all lead to extreme violence.⁵ However, this is merely one hypothesis on the reasons leading to extreme violence. A much broader discussion is required to answer questions such as: “Why does extreme violence arise?”, “In what circumstances are those who commit war crimes responsible for their behaviour at the time the crime is committed?” and “How should war crimes be considered?” The paper seeks to provide some answers as to why war crimes are committed.

¹ Power, S., *A problem from hell, America and the age of genocide*, Harper Collins Perennial, New York, 2007.

² Dutton, D. G., Boyanowsky, E. O., Harris Bond, M., *Extreme mass homicide: From military massacre to genocide*, *Aggression and Violent Behavior*, Vol. 10, No. 4, 2005, pp. 10, 437 – 473.

³ Power, S., *op. cit.* (fn. 1).

⁴ Staub, E., *The roots of evil: social conditions, culture, personality and basic human needs*, *Personality and Social Psychology Review*, Vol. 3, No. 3, 1999, pp. 179 – 192.

⁵ *Ibid.*

Specifically, we focus on certain individual psychological and legal perspectives of raising the insanity defence in legal proceedings with respect to war crimes. In the first part, we discuss the issues of assuming responsibility for committed crimes and raising the insanity defence since insanity pleas are particularly common among defendants. In the second part of the paper, we conclude our deliberations by highlighting some legal aspects of insanity pleas in international criminal law.

II. THE INSANITY DEFENCE

Insanity – or rather madness, as it was called in the past – was a concept known as early as Ancient Greece. It was often understood and explained much like physical illnesses, which were thought to be the result of natural causes and the imbalance of four basic bodily substances.⁶ Ancient Romans pointed out that strong emotions may lead to physical and mental health problems. They treated madness as possible grounds for diminished responsibility with the mentally ill, but the defendant must first have been found to be ‘not of sound mind’ (*non compos mentis*).⁷ The Middle Ages saw a turnabout in progressive understanding of insanity. Until as late as the 13th century, Europe seemed to have forgotten that madness or insanity could be grounds for diminished responsibility. Worse still, an act of malice and the responsibility for it were deemed to be inseparable, with the defendant’s mental state bearing no importance on the judgment.⁸ Until around the 17th century, an act of malice was considered a punishable offence in Europe only when the accused admitted to it.⁹ For this reason, religious and secular authorities alike did their best to obtain, in true Machiavellian fashion, the confessions of the accused. The beginning of the Renaissance period spurred the development of a similar understanding of responsibility for criminal offences to that prevailing in Ancient Greece and Rome, but no exact criteria for evaluating insanity or madness existed until the 18th century. The prevailing opinion of the time was that the responsibility for the actions of mentally ill persons could be compared

⁶ Weinstein, R. M., *Madness*, in: G. Ritzer (ed.), *The Blackwell Encyclopedia of Sociology*, vol. VI, Blackwell Publishing, Malden, 2007, pp. 2693 – 2695.

⁷ Robinson, D. N., *An Intellectual History of Psychology*, 3rd edition, The University of Wisconsin Press, London, 1995.

⁸ Eigen, J. P., *Delusions’s odyssey: charting the course of Victorian forensic psychiatry*, *International Journal of Law and Psychiatry*, Vol. 27, No. 5, 2004, pp. 395 – 412.

⁹ Foucault, M., *Folie et déraison: Histoire de la folie à l’âge classique*, Librairie Plon, Paris, 1961.

to wild beasts, and these, of course, could not commit a criminal act because they did not have a human soul.¹⁰ One of the first trials with preserved documentation where the defendant was relieved of responsibility for a criminal act on the grounds of mental confusion or madness was held in the UK.¹¹ About two hundred years later, in the 18th century, the concept of minimal mental competency for defendants began to emerge and soon became the benchmark of a just and fair trial.¹² It was also during this era that changes to English and French legislation were introduced, encouraging greater tolerance towards and acceptance of defendants with mental or personality disorders.¹³ The first sanity tests were introduced soon afterwards and were conducted by non-legal experts.¹⁴ In current legal practice, insanity as a legal defence implies the discharge of responsibility for a committed crime. This can either be because a crime was committed by a person suffering from a mental disorder, limiting their capacity for sound judgment, or as a result of other excusable reasons, such as the inability to distinguish between right and wrong.¹⁵ Generally speaking, the insanity defence can only be raised for the period of time in which a criminal act was committed. This means that an assessment of whether the mental condition of the accused was significantly impaired or disturbed at the time the crime was committed has to be obtained retrospectively. Importantly, it should be remembered that there are two basic ways of defining insanity: as a legal concept or a psychological concept, with the latter treating it as a mental or personality disorder. A person can be diagnosed as mentally ill, but can still be held responsible for a committed criminal act if they were able to control their behaviour and distinguish between what is morally right and wrong.¹⁶

III. THE INSANITY DEFENCE IN WAR CRIME CASES

What are the most common reasons behind insanity pleas in war crime cases? If the prosecution presents solid evidence on committed war crimes,

¹⁰ Roesch, R., Ogloff, J. R. P., Golding, S. L., *Competence to stand trial: legal and clinical issues*, Applied and Preventative Psychology, Vol. 2, No. 1, 1993, pp. 45 – 51.

¹¹ Eigen, J. P., *op. cit.* (fn. 8).

¹² Roesch, R., Ogloff, J. R. P., Golding, S. L., *op. cit.* (fn. 10).

¹³ Scull, A. T., *Madhouses, Mad-doctors, and Madmen: The Social History of Psychiatry in the Victorian Era*, University of Pennsylvania Press, Philadelphia, 1981.

¹⁴ Howitt, D., *Introduction to forensic and criminal psychology*, Pearson Education, Harlow, 2009.

¹⁵ Davison, G. C., Neale, J. M., *Abnormal Psychology*, John Wiley & Sons, New York, 2001.

¹⁶ *Ibid.*

defendants often plead not guilty by reason of insanity or severely impaired judgment. A frequent diagnosis used in proceedings to corroborate impaired judgment is post-traumatic stress disorder (PTSD). The first attempts of defining PTSD date back to the 17th century, when it was described as a sort of nostalgia manifesting itself as behavioural and mental issues in soldiers.¹⁷ During World War I (1914-1918), a period which saw a swift rise in the development and use of new weapons of mass destruction and modes of combat, the term shell shock gained ground. Described as a form of war psychosis, it was said to result from concussions suffered during grenade explosions. Using combat trauma as an argument to reduce the sentence of offenders first appeared in criminal law and civil law following World War I. One of the first recorded insanity pleas for military veterans dates back to 1925, when the accused tried to avoid a child abuse sentence by attributing his behaviour to grenade shock suffered during the war.¹⁸ During the Vietnam War (1965-1973) and in the years that followed, American veterans appearing in court increasingly suffered from combat trauma and used this as defence in court proceedings, creating the need for a formal definition of PTSD. This finally happened in 1980 with the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III), published by the American Psychiatric Association. From the 1980s onwards, the number of cases in civil, criminal and military jurisprudence where the defendants included PTSD in their defence grew rapidly. However, it was later proven by experts that such defences were often unfounded.¹⁹ Modern warfare, as exemplified by the Iraq War (2003-2011) and the Afghanistan War (2003-), has brought new ways of fighting as a result of new technology, yet approximately 20% of soldiers continue to suffer from PTSD.²⁰ Previously, Baumeister and Campbell²¹ found that up to 30%

¹⁷ Miller, L., *Posttraumatic stress disorder and criminal violence: Basic concepts and clinical-forensic applications*, *Aggression and Violent Behavior*, Vol. 17, No. 4, 2012, pp. 354 – 364.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Holbrook, J., *Veterans' courts and criminal responsibility: A problem-solving history and approach to the liminality of combat trauma*, in: D. C. Kelly, S. Howe-Barksdale, D. Gitelson (eds.), *Treating young veterans: Promoting resilience through practice and advocacy*, Springer, New York, 2011, pp. 259 – 300.

²¹ Baumeister, R. F., Campbell, W. K., *The intrinsic appeal of evil: Sadism, sensational thrills, and threatened egotism*, *Personality and Social Psychology Review*, Vol. 3, No. 3, 1999, pp. 210 – 221.

of soldiers suffered from PTSD and that the condition was mainly caused by their own violent behaviour. Since PTSD accompanies all military conflicts, members of the armed forces continue to use it in an attempt to mitigate their sentence.²² Symptoms of PTSD include, among soldiers and veterans alike, episodes of irritability, impulsivity and insomnia. In order to alleviate these symptoms, sufferers turn to substance abuse (most often alcohol abuse), only to aggravate their condition. The risk of committing war crimes increases when members of the armed forces display symptoms such as:²³

- impulsivity (the tendency to react in a reckless, uncontrolled manner accompanied by low frustration tolerance),
- predominantly negative emotional states (e.g. anxiety, depression, suspicion, anger and hostility, all leading to excessive responses to mild provocation),
- antisocial behaviour (perpetrators would frequently see themselves as noble warriors in a hostile environment who are entitled to privileges such as money, status and women due to their role),
- psychoactive substance abuse (lowering the inhibition of antisocial behaviour).

It is only reasonable to expect that the described emotional responses, behavioural patterns and perception of reality increase the probability of outbursts of extreme violence. However, it must be stressed that PTSD assessment of persons allegedly suffering from this disorder is by no means easy, as most symptoms can easily be feigned.²⁴

At the individual level, causes for extreme violence can be traced not only to PTSD. For example, Fromm described sadism as the conversion of impotence into the experience of omnipotence, placing at its core the desire for complete and unrestricted control over another person.²⁵ Control is manifested by inflicting pain and humiliation on others, with the victim being unable to defend him or herself. According to Fromm, the sense of omnipotence is

²² Miller, L., *op. cit.* (fn. 17).

²³ Andrews, D. A., Bonta, J., *Rehabilitating criminal justice policy and practice*, Psychology, Public Policy, and Law, Vol. 16, No. 1, 2010, pp. 39 – 55.

²⁴ Sweet, J. J., *Posttraumatic stress disorder and neuropsychological malingering: A complicated scenario*, in: J. E. Morgan, J. J. Sweet (eds.), *Neuropsychology of malingering casebook*, Psychology Press, New York, 2009, pp. 155 – 169.

²⁵ Fromm, E., *The anatomy of human destructiveness*, Holt Paperbacks, New York, 1973/1992.

created by the ability to create the illusion of transcending the restrictions of human existence, particularly in those frustrated by their own inefficiency and those unhappy with their lives. With this interpretation of extreme violence, it is hard to avoid drawing parallels with the previously mentioned emotional responses of persons suffering from PTSD, particularly when we consider that at the core of both states lies an intense sense of anxiety at being trapped by the limits of one's own existence. Other psychodynamic authors such as Freud argued that deviant leaders who find themselves in the role of those creating extreme violence are able to emotionally detach themselves completely from everyone except themselves, being able to commit crimes without experiencing guilt and inducing similar behaviour in their followers.²⁶

Interestingly, there appear to be a number of similarities between war criminals and serial killers or serial sexual abusers. A high percentage of war criminals were victims of child sexual abuse, as with serial killers and sexual abusers.²⁷ Further, they all share predominantly stereotypical convictions about their victims. Serial rapists might often view women as whores and seek their victims among prostitutes.²⁸ Strong similarities have also been established between civilian and military war crimes when considering them from the perspective of the FBI's crime scene analysis. Here, serial offenders are divided into two theoretical groups: organized and disorganized offenders. Organized offenders are psychopathic personalities devoid of empathy, while disorganized offenders are psychotic personalities who might position the bodies to suit their preferences or insert objects into the victim's vagina. This distinction has also been established by war crime investigators.²⁹ However, caution is needed when war criminals are compared with serial offenders, as the circumstances are not the same in these criminal offences. Serial offenders with a sadistic or antisocial personality disorder commit crimes independently, while war criminals often follow orders and transfer the blame for their actions to their superiors. Moreover, war crimes are frequently committed by persons who display no signs of psychosis prior to the armed conflict; on the contrary, they might

²⁶ Freud, S., *Group psychology and the analysis of the ego*, International Psychoanalytic Press, London, 1922.

²⁷ Ressler, R. K., Burgess, A. W., Douglas, J. E., Hartman, C. R., D'Agostino, R. B., *Sexual killers and their victims: Identifying patterns through crime scene analysis*, *Journal of Interpersonal Violence*, Vol. 1, No. 3, 1986, pp. 288 – 308.

²⁸ Marshall, W. L., Kennedy, P., *Sexual sadism in sexual offenders: An elusive diagnosis*, *Aggression and Violent Behaviour*, Vol. 8, No. 1, 2003, pp. 1 – 22.

²⁹ Dutton, D. G., Boyanowsky, E. O., Harris-Bond, M., *op. cit.* (fn. 2).

typically be disciplined and normal persons, both privately and in the armed forces, returning to their initial normality once the conflict has been resolved.³⁰

We will now look at social psychology, where examples of deviant behaviour are explained by how social context influences human behaviour. One of the most renowned researchers of human aggression and violence, Philip Zimbardo, describes deindividuated aggression where arousal and anomie merge into aggressive behaviour, bringing the aggressor pleasure with a self-reinforcing effect. Without restrictions, violence is quick to escalate both in intensity and frequency. With the suppression of the common violence inhibitors, aggressive behaviour experience turns into gratification.³¹ In military combat, the disappearance of normative aggression inhibitors is quite evident, but a lack of such inhibitors is not all that generates violence. In fact, armed conflicts themselves spontaneously motivate the emergence and development of new social norms that justify and even encourage violence.³² Several previous psychological studies have shown that atrocious crimes can be committed by persons otherwise perceived as normal. Famously, the populist Milgram experiment on obedience – today deemed a methodological disaster – is one such example. Nevertheless, the latest research evidence has confirmed some of Milgram's hypotheses and it seems that, for many war criminals, predisposing factors for developing aggression later on cannot be determined.³³ As has already been mentioned, the importance of environment was emphasized by Zimbardo and his Stanford prison experiment, which revealed that, in some people, contagious situations induce extreme deviance. In this experiment in a mock prison, a third of the guards became verbally abusive and employed physical punishment against the prisoners, although both groups were university peers just a few days earlier.³⁴ It seems that the reasons behind war crimes lie in the fact that people find themselves in unusual, extreme circumstances

³⁰ Lifton, R. J., *Home from the war – neither victims nor executioners*, Simon and Schuster, New York, 1973.

³¹ Zimbardo, P. G., *The human choice: Individuation, reason, and order versus deindividuation, impulse, and chaos*, in: W. Arnold, B. D. Levine (eds.), *Nebraska symposium on Motivation*, University of Nebraska Press, Lincoln, 1969, pp. 237 – 307.

³² Dutton, D. G., Boyanowsky, E. O., Harris Bond, M., *op. cit.* (fn. 2).

³³ Waller, J., *Becoming evil: How ordinary people commit genocide and mass killing*, 2nd edition, Oxford University Press, New York, 2007.

³⁴ Haney, C., Banks, W. C., Zimbardo, P. G., *Interpersonal dynamics in a simulated prison*, *International Journal of Criminology and Penology*, Vol. 1, No. 1, 1973, pp. 69 – 97.

and are given the opportunity to establish a master-slave relationship.³⁵ Apparently, some people can resist the temptation of taking advantage of anomic conditions, so how much do personality differences between those involved in armed conflict really contribute towards war crimes? Toch³⁶ has found that, among violent males, an estimated 6% took pleasure in hurting others. Analogously, Groth³⁷ revealed that 5% of rapists enjoyed inflicting pain on their victims. Moreover, a normal population has an estimated 1.2% of psychopathic personality cases³⁸, which is less than was demonstrated by Toch and Groth, but nevertheless clearly shows that a certain percentage of the male population has personality risk factors for the outbreak of extreme violence episodes such as war crimes. Still, war conditions differ greatly from non-conflict conditions in which violent sexual offences are committed. In war conditions, we can expect to see a rise in the number of persons capable of committing extreme acts of violence, probably due to a reduced sense of responsibility and guilt.³⁹ It seems that we are no closer to answering the question of what triggers such extreme acts of violence such as war crimes at the individual level. Personality analyses of Nazi leaders and officers charged with crimes against humanity at the Nuremberg trials following World War II revealed that, for example, there were no personality predictors helping to indicate behaviour in relation with the Holocaust and other war crimes.⁴⁰ It seems that the way we experience and interpret unusual conditions influences our behaviour to such a degree that it might elicit unexpected reactions. Yet this does not mean that all people react unexpectedly in war conditions and that the system of morals and values is bound to collapse. Not all those who engage in warfare are war criminals; on the contrary, most military staff never commit a war crime. This was a brief discussion on insanity and war crimes from the psychological perspective. We

³⁵ *Ibid.*

³⁶ Toch, H., *Violent men: An inquiry into the psychology of violence*, American Psychological Association, Washington, 1969/1993.

³⁷ Groth, A. N., *Men who rape: The psychology of the offender*, Basic Books, New York, 1979.

³⁸ Neumann, C. S., Hare, R. D., *Psychopathic traits in a large community sample: Links to violence, alcohol use, and intelligence*, *Journal of Consulting and Clinical Psychology*, Vol. 76, No. 5, 2008, pp. 893 – 899.

³⁹ Dutton, D. G., Boyanowsky, E. O., Harris-Bond, M., *op. cit.* (fn. 2).

⁴⁰ Suedfeld, P., *Reverberations of the Holocaust fifty years later: Psychology's contributions to understanding persecution and genocide*, *Canadian Psychology*, Vol. 41, No. 1, 2000, pp. 1 – 9.

will now turn to the legal perspective, which, quite often, has to resolve different issues.

IV. INSANITY IN INTERNATIONAL CRIMINAL LAW

From the criminal law perspective, insanity is a state of mental malfunctioning in an offender who commits an act with all signs of a crime, sufficient to relieve them of legal responsibility for the act committed. Despite the many definitions of insanity in criminal jurisdictions in different countries, most insanity definitions in criminal law are centred on two causally related elements: the biological element and the psychological element.⁴¹ Typically, the biological element is defined as a mental abnormality, and the psychological element as either the inability of a person to understand the wrongfulness of their act or as the inability to control their conduct. Here, insanity is interpreted according to the Rome Statute of the International Criminal Court (Rome Statute), the Charter of the International Military Tribunal (Nuremberg Charter) and the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY).

In international criminal law, insanity is considered as a complete defence for persons found to be insane. While civil law systems distinguish between justifications and excuses, common law systems focus on defences. The Rome Statute, which serves as the basis for the decisions of the first permanent International Criminal Court (ICC), introduced the first ever comprehensive codification of justifications and excuses. Adopted in 1998 in Rome, the Statute entered into force after achieving 60 ratifications in 2002 and currently has over 120 signatories. In Article 31, the Rome Statute provides grounds for excluding criminal responsibility, one of them being insanity.⁴² In previous statutes, the issue of insanity was not specifically addressed; for example, the Nuremberg Charter does not even mention it. This was a document that entered into force with the establishment of the Nuremberg Tribunal in 1945, serving as the basis for trial and punishment of Nazi leaders who committed war crimes during World War II. The Nuremberg Charter was followed by the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY)

⁴¹ Schönke, A., Schröder, H., *Strafgesetzbuch, Kommentar*, C.H. Beck, München, 2010.

⁴² International Criminal Court, *Rome Statute of the International Criminal Court*, 1998. Retrieved from http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

from 1993 which already contains a general legal basis for insanity pleas.⁴³ This is clearly evident from the UN Secretary-General's report which states that the ICTY itself decides on the use of justifications and excuses defences, thereby possibly relieving a person of individual criminal responsibility. Such defences could be minimum age or mental incapacity, according to the general principles recognized by all nations.⁴⁴ Further, insanity is mentioned in the ICTY Rules of Procedure and Evidence in connection with a possible medical, psychological or psychiatric check-up of the defendant⁴⁵ and in connection with the defendant's obligation to give notice of any special defence they are raising, including that of diminished mental responsibility or lack thereof.⁴⁶

V. INSANITY AND INCAPACITY FOR TRIAL

From the legal perspective, both insanity and incapacity for trial suggest the existence of mental abnormality causing the offender to lack conscious awareness of the act committed and/or the inability to control their conduct. Insanity is relevant at the moment the crime was committed and allows a complete defence, while incapacity for trial becomes relevant later, at the time the defendant is being tried in a court of law. If a defendant is found incompetent to stand trial, the proceedings are suspended or terminated while the offence charged remains valid.

In the Nuremberg trials against Nazi war criminals, pleading insanity at the time the offence was committed and pleading incapacity for trial were, as a rule, employed simultaneously.⁴⁷ In fact, defendants often used the insanity

⁴³ Knoop, G. J., *Defences in Contemporary International Criminal Law*, Martinus Nijhoff Publishers, Leiden, 2008; Secretary General, *Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*. Retrieved from http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf; Sparr, L. F., *Personality Disorders and Criminal Law: An International Perspective*, Journal of American Academy of Psychiatry and the Law, Vol. 37, 2009, pp. 168 – 181.

⁴⁴ Secretary General, *op. cit.* (fn. 43).

⁴⁵ Krug, P., *The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation*, American Journal of International Law, Vol. 94, No. 2, 2000, pp. 317 – 335.

⁴⁶ International Tribunal for Former Yugoslavia, *Rules on procedure and evidence*, 1993. Retrieved from http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf.

⁴⁷ Weiner, P. L., *Fitness Hearings in War Crimes Cases: From Nuremberg to The Hague*, Boston college international and comparative law review, Vol. 30, No. 1, 2007, pp. 185 – 198.

defence in an attempt to have the proceedings against them terminated due to their incompetency to stand trial.⁴⁸ The legal practice of the Nuremberg Tribunal reveals that the judges mainly focused on the defendants' competence to stand trial.⁴⁹ However, the judgements of the Nuremberg Tribunal and other military tribunals established in the aftermath of World War II reveal some perspectives and examples on how the issue of insanity was approached. For example, the *Streicher*⁵⁰ trial raised the issue of the defendant's intelligence. Prior to the trial, Streicher scored 106 on an IQ test, the lowest score of all the defendants but still high enough that he should have been aware of the wrongfulness of his actions.⁵¹ Therefore, the insanity defence was unsuccessful and the defendant was subsequently found guilty and executed.

In the *Milch*⁵² case, the defence claimed that the reason for the crimes committed was in the defendant's violent temper and the fact that he was overworked and, therefore, was not wholly responsible for all his utterances.⁵³ Moreover, the defence argued that the accused gave orders in fits of uncontrolled anger and was not expecting his associates and subordinates to actually carry them out. Allegedly, the fits of uncontrollable anger were the result of head injuries that the accused had suffered in two serious accidents.⁵⁴ The Tribunal found the defendant guilty on this count. The judge expressed his opinion that the offences were made persistently, over a long period of time. Had the defendant made only a few violent statements and orders, the explanation

⁴⁸ Chesnut, P. F., *Certificate of service on defendant Gustav Krupp Von Bohlen*, 1945. Retrieved from <http://avalon.law.yale.edu/imt/v1-07.asp>; International Military Tribunal (Nuremberg), *Judgment of 1 October 1946*, 1946. Retrieved from http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

⁴⁹ Lawrence, G., *Order of the Tribunal Rejecting the Motion on Behalf of Defendant Hess, and Designating a Commission to Examine Defendant Hess with Reference to his Mental Competence and Capacity to Stand Trial*, 1945. Retrieved from <http://avalon.law.yale.edu/imt/v1-27.asp>.

⁵⁰ Julius Streicher was an important element of the Nazi anti-Semitic propaganda machine.

⁵¹ The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals: the Trial of Peter Back*, 1948. Retrieved from http://www.loc.gov/frd/Military_Law/pdf/Law-Reports_Vol-3.pdf.

⁵² Erhard Milch was one of the key figures in the development of the Nazi aerial warfare.

⁵³ Appleman, J. A., *Military Tribunals and International Crimes*, Bobs-Merrill Company Inc. Publishers, Indianapolis, 1954.

⁵⁴ *Ibid.*

offered by the defence might have had some bearing. Nevertheless, since the statements were made over a long period of time, at various places and under varying conditions, the Tribunal concluded that they reflected the true defendant's attitude toward the Nazi foreign labour policy and its victims.⁵⁵ In passing a sentence, the insanity plea was therefore not accepted.⁵⁶

In contrast, the *Krupp*⁵⁷ case was a typical example of using the incapacity for trial defence. At the time of the trial, the defendant was 75 years old, had health issues, was unable to communicate and had completely lost the ability to understand what was going on around him.⁵⁸ The defence called experts who testified that the defendant was unfit to stand trial. To this, the prosecution pleaded that the defendant be tried *in absentia* or that the defendant be substituted with his son, Alfried.⁵⁹ The tribunal granted the defence motion, terminated the proceedings against Gustav Krupp and dismissed the substitution of Alfried for Gustav Krupp.⁶⁰

Also of interest is the *Hess* case. Here, the defendant claimed that he was unfit to stand trial, therefore the tribunal appointed a panel of experts to determine whether Rudolf Hess was, in fact, competent to stand trial.⁶¹ Their assessment spanned the defendant's entire life during World War II, including the period when he was detained in England and had supposedly begun to suffer from amnesia.⁶² The experts could not agree on whether Hess was simulating loss of memory, but their prevailing opinion was that he showed dissociative disorder symptoms, psychopathy symptoms and had suffered par-

⁵⁵ The United Nations War Crimes Commission, *op. cit.* (fn. 51).

⁵⁶ Scaliotti, M., *Defences before the International Criminal Law, Substantive Grounds for Excluding Criminal Responsibility, Part 2*, International Criminal Law Review, Vol. 2, No. 1, 2002, pp. 1 – 46.

⁵⁷ Gustav Krupp was an influential German industrialist charged with committing crimes against humanity for mistreating concentration camp inmates as forced labour.

⁵⁸ Chesnut, *op. cit.* (fn. 48); Tunbridge, R. E., Piedelievre, R., Kurshakov, N., Sepp, E., Krasnushkin, E., *Report of Medical Commission Appointed to Examine Defendant Gustav Krupp Von Bohlen*, 1945. Retrieved from <http://avalon.law.yale.edu/imt/v1-10.asp>.

⁵⁹ Jackson, R. H., *Answer of the United States prosecution to the motion on behalf of defendant Gustav Krupp Von Bohlen*, 1945. Retrieved from <http://avalon.law.yale.edu/imt/v1-11.asp>.

⁶⁰ Weiner, P. L., *op. cit.* (fn. 47).

⁶¹ Lawrence, G., *op. cit.* (fn. 49).

⁶² International Military Tribunal, *op. cit.* (fn. 48); Weiner, P. L., *op. cit.* (fn. 47).

tial amnesia, but was still competent to stand trial.⁶³ The tribunal found that the defendant indeed acted abnormally, suffered from loss of memory and had mentally deteriorated during the trial, but none of this meant that he did not realize the nature of the charges against him or that he was incapable of defending himself. Moreover, the tribunal concluded that there were no facts substantiating the claim that the defendant was not sane when the acts he was charged with were committed.⁶⁴

Unlike the Nuremberg Charter, the ICTY Statute and legal practice and the Rome Statute are more consistent in defining mental abnormality at the time a crime was committed. In these statutes, the biological condition serving as the basis for the insanity plea is defined in more detail. While the Nuremberg Tribunal at first defined the biological condition in a general manner as insanity influencing the defendant's behaviour in a certain way⁶⁵, it later (1948) made the definition more specific, for example in the *Gerbsch*⁶⁶ case. From then on, the biological condition of insanity signified that the mental faculties in the accused were defective and undeveloped.⁶⁷ As has previously been mentioned, Item A in the first paragraph of Article 31 of the Rome Statute provides that a person is not criminally responsible if they suffer from a mental disease or defect at the time the criminal act was committed, thereby rendering them incapable of appreciating the unlawfulness or nature of their conduct, or if they are incapable of controlling their conduct to conform to the requirements of law. This is, therefore, a more comprehensive definition of the biological condition of insanity, specified in the Rome Statute as mental disease or defect at the time the crime was committed. Moreover, the Rome Statute adds the psychological condition for the insanity defence, identifying its two components:⁶⁸

⁶³ Rees, J., *British Medical Report in Hess case*, 1945. Retrieved from http://avalon.law.yale.edu/imt/chap_04.asp.

⁶⁴ International Military Tribunal, *op. cit.* (fn. 48).

⁶⁵ Weiner, P. L., *op. cit.* (fn. 47).

⁶⁶ In 1948, Wilhelm Gerbsch was found guilty by the Court in Amsterdam of committing ill treatment against Dutch prisoners in the German penal camp Zoeschen where he was a guard.

⁶⁷ Scaliotti, M., *op. cit.* (fn. 56); The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals: the Trial of Erhard Milch*, 1949. Retrieved from http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-7.pdf.

⁶⁸ Bassiouni, C., *The legislative history of the ICC: An article by article evolution of the statute*, Transnational Publishers, New York, 2005.

- awareness: the defendant is incapable of appreciating the unlawfulness or nature of their conduct;
- volition: the defendant does not have the capacity to control their conduct to conform to the requirements of law.

The offender's ability to appreciate or control his or her conduct must be completely absent or destroyed.⁶⁹ In addition, according to the Rome Statute, a causality must exist between the biological and the psychological elements. The ICTY formulated the biological condition through its legal practice, in two general designations. In the *Čelebići* case, the biological condition was defined as a defect of reason or disease of the mind.⁷⁰ At the same time, the ICTY used the insanity definition from the Rome Statute, relating it primarily to the psychological element or condition awareness.⁷¹

VI. CONCLUSION

It seems that the Rome Statute, unlike some previous statutes, succeeds in formulating provisions which can be used by the ICC in practice and are potentially effective. Previously, international criminal courts had a general legal basis for applying the insanity defence or they employed it in legal practice for specific cases. The Rome Statute explicitly regulates the issue of insanity, making a clear distinction between insanity and incapacity for trial. In this, it differs essentially from the Nuremberg Charter and the Nuremberg Tribunal legal practice, coming close to and even upgrading the ICTY Statute. By explicitly defining insanity elements, it corresponds with the legal practice of the Nuremberg Tribunal and the ICTY in content, but it is formally more clearly delineated from its predecessors in that it does not leave these issues up to the legal practice of international courts, but rather defines insanity elements along the known biological-psychological paradigm. As far as the effects of insanity are concerned, the Rome Statute provisions do not essentially differ from similar statutes and legal practice of international criminal law. Insanity

⁶⁹ Knoops, G. J., *op. cit.* (fn. 43).

⁷⁰ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *Prosecutor v. Zejnil Delalić, Zdravko Mučić, Hazim Delić, Esad Landžo, IT-96-21-Abis, judgment on sentence appeal*, 2003. Retrieved from www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf.

⁷¹ Knoops, G. J., *op. cit.* (fn. 43).

is therefore considered a complete defence resulting in exclusion of the criminal act and, more specifically, exclusion of the offender's culpability.

In its regulation of the insanity issue, the Rome Statute is a compromise between the common law and the civil law systems, making it unproblematic from the legal perspective. However, there is a need for standardizing psychological diagnostics serving as the basis for establishing the biological condition of insanity, as this would facilitate work at the international level and ensure the principle of equality. Unfortunately, a complete unification of diagnostics is not possible due to different existing diagnostic criteria, such as Diagnostic and Statistical Manual of Mental Disorders (DSM – IV) and International Statistical Classification of Diseases and Related Health Problems (ICD – 11), which fail to conform sufficiently in order to satisfy lawyers. A further problem is posed by the fact that defendants often fake the symptoms of insanity in an attempt to avoid punishment, and there is also the difficulty of establishing the defendant's mental health retrospectively. Sometimes the offence charged was committed several years prior to the court proceedings, making it easier to manipulate the truth.

Sažetak

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NEKE PSIHOLOŠKE I PRAVNE KARAKTERISTIKE
KORIŠTENJA NEUBROJIVOSTI U OBRANI NA SUĐENJIMA
ZA RATNE ZLOČINE U EUROPI

Na suđenjima ratnim zločincima optuženici su se često izjašnjavali da nisu krivi zbog neubrojivosti u nastojanju da izbjegnu preuzimanje odgovornosti za kaznena djela za koja su optuženi. Rad razmatra povijest korištenja neubrojivosti za obranu i neke čimbenike koji bi mogli objasniti zašto su neki ratni zločini počinjeni. Autori se usredotočuju prvenstveno na psihološke elemente neubrojivosti i razloge za ekstremno nasilje, koje se pojavljuje na individualnoj razini. Osobe koje se terete za ratne zločine često koriste posttraumatski stresni poremećaj kao osnovu za korištenje neubrojivosti u obrani. Autori također razmatraju neubrojivost iz perspektive međunarodnog kaznenog prava. Rimski statut se sa izričitim i preciznim definiranjem neubrojivosti odmaknuo od općih odredaba, upotrijebljenih na Nürnberškom sudu, u isto vrijeme čineći jasnu razliku između neubrojivosti i nesposobnosti za suđenje. Neubrojivost može činiti cjelovitu obranu, koja rezultira isključenjem kaznenog djela i isključenjem krivnje počinitelja.

Ključne riječi: ratni zločin, neubrojivost, međunarodno kazneno pravo

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