Towards a Scientific Standard for the Admissibility and Evaluation of Psychiatric Evidence in War Crimes Prosecutions

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I. Introduction

The historical emergence of international criminal law over the past century has been driven largely by tragedy. ² Few people will ever forget the compelling human suffering brought about by war and internal ethnic conflict in the former Yugoslavia and Rwanda during the 1990s. As a result of this tragedy, the Security Council³ established the International Tribunal for the former Yugoslavia (ICTY) in order to prosecute war crimes committed during the breakup of Yugoslavia.⁴ Although this was not the first war crimes prosecution in the history of mankind, the development of norms for the ordering of violence has been primarily reactive.⁵ Trials, like those occurring at the ICTY, take place in an evolving social and political context. There is indeed a clear recognition of the need to comply with the due process rights of defendants and to take a greater account of the interests of victims. Therefore, the development of norms requires some consensus on the existence of values of the international community to be effective.⁶ This becomes even more salient when discussing the procedures with which ad hoc tribunals such as the ICTY and the International Criminal Tribunal for Rwanda (ICTR) handle psychiatric defenses and evidentiary procedures.

² See Simon Chesterman, Never Again . . . And Again: Law, Order, and The Gender of War Crimes in Bosnia and Beyond, 22 Yale J. Int’l L. 299, 300.
³ According to the U.N. Charter, the United Nations Security Council has the primary responsibility for the maintenance of international peace and security. See U.N. Charter art. 24, para. 1.
⁵ See CHESTERMAN, supra note 1.
At this embryonic stage of consistent and aggressive international war crimes prosecutions, there are many substantive and procedural questions about defenses and evidence that remain unresolved. One area in particular, psychiatric evidence, is still evolving within the legal framework of war crimes prosecutions. Psychiatric evidence involves many issues concerning the legal infrastructure of establishing a *mens rea* defense: the role of mental health professionals in the gathering and evaluation of evidence; the acceptable procedural standards for admitting and evaluating the evidence; the standard of proof for determining insanity and diminished capacity; and a normative and procedural structure for the medical disposition of defendants suffering from mental disease or disorder. These issues remain largely unexplored in the context of international prosecutions.

The concept of mental disease and disorder, which is so fundamental to psychiatric practice, has several important implications in international war crimes prosecutions. The subject area of defenses is extremely unsettled despite the recognition of separate mental defenses. Lawmakers and jurists have been ambivalent about formulating separate mental defenses, and even among those favoring such a step, there are many disagreements over the defenses to be recognized and on their specific elements.

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8 *Id.* at 319. Adding to the available defenses is a principle borrowed from municipal legal systems: the “mental incapacity” of the accused at the time the acts in question were committed. This principle, formulated as an excuse and not as indicative of a lack of *mens rea* required for criminality, is codified in Article 31(1)(a) of the ICC Statute and also found in the procedural codes--the Rules of Procedure and Evidence (RPE)--of the ICTY and ICTR. It was applied in November, 1998, in the ICTY’s *Celebici Camp* judgement, in which the Trial Chamber defined “diminished responsibility,” a concept borrowed from the criminal law of England and Wales. *See id.* at 318-319.

9 The result has been development of an “unstructured conglomerate” of traditional defenses “assembled from different legal traditions.” *See Albin Eser, “Defences” in War Crime Trials, in War Crimes in International Law* 251, 273 (Yoram Dinstein & Mala Tabory eds., 1996).
Disagreements were apparent, for example, during the process of drafting the ICC statute’s provision on the mental incapacity defense because of the substantive differences as defined by different municipal legal systems. As a result, the use of the defense in international courts might indeed restrain on a court’s norm-creating authority in using general principles of law as a source for international law.

More importantly, incorporating psychiatric methodologies and diagnostic categories into the framework of international criminal courts presents new substantive, procedural, and evidentiary issues. Overlapping of legal and psychiatric issues, coupled with the complexity of presenting and understanding psychiatric-based defenses, has already made this area extremely controversial in domestic legal systems. This same controversy already exists within the confines international human rights law and the negative public perception of psychiatric testimony and defenses could have implications for the credibility of a still developing area of law and the credibility of international prosecutions.

Mental defenses and psychiatric evidence present a multifaceted challenge to the system of international prosecution. The international courts’ and tribunals’ development of substantive law in this area, especially on questions of defining the nature and parameters of psychiatric defenses will take time. But some related questions concerning

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10 See Krug, supra note 7 at 319. See also THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 416, 491 (M. Cherif Bassiouni ed., 1998). Two different formulations of the defense were among the proposed provisions compiled by the Preparatory Committee on the Establishment of an International Criminal Court in 1996. See id. at 491. The defense in its final wording was placed in the consolidated draft statute at the December 1997 meeting of the Preparatory Committee. See id. at 419.
11 See Krug, supra note 7 at 319 & n. 15.
12 Id.
13 Id.
14 Id.
procedure and the consequences of a successful defense are more immediate. Thus, the importance of understanding the interaction between law and psychiatry exceeds merely a localized or regional issue. It is the eventual consensus and harmonization of procedures dealing with mental disease and illness that will demonstrate the war crimes tribunals’ and the International Criminal Court’s (ICC) legitimacy and leadership in this important area of human rights law.

This article will explore the nature and use of psychiatric/psychological defenses and evidence in war crimes prosecutions. It will focus on several aspects of these defenses and evidence including attacking eyewitness testimony (e.g., perception biases), group judgments and decision making (e.g., heuristics and biases), and insanity/diminished capacity. The paper will argue that the current war crimes tribunals and ICC lack sufficient standards necessary for a defendant to meet the burden of proof necessary to put forth these types of defenses. Also, these lack of standards fail to give justices the necessary criteria by which to evaluate this scientific evidence and determine if it will assist them in rendering judgment.

Part II involves a discussion of the development of psychiatry as a medical science in the western world. Psychiatry has come to encompass a wide spectrum of human mental, instinctual, and behavioral experience. This discussion will focus on several aspects of psychiatric/psychological evidence and theories used in criminal defenses. This will include a discussion of the theoretical foundations of psychiatry, including recent developments, especially in neuroscience; detailing how these concepts are incorporated into the law of several countries. The purpose is to provide a skeletal framework and
understanding of psychiatry and its application in law. This empirical approach will help to formulate which of the different theories in the law capture the meaning rationality and legal responsibility. Part II will further examine the differing goals and overlapping concerns between psychiatry and the law. In the international criminal legal context, the discussion will center on the types of psychiatric evidence and defenses that have been used or are likely to be used in war crimes prosecutions.

This part will culminate in a discussion of how these disciplines have participated in the enduring dialogue and ability of the law to achieve its policy objectives in various countries. At some point, it is necessary to acknowledge and grapple with the difficulty of integrating this body of information across professional disciplines into the realm of law and legal systems. The application of psychiatry and the simultaneous appreciation of the sociological context of a patient’s illness are needed to build that broad base.

Part III analyzes the applicable ICTY, ICR and ICC Statutes, Rules of Procedure and Evidence, and relevant United States common law interpretations relating to psychiatric defenses, evidentiary issues, and testimony. This part will outline the current status of the substantive law regarding psychiatric defenses and evidence in war crimes prosecutions. Particular attention will be placed on the lack of evidentiary rules and the issues and problems that result from ambiguities in the law.

Finally, part IV will argue that the current war crimes tribunals and the ICC lack sufficient standards necessary in order for a defendant to meet the burden of proof to introduce psychiatric evidence or establish insanity/diminished capacity defenses. Also, these lack of standards fail to give justices the necessary criteria by which to evaluate this
scientific evidence. Part IV will begin with an examination of the current evidentiary standards for evaluating psychiatric evidence in the United States. This part concludes that defining a legal standard for psychiatric defenses in the tribunals and ICC along similar lines to current United States court practice is a necessary first step in order to fully establish the validity of international criminal prosecutions. With the potential for increased criminal prosecution at the international level, precedent established by these courts has applicability to international criminal prosecutions extending well beyond the former Yugoslavia and Rwanda.

II. Psychiatry & the Law

In many ways psychiatry, partly because of its origins and evolution, has always occupied a curious and somewhat unique position in medicine.15 From the early Greeks to the modern era, the exploration and discovery of the mind has fascinated and intrigued mankind. It is, in a very real sense, an intellectual voyage but more importantly it is a study of self-discovery. The explorations of the mind surely have been more important to human development than the explorations of the external world.16 Historians regularly list technological advances as the great milestones of culture, but even more transforming than any this was the recognition that “human beings could examine, comprehend and even control their own thought processes, emotions and resulting behavior.”17 With that realization, humans became something unique in this world as the only animal that, by examining its own mind and behavior, could alter them.18

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17 Id.
18 Id.
A. What is Psychiatry?

The historical development of psychiatry is often viewed in the context of the general publics’ perceptions of “craziness” and the treatment of the mentally ill. Mental illness was historically tied to notions of religion and seen as God’s punishment for sin, and until the middle of the eighteenth-century, these religious attitudes exerted significant influence on the treatment of the mentally ill.20 Partly in reaction to this combination of medieval scholasticism and superstition, Dr. Sigmund Freud developed a method of psychoanalysis which evolved into the beginnings of a modern and dynamic field of psychiatry.21 Freud has been sharply criticized in recent years but, his influence on the judicial system remains evident today.22 However, psychiatry in its modern practice has diverged significantly from the speculative Freudian psychology, to a more empirically based application of universal psychologically and biologically based principles.

Modern psychiatry applies knowledge from the biological and social sciences to the care and treatment of patients suffering from disorders of mental activity and behavior.23 It emerged as a branch of medicine in the first half of the nineteenth century when some of those kept in workhouses and other institutions were recognized as curable and therefore within the province of medicine.24 One of psychiatry’s first tasks was to classify mental disorders. After the First World War psychiatric care was extended to

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20 Id. at 625-27.
21 Id. at 627.
22 Id. For a comprehensive listing of Freud’s contributions to psychology see generally Deutsch, Platt & Senghaas, Conditions Favoring Major Advances in Social Science 451 (1971).
24 Id.
provide treatment for those living in the community and suffering from disorders not requiring admission to a hospital.\textsuperscript{25}

In the late 19\textsuperscript{th} and throughout the early 20\textsuperscript{th} centuries, the Behaviorist school, evoking such luminaries as Pavlov and Skinner, came to dominate psychology and psychiatric treatment. Despite this prevalence, the 1950s brought forth the biomedical model and with it came the advent of drug medications to treat mental illness. Chlorpromazine, the first antipsychotic drug, appeared in 1952 and sold under the trade name “Thorazine.”\textsuperscript{26} Psychiatrists often described the effects of the drug as a “chemical lobotomy” or the drug itself as “zombie juice.”\textsuperscript{27} Many patients improved, particularly those with schizophrenia, and the patient population in some U.S. hospitals had slightly declined by the middle of the 1950s.\textsuperscript{28}

More and more patients began to receive antipsychotic drugs for their mental illnesses. To many people, this signified psychiatry’s prior history as irrelevant in evaluating the profession or its capabilities.\textsuperscript{29} Indeed many psychiatrists regarded medication as a revolutionary treatment that had transformed the practice of psychiatry.\textsuperscript{30} Many excessive procedures, like the leucotomy,\textsuperscript{31} became relics of the irrelevant past.

\textsuperscript{25} Id.
\textsuperscript{27} Id. Side effects of chlorpromazine are typical of early antipsychotic drugs. They include tardive dyskinesia, akathisia. See LAURENCE BRUNTON ET AL., GOODMAN & GILMAN’S \textit{THE PHARMACOLOGICAL BASIS OF THERAPEUTICS} 477 (2005).
\textsuperscript{28} See GELMAN, supra note 26. See also Sheldon Gelman, Medicating Schizophrenia 189, 191 (1999).
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 569.
\textsuperscript{31} Id. A leucotomy refers to what is now more commonly known as a prefrontal lobotomy. It consists of cutting the connections to and from, or simply destroying, the prefrontal cortex. See The Mind, supra note 22 at 435. Prefrontal leucotomy subsequently fell into disrepute, after its widespread use was shown to have created far more damage than benefit, and because of its irreversible nature. Id. For a brief history of psychosurgery procedures, including leucotomy, see id. at 660-661.
Since 1977, the biopsychosocial model, a framework based on an integrative, whole-person approach to patient care,\textsuperscript{32} again transformed the way psychiatry is practiced. The years since 1980 have witnessed major developments in the brain sciences, in particular neurochemistry and how different aspects of mental functioning are represented by different regions of the brain.\textsuperscript{33} Thus, psychiatry is presented with a new and unique opportunity. It can define for the law those mental functions that need to be studied for a meaningful and sophisticated understanding of the operations of the human mind. In this interaction, it can seek the answers to questions related to diagnosis and treatment of mental disorders and pose the behavioral questions that biology needs to answer if we are to have an advanced understanding of the functioning of mental processes.\textsuperscript{34}

B. The Intersection of Law and the Goals of Psychiatric Medicine

The disciplines of psychiatric medicine and law have somewhat different traditions and methods of reasoning, so the relationship has often been described as “a highly neurotic, conflict-ridden ambivalent affair.”\textsuperscript{35} Law and psychiatry is often reduced to a battle between lawyers and psychiatrists over legal issues of common professional concern, particularly those issues concerning criminal responsibility.\textsuperscript{36} The crucial issue at the crossroads of law and psychiatry is the proper weight that legal liability should accord psychiatric disabilities. More specifically, the courts must find a way to structure

\textsuperscript{32} See Paul R. McHugh, M.D. & Phillip R. Slavney, M.D., THE PERSPECTIVES OF PSYCHIATRY 286 (2\textsuperscript{nd} ed., 1998). The biopsychosocial concept consists of the “person” placed squarely in the middle of a conceptualized strata of knowledge where matters biological, psychodynamic (i.e., experience and behavior) and social are examined as a whole rather than a clinical diagnosis being restricted to any one matter. \textit{Id.}

\textsuperscript{33} See Howard Goldman, REVIEW OF GENERAL PSYCHIATRY 10-11 (5\textsuperscript{th} ed., 2000).

\textsuperscript{34} \textit{Id.} at 11.


\textsuperscript{36} See Michael S. Moore, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (Cambridge Univ. Press, 1984).
the relationship between legal and psychiatric concepts so that psychiatric evidence does not threaten the social goals of the law.\textsuperscript{37}

However, there have been several sharp critiques of psychiatry over the years, especially in the realm of criminal law. The legal critique of psychiatry as unreliable comes from the belief that psychiatry is “inappropriately lenient or unduly exculpatory.”\textsuperscript{38} The law has traditionally rejected the notion that an illness diagnosed as less severe than “psychotic psychopathology” might be exculpatory.\textsuperscript{39} Moreover, the legal system is often skeptical of psychiatry because psychiatrists have never been able to come to an agreement on the precise meanings of responsibility, mental illness, or dangerousness.\textsuperscript{40} Nevertheless, within the practice of psychiatry, experts are more likely to agree on the presence of symptoms and serious mental disorder than on the legal significance of those findings.\textsuperscript{41}

Despite these critiques, the relationship between psychiatric concepts and legal concepts represent how psychiatry and the law are increasingly speaking in the same or similar terms. If the mental state and the motivations of the defendant are at issue, it makes practical sense to use psychiatry to advance this inquiry, accomplished without disrupting the social goals of the law.\textsuperscript{42} However, this is a difficult proposition given the

\begin{footnotesize}
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\item \textsuperscript{37} Peter R. Dahl, \textit{Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials}, 73 CALIF. L. REV. 411, 412 (1985) (arguing that effective use of psychiatric information by the law is most likely if the law does not attempt to make fine distinctions of the sort that psychiatrists make).
\item \textsuperscript{39} See PERLIN, \textit{supra} note 38 at 676.
\item \textsuperscript{40} \textit{Id.} at 677.
\item \textsuperscript{41} See GOLDMAN, \textit{supra} note 33, at 531.
\item \textsuperscript{42} See DAHL, \textit{supra} note 37 at 414.
\end{itemize}
\end{footnotesize}
differing objectives of each discipline. The law is concerned with achieving social policy goals and protecting the community from those who violate societal norms. In contrast, psychiatry seeks to discover the causes of human behavior and to find cures for mental illness.

The fundamentally different natures of the disciplines cause serious difficulties for the legal system. The relative infancy of the medical science of psychiatry can undermine the heart of what the law is trying to achieve, namely stability and predictability. The law cannot readily abandon core concepts each time there is a change in fundamental psychiatric theories, to do so would leave jurisprudence in the untenable position of being governed by psychiatry, thus losing its objective, namely social policy control. On the other hand, excluding “cutting edge” psychiatric theories would cause problems within the law itself. The decision over how much weight to accord psychiatric evidence is not necessarily contingent upon the law keeping its concepts constant as psychiatry advances. Thus, the intersection of psychiatry and law is a very difficult and delicate balance; the analysis of defendant’s actual mental state might be useless unless questions concerning the mens rea element of a crime make psychiatric sense.

\[43\] Id. at 415.
\[44\] Id. See also supra Part II.A. and accompanying notes.
\[45\] Id. at 416.
\[46\] Id. As Dahl points out…(“[t]he law would be basing crucial decisions…on subtle distinctions that are often not borne out in what appears to be the most relevant discipline.”). Id.
\[47\] Id. at 417.
C. Psychiatric Defenses in Criminal Prosecutions

As psychiatric knowledge continues to make progress, courts are increasingly calling on psychiatrists to assist in answering the legal questions that are raised. The first crucial question in forensic psychiatry is: What is a Mental Disorder? The definition of a mental disorder is difficult to define, contextual, and it often depends on whom you ask. The DSM-IV defines a mental disorder as:

[A] clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.

A somewhat more lay definition of mental disorder is “a term used for a group of disorders causing severe disturbances in thinking, feeling and relating. They result in substantially diminished capacity for coping with the ordinary demands of life.” The one common trait of mental disorders is that they all involve, or are presumed to involve,

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48 See GOLDMAN, supra note 33, at 530.
49 Forensic psychiatry is “the medical subspecialty that involves the use of psychiatric expertise to assist in the resolution of legal disputes.” See GOLDMAN, supra note 33, at 530.
51 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, xxi-xxii (4th ed. 1994) [hereinafter “DSM”].
52 Id. at xxi-xxii.
53 Concerning the definition of “mental illness,” available at http://www.compeer.org (last visited Dec. 1, 2006) (Compeer is a non-profit program that matches community volunteers in supportive relationships with people who are receiving mental health treatment).
some disturbance of mental functioning; this could affect the intellectual capacities, thought processes, emotions, or underlying motivations.\textsuperscript{54} Despite these seemingly clear definitions, it remains a difficult task to definitively explain what it means to have a mental disorder. What might be perceived as a disorder could perhaps be nothing more than a personality “quirk” or a disturbance not severe enough to disrupt a person’s life. This makes it particularly difficult, as this paper will discuss when it comes to defining a mental disease or defect in the ICC, ICTY, and ICTR, to classify and define precisely where the line of individual criminal responsibility begins in terms of assigning guilt for a war crime.

I. Competency

Another issue in forensic evaluations involves questions of competency of the defendant to stand trial.\textsuperscript{55} As a defendant moves towards trial, he must have an appreciation of the charges and allegations, an understanding of the roles of the courtroom personnel and the nature of the proceedings, and the ability to assist his attorneys.\textsuperscript{56} Psychiatric disorders can affect these abilities in many ways, including delusions that affect the capacity to understand proceedings, to perceive one’s attorneys as allies, or that affect the perceptions about the neutrality of the court.\textsuperscript{57}

In the United States, the prevailing standard is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against

\textsuperscript{54} Joan Busfield, \textsc{Men, Women, and Madness: Understanding Gender and Mental Disorder} 52 (1996).
\textsuperscript{55} See Krug, supra note 7 at fn. 17. At the Nuremberg Trials, defendants Rudolf Hess and Julius Streicher were examined to determine if they were fit to stand trial. \textit{Summarized in} Telford Taylor, \textit{The Anatomy of the Nuremberg Trials: A Personal Memoir} 149-51, 178-79 (1992). \textit{Id.}
\textsuperscript{56} See Goldman, supra note 33, at 532.
\textsuperscript{57} \textit{Id.}
him.\textsuperscript{58} Under the practice of the ICTY and ICTR, once an accused is detained, he can be released only on the order of a trial chamber in exceptional circumstances.\textsuperscript{59} Unfortunately, the rules provide no clue as to what these exceptional circumstances are, although it is conceivable that an illness that seriously affects the health of the accused is probably one of those exceptional circumstances.\textsuperscript{60}

2. Insanity

In the United States, various state legislatures and courts have developed various formulations of the insanity defense. The standard currently in effect in many jurisdictions contains both cognitive and volitional elements. If the defendant can show that he could not appreciate that his acts were wrong or that he was incapable of making his actions conform to the law, he satisfies his burden of proof of insanity.\textsuperscript{61} The first standard adopted in the United States derived from \textit{M’Naghten’s Case}.\textsuperscript{62} The \textit{M’Naghten} rule is a cognitive standard in that it focuses on the defendant’s awareness of his actions

\begin{footnotes}
\textsuperscript{60} See \textit{THE PROSECUTION OF INTERNATIONAL CRIMES} 318 (Roger S. Clark and Madeleine Sann, eds.) (1996). \textit{See also} KRUG, \textit{supra} note 7 at fn. 17. Two defendants before the ICTY, Drazen Erdemovic and Esad Landzo, underwent psychiatric examinations to determine their competency to stand trial. Both of the accused were deemed competent, although Erdemovic was first found unfit (that determination was later changed). \textit{See Prosecutor v. Erdemovic}, Sentencing Judgement, No. IT-96-22-T, paras. 5-8 (Nov. 29, 1996) and Prosecutor v. Delalic, Judgement, No. IT-96-21-T, para. 36 (examination of defendant Esad Landzo)(Nov. 16, 1998) available at http://www.un.org/icty [hereinafter “ICTY Web site”]. \textit{See also} Celebici Camp Judgement, infra note 71.
\textsuperscript{62} 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843). The \textit{M’Naghten} rule derives itself from earlier case law and source material concerning conclusions on the human psyche in general and the science of psychology up to that point in time. For example, in the Eirenarcha [Handbook for Justices of the Peace] of 1582, William Lombard of Lincoln’s Inn set forth the test of whether the man had “knowledge of good or evil.” Arnold’s Case, 16 State Trials 695 (1724), set forth the so-called “Wild Beast” test of whether the defendant “doth not know what he is doing no more than . . . a wild beast.” See \textit{State v. White}, 456 P.2d 797, 801 (1969).
\end{footnotes}
or of their moral significance, and it exculpates those who do not understand the meaning of their acts or society’s condemnation of them.\textsuperscript{63} In order to establish a defense on the ground of insanity, the defendant must prove that, at the time of the act, the accused was laboring under such defect of reason, from a disease of the mind, as “not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.”\textsuperscript{64}

In 1954, \textit{Durham v. United States}\textsuperscript{65} added a volitional component to the insanity defense by holding that an accused is not criminally responsible, despite awareness of his actions, if his unlawful act was the “product of mental disease or defect.”\textsuperscript{66} The American Law Institute’s Model Penal Code combined the cognitive and volitional tests into a single formula: “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.”\textsuperscript{67}

\textit{a. In War Crimes Prosecutions}

In war crimes prosecutions, the insanity plea as an affirmative defense was not completely clear from reading the rules of procedure. The ICTY Rules provide for the use of “special defenses.”\textsuperscript{68} Other than the defense of diminished mental capacity however, the ICTY Rules fall short of defining what those special defenses are.\textsuperscript{69} One

\textsuperscript{63} See COBUN, \textit{supra} note 61 at 475-76.
\textsuperscript{64} 10 Cl. & Fin. at 210, 8 Eng. Rep. at 722.
\textsuperscript{65} 214 F.2d 862 (D.C. Cir. 1954).
\textsuperscript{66} \textit{Id.} at 874-75.
\textsuperscript{67} American Law Institute (ALI) \textsc{Model Penal Code} 4.01(l) (1962).
\textsuperscript{69} See KRUG, \textit{supra} note 7 at 319.
interpretation of the ICTY statute’s ambiguity is that it should be construed narrowly so that war criminals will be prevented from asserting the insanity defense.\textsuperscript{70} However, such an interpretation would seem incongruous when compared with the ICC statute that provides for an insanity defense. Nonetheless, in \textit{Prosecutor v. Delalic},\textsuperscript{71} the ICTY Trial Chamber held that special defenses should be construed broadly to include the affirmative defense of insanity.\textsuperscript{72} Although the insanity defense can be raised, the ICTY has not formalized a legal standard for the defense.\textsuperscript{73}

\section{3. Diminished Capacity}

When a defendant introduces psychiatric evidence on the issue of \textit{mens rea}, it is often referred to as a diminished capacity defense.\textsuperscript{74} In the United States Federal court system, as well as in many state legal systems, diminished capacity is not an affirmative defense but a failure of proof defense;\textsuperscript{75} it is essentially an evidentiary rule, which brings relevant facts to bear on the primary determination of culpability.\textsuperscript{76} In contrast, the insanity defense

\footnotesize
\begin{itemize}
  \item Id.
  \item Id. at p. 1161.
  \item See COBUN, \textit{supra} note 61 at 479.
  \item See COBUN, \textit{supra} note 61 at 479.
\end{itemize}
defense triggers special treatment separate from the nature of the offense.\textsuperscript{77} Thus, it is often difficult to incorporate evidence of a defendant’s mental illness into a diminished capacity defense unless it specifically relates to the \textit{mens rea} of the offense.\textsuperscript{78} A defendant may satisfy the burden of proof for an insanity defense, but at the same time still have the requisite state of mind at the time of the act. Therefore, diminished capacity is a somewhat limited doctrine since the \textit{mens rea} of a crime does not necessarily incorporate evidence of mental illness.\textsuperscript{79} Even where a defendant presents a successful diminished capacity defense, he still risks conviction of a lesser offense.\textsuperscript{80}

Thus, diminished capacity is a mitigating, rather than exculpatory defense which is tied to the requisite \textit{mens rea} of the statute. Unlike the insanity standard which attempts to distinguish between defendants on the basis of the severity of their illness, diminished capacity differentiates defendants on the basis of a mental illness rebutting proof of \textit{mens rea}.\textsuperscript{81} Even a defendant who suffers from a severe mental illness will fail to prove diminished capacity if his illness does not bear on the \textit{mens rea} of the offense at issue.\textsuperscript{82}

\textit{a. In War Crimes Prosecutions}

The adoption of the mental incapacity defense in war crimes prosecutions necessitates the adoption of special procedural and evidentiary rules to address this unique affirmative defense.\textsuperscript{83} However, the reality has been that the mental incapacity defense has rarely been asserted in war crimes prosecutions and received little attention in international law.

\begin{flushleft}
\textsuperscript{77} \textit{Id.} at 480.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 482.
\textsuperscript{82} \textit{Id.} at 482.
\textsuperscript{83} \textit{See} KRUG, \textit{supra} note 7 at 328.
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prior to the establishment of the ICTY, ICTR and ICC in the 1990s. The ICTY Statute is itself silent. Currently, the content of the mental incapacity defense is slim, consisting of Article 31(1)(a) of the ICC Statute and Rules of Procedure & Evidence 67(A)(ii)(b) of the ad hoc tribunals, and the definition of the “diminished responsibility” component in *Celebici Camp*. Unlike other defenses recognized in international criminal law, mental incapacity (i.e., diminished capacity) is unique, in that it inherently incorporates the field of psychiatry within its concepts and method of inquiry. Consequently, psychiatrists and other mental health professionals play an important role as experts in international war crimes trials whenever a mental incapacity defense is asserted.

D. Psychiatric Evidence in Criminal Prosecutions

Psychiatrists, psychologists, and other mental health professionals may be involved in several aspects in a criminal case; however, their primary role is to perform assessment

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84 *But see id.* at fn. 17. In commentary on a 1945 decision by the U.S. Military Commission, the UN War Crimes Commission suggested that a “defense of madness” might have been raised. 3 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 60, 61 (1948) (trial of Peter Back). In 1948, a Dutch court reduced an offender’s sentence for war crimes on the grounds of his mental condition at the time the acts were committed. *See* 13 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 131, 132, 137 (1949) (trial of Wilhelm Gerbsch).

85 Article 31(1)(a) of the 1998 ICC Statute (under “Grounds for excluding criminal responsibility”) states that a person shall not be criminally responsible if, at the time of that person’s conduct, he or she “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.” *See* Rome Statute of the International Criminal Court, July 17, 1998, Arts. 31 (grounds for excluding criminal responsibility), UN Doc. A/CONF.183/9*, available in <http://www.un.org/icc>, reprinted in 37 ILM 999 (1998) [hereinafter ICC Statute].

86 ICTY RPE Rule 67(A)(ii)(b), which is located amid the rules on production of evidence in the discovery stage of the proceeding, states: As early as reasonably practicable and in any event prior to the commencement of the trial . . . the defense shall notify the Prosecutor of its intent to offer: . . . (b) any special defense, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defense. The ICTR adopted the same formulation in its RPE, Rule 67(A)(ii)(b), in June, 1995. *See* Krug, supra note 7 at 320.

87 *See infra* note 163 and accompanying text.

88 *See* KRUG, supra note 7 at 322.

89 *Id.* at 322-23.
functions. In criminal cases, these functions *inter alia* include assessments, consultations, and testimony related to competency to waive Miranda and other constitutional rights (in U.S. Courts) and to stand trial, and criminal responsibility.

Whenever there is evidence that a defendant suffers from some mental disease or defect it is usually introduced through the testimony of a forensic psychiatrist. If the defendant’s mental capacity is in issue as it relates to criminal culpability, a psychiatrist’s diagnosis is crucial to understanding whether the defendant possessed the requisite *mens rea* at the time the offense was committed. The Supreme Court of the United States has historically been very skeptical when assessing psychiatric testimony concerning mental illnesses. This skepticism, in turn, has dictated the attitudes and policies toward mentally ill offenders in the lower courts and state legislatures. However, when compared to the Supreme Court’s general acceptance of such evidence for use in future predictions of dangerousness and in approving state sexual predator statutes, this

91 *Id.* at 532-33.
93 The Supreme Court has frequently described psychiatric evidence as unreliable, stressing that “[p]sychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness.” *Id.* at 496. *See also* Parham v. J.R., 442 U.S. 584, 629 (1979) (stating that “[e]ven under the best of circumstances psychiatric diagnosis and therapy decisions are fraught with uncertainties”); Addington v. Texas, 441 U.S. 418, 429 (1979) (stating that “[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous”); O’Connor v. Donaldson, 422 U.S. 563, 578 n.2 (1975) (Burger, C.J., concurring) (noting that psychiatry is uncertain). The author mentions that the Supreme Court is just as selective in its attitude toward scientific evidence, and toward psychiatric testimony especially, as it is toward the common law tradition of *mens rea*. *See* Byers, *supra* note 92 at 495-96.
94 *Id.* at 496. (The author cites to Joanmarie Ilaria Davoli, *Still Stuck in the Cuckoo’s Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 Tenn. L. Rev. 987, 998-990 (2002) to note that the Court frequently reiterates that psychiatry and the study of mental illness are inexact, with a questionable medical foundation, implying this is an unreliable field and, thus, cannot serve as the basis for sound legal judgment.). *Id.* at fn. 312.
skepticism is perhaps selective.\footnote{See Barefoot v. Estelle, 463 U.S. 880, 884-85, 896-99 (1983), superseded on other grounds by statute (holding admissible psychiatric predictions of future dangerousness in death penalty sentencing). See also Kansas v. Hendricks, 521 U.S. 346, 355 n.2 (1997) (upholding a state’s sexual predator commitment statute against due process challenge while noting that it is “not possible to predict with any degree of accuracy the future dangerousness of a sex offender”).} As far as the United States legal system is concerned, the sad truth is that even today, many courts continue to adhere to misconceptions and myths about psychiatry.\footnote{See BYERS, supra note 92 at 496-498. The author mentions in a footnote that the American Psychiatric Association (APA) published a Statement on Prediction of Dangerousness in 1983, stating that predictions of future dangerousness are unreliable. See id. at fn. 326.}

In the realm of international law, psychiatric evidence has been widely accepted as having validity. In the case of Soering v. United Kingdom,\footnote{Soering v. United Kingdom, 161 Eur. Ct. 1 H.R. (Ser. A), 28 I.L.M. 1063 (1989).} the European Court of Human Rights refused to extradite a German national to the United States to face the death penalty because forcing the petitioner to be exposed to the “death row phenomenon” experienced in U.S. prisons violated basic fundamental human rights.\footnote{Id. at para. 64.} According to the court, the psychiatric evidence presented in this case demonstrated that the “extreme stress, psychological deterioration and risk of homosexual abuse and physical attack undergone by prisoners on death row ...” constituted a cruel and unusual penalty under the European Convention.\footnote{Id.} Although this was not a criminal adjudication per se, this case represented a significant recognition in international law of the effects of psychiatric illness and mental stress on the human psyche.

While the use of psychiatric evidence is not unheard of in international war crimes prosecutions, it is still an area of the law that receives scant attention as evidenced the minimal case law and procedural guidance in the ICC, ICTY and ICTR statutes. However, it is important to discuss the context in which the different uses of psychiatric
testimony come up in judicial proceedings in order to suggest how the international tribunals and the ICC might consider approaching this complex issue in their own evidentiary and procedural rules.

1. **Perception Theory and Eyewitness Testimony**

   When the identity of a perpetrator is disputed in a criminal, the defense may offer psychological evidence to challenge the reliability of an eyewitness identification.\(^\text{100}\) Due to the human brain’s limitations during the process of memory “recall,” eyewitness identification often is inaccurate.\(^\text{101}\) The recall process is complex and memory distortion can occur due to various factors, such as “event factors” (e.g., exposure time, detail saliency), or “witness factors” (e.g., stress, past experiences).\(^\text{102}\) Other factors, including post-event information and intervening thoughts can also distort the memory of the witness.\(^\text{103}\) Due to the inherent intervening factors in human perception and recall, there will always be a risk of error in eyewitness identification.\(^\text{104}\)

   Although U.S. Courts are keenly aware of the dangers that contribute to the unreliability of eyewitness identifications, none have ever excluded an eyewitness

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\(^{101}\) See Sparks, *supra* note 100 at 1319. See also John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 20 (1983). A misconception about the memory process is that observations are stored in the brain like a computer and can easily be recalled. *Id.* See also Alan Baddeley, *Human Memory: Theory and Practice* 197-210 (Revised ed., Allyn and Bacon 1998) (1990). The question of how recall and recognition are related is one of the oldest in the study of memory. *Id.* at 197.


\(^{103}\) *Id.* at 746.

\(^{104}\) *Id.*
identification based solely on the human memory process. To exclude first hand testimony based on such a critique at a war crimes trial would certainly undermine the fact finding purpose of the judicial system. However, it would also seem logical to allow challenges to such testimony and admit expert testimony as to the dangers of eyewitness identifications, and let the judicial panel decide whether there was error on the part of the witness’ perception of the event.

In contrast, the various U.S. Federal circuit courts have taken different approaches in evaluating expert testimony on eyewitness identifications. Interestingly, in United States v. Downing, the Third Circuit reversed the trial court’s exclusion of eyewitness expert testimony. In Downing, the trial court determined that the defendant’s expert opinion on the subject matter was not helpful to the jury. In reversing, the Third Circuit reasoned that such expert opinion was within the common knowledge of the jury and “can assist the jury in reaching a correct decision…” While accepting expert eyewitness testimony as within the common knowledge of juries, the Downing court also concluded that same testimony may be excluded if it is not specifically relevant to the case. Therefore, a defendant wishing to offer expert testimony must first show how such testimony relates to the eyewitness identification at issue. Commentators

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105 Id. at 752 (O’Hagan acknowledges that eyewitness identifications are often correct, and does not argue for a per se exclusion.).
106 Id. at 755. O’Hagan mentions several solutions, including: “(1) complete exclusion of eyewitness identifications, at least when no other evidence of guilt exists; (2) admission of such identifications with jury instructions; or (3) admission with explanatory expert testimony.” O’Hagan suggests that the most logical compromise is to admit expert testimony concerning unreliability “every time such identifications are admitted at trial.” Id. at 751.
107 See generally O’HAGAN, supra note 102.
108 753 F.2d 1224 (3d Cir. 1985).
109 Id. at 1228-29. The government’s case substantially rested on eyewitness identifications. Id. at 1227.
110 Id. at 1230.
111 Id. at 1231-1232.
112 Id. at 1242.
113 Id.
have argued that while this appears to be reasonable, it creates a presumption that such evidence is too general.\textsuperscript{114}

In war crimes prosecutions this level of guidance and rationale is unfortunately nonexistent. The ICTY Trial Chamber, in \textit{Prosecutor v. Furundzija},\textsuperscript{115} seems to accept a rationale similar to the \textit{Downing} court for admitting this type of expert testimony. The Trial Chamber found that a prosecution witness likely suffered from Post Traumatic Stress Disorder (PTSD).\textsuperscript{116} The Trial Chamber accepted testimony from two defense experts who stated that this affected and contaminated the witness’s ability to render a proper eyewitness’ account and that such trauma can have an effect on memory.\textsuperscript{117} However, the Trial Chamber found no evidence of brain damage or that the witness’ memory was in any way contaminated by her treatment for PTSD;\textsuperscript{118} adding that even when a witness is suffering from PTSD, that this does not necessarily indicate that inaccurate evidence will be given.\textsuperscript{119}

The only conclusion to be drawn from the Trail Chamber’s acceptance of such testimony, absent any specific guidance in the evidentiary rules, is that the expert testimony bore directly on a diagnosis of a witness and that it had a nexus to the testimony given by the witness at trial.

\textsuperscript{114} See O’ HAGAN, \textit{supra} note 102 at 769.
\textsuperscript{115} Judgement, No. IT-95-17/1-T (Dec. 10, 1998), \textit{available at the ICTY Web site, supra} note 60.
\textsuperscript{116} \textit{Id.} at para. 101.
\textsuperscript{117} \textit{Id.} at paras. 102-103. This was based on the testimony of Dr. Morgan who stated that high levels of stress hormones can damage the area of the brain called the hippocampus, responsible for memory. \textit{Id.} at para. 102. The defense also called Dr. Jeffrey Younggren, an experienced clinical and forensic psychologist who indicated that the “trauma can have an effect on memory: the more trauma, the worse the memory.” \textit{Id.} at para. 103.
\textsuperscript{118} \textit{Id.} at para. 108.
\textsuperscript{119} \textit{Id.} at para. 109.
2. Heuristics and Bias in Eyewitness Testimony

As part of the field cognitive psychology, the study of heuristics concerns the formation of beliefs based on the likelihood of uncertain events.\(^{120}\) Heuristics is a method for discovering knowledge or solving problems when no algorithm exists; essentially, it is a psychological process of trial and error.\(^{121}\) A piece of information or rule used in the decision-making process may be called a heuristic for that problem.\(^{122}\) Within the study of heuristics, experts have identified several methods by which people reach decisions without real knowledge.

Forming opinions on the probability of an uncertain event “by the ease with which instances or occurrences can be brought to mind” is referred to as the “availability heuristic.”\(^{123}\) The “representativeness heuristic,” involves the belief that the outcome of a case will depend upon its similarity to a group of other cases.\(^{124}\) In more practical terms, human beings often form opinions about others based on the extent to which that person is “representative of a stereotype of a class of people.”\(^ {125}\) The following example of a person describing their former neighbor illustrates this point:

“Steve is very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail.” How do people assess the probability that Steve is engaged in a particular occupation from a list of possibilities (for example, farmer, salesman, airline pilot, librarian, or physician)?...In the representativeness heuristic, the probability that Steve is a


\(^{121}\) See *THE MIND*, supra note 23 at 312.

\(^{122}\) Id.

\(^{123}\) See Harcourt, supra note 120 at 1181.

\(^{124}\) Id.

\(^{125}\) Id. See also Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases, in Judgment under Uncertainty: Heuristics and Biases* 3 (Daniel Kahneman et al. eds., 1982).
librarian, for example, is assessed by the degree to which he is representative of, or similar to, the stereotype of a librarian.\textsuperscript{126}

Heuristics in judgment and decision making have, over the course of human evolution, become useful. However, they are also often times misleading and may cause serious errors.\textsuperscript{127} Thus, the \textit{a priori} inferences that judges, juries, and witnesses draw from their experiences may be based on stereotypes, biases and familiarities.\textsuperscript{128} Such is the danger from unchallenged testimony.

As has been demonstrated in numerous studies, mental images can distort thought in heuristic theory and in turn affect the judicial decision making process. An expert witness trained in cognitive psychology may provide useful and relevant evidence; however, the procedural rules in the international tribunals have been silent on how courts should treat such evidence. Because of the heavy reliance on eyewitness identification in the ICTY and ICR, the process and procedures of adjudication in the ad hoc tribunals and the ICC may benefit from these experimental sciences.

3. Genetics

Some scientists suspect that particular behaviors and mental disorders are directly linked to the human genome.\textsuperscript{129} This branch of science has created an enormous amount of controversy because a genetic link for neurochemical imbalances would imply a genetic base for the aggression.\textsuperscript{130} Critics contend that stigmatization of certain racial

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\textsuperscript{126} See Harcourt, \textit{supra} note 120 at 1181.
\textsuperscript{127} See Harcourt, \textit{supra} note 102 at 1182. They often fail to take into account probability theory and other more reliable scientific accounts and intuitive judgments often depart markedly from actual probabilities.
\textsuperscript{Id.}
\textsuperscript{129} Id.
\textsuperscript{Id.} at 599.
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groups would result if genetic evidence were used in trials. Although a genetically based psychiatric defense has never been asserted in a war crimes trial, some psychiatric defenses come close to bringing the nurture/nature debate of psychiatry into the courtroom. The danger in this type of evidence is that it could theoretically turn the culpability principle of criminal law on its head. While this branch of behavioral science is still in its infancy, it is quite certain to make an impact in neuropsychiatry in the near future. Thus, it is important for all courts to prepare for the eventualities of having to evaluate this new, cutting-edge, type of psychiatric evidence.

III. Psychiatric Defenses and Evidentiary Rules in the ICC, ICTY and ICTR

Psychiatric defenses and evidence present a multifaceted challenge to the system of international prosecution. For one thing, the subject area of defenses is extremely unsettled despite the recognition of separate defenses. As previously mentioned, lawmakers and jurists have long been ambivalent about the desirability of formulating discrete separate defenses, resulting in varying disagreement on the defenses to be recognized and on the specific elements of each defense. Moreover, incorporating psychiatry into the framework of international prosecution presents new substantive, procedural, and evidentiary issues. The international courts’ development of substantive law in this area on questions associated with defining the nature and parameters of the defense will take time. But some related questions concerning procedure and the consequences of a successful defense are more immediate. After

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131 Id. at 600.
132 See generally Jennifer L. Larkin, The Insanity Defense Founded on Ethnic Oppression: Defending the Accused in the International Criminal Tribunal for the Former Yugoslavia, 21 N.Y.L. Sch. J. Int’l & Comp. L. 91 (2001). The author argues that evidence of an ethnically oppressive environment could be used to establish the affirmative defense of insanity. Id. at 92
133 See Eser, supra note 9.
134 See Krug, supra note 7 at 319.
outlining the current status of the substantive law concerning psychiatric defenses and evidence, this part will identify certain pressing questions that remain unanswered because of gaps or ambiguities in the normative base for international prosecution.

A. The International Criminal Court

The Rome Conference culminated in the approval, by majority vote, of the text of the Statute of the International Criminal Court. The Statute became effective on July 1, 2002 following its ratification by sixty nations. Jurisdiction of the International Criminal Court (“ICC”) has been confined to the crime of genocide, crimes against humanity, war crimes, and (conditionally) the crime of aggression. Its jurisdiction in cases other than Security Council referrals, are based on the principles of nationality and territoriality. Accordingly, the ICC can only exercise jurisdiction if the state of which the suspect is a national or the state on whose territory the crime was committed has either ratified the ICC Statute or has accepted the exercise of jurisdiction by the ICC in the particular case to be prosecuted. The jurisdiction of the ICC is complementary to that of national criminal justice systems in that the ICC can only exercise jurisdiction if a state with custody of a suspect is unwilling or unable to bring that person to justice.

1. Defenses and Evidentiary Procedure

Article 31(1)(a) of the ICC Statute (under “Grounds for excluding criminal responsibility”) states that a person shall not be criminally responsible if, at the time of that person’s conduct, he or she “suffers from a mental disease or defect that destroys that

136 For a list of all countries that have signed and/or ratified the ICC Statute, visit the United Nations’ website, at http://http://www.un.org/law/icc/statute/rome.htm (last visited Nov. 12, 2006).
137 ICC Statute, supra note 119, at art. 5(1).
138 Id. at art. 12(2)-(3).
139 Id. at art. 17(1)(a)-(b).
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.”  

Article 31(1)(a) does not define the term “mental disease or defect,” and does not include any language as to what kind of behavior “mental disease or defect” might exclude. Thus, lawyers and judges are left to decipher what standard of evidence is necessary to qualify or meet the elements of the defense. Moreover, it makes the reliance on psychiatric diagnoses crucial in determining individual criminal responsibility. Defining behavior as being a mental illness certainly contains an implicit subjective aspect of what is normal and what is not. This is an issue because without defining the criteria, judges are left with no basis from which to assess the level of responsibility. Furthermore, without a clear standard for the psychiatric evaluation on a particular defendant, the judges might base their decisions on faulty scientific methods, unclear definitions of mental disorders and general lack of objectivity in deciding which evidence accurately represents the psychological state of mind of the defendant.

Finally, article 31(1)(a) of the Rome Statute is silent on the quantum of proof needed to establish particular defenses. Common law jurisdictions have developed doctrines involving affirmative defenses, like insanity. Conversely, other defenses such as mistake of fact do not shift the burden to the accused, who must simply offer evidence of the

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140 Id. at art. 31(1)(a). Article 31(1)(a) is relatively narrow in scope, and is quite similar to Section 4.01(1) of the ALI’s Model Penal Code. See supra note 67, and accompanying text. “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he (or she) lacks substantial capacity either to appreciate the criminality/wrongfulness of his (or her) conduct or to conform his (or her) conduct to the requirements of the law.” Id.

141 Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium 212-213, fn. 159 (New York, 2002). The Model Penal Code, however, defines the terms “mental disease or defect” as not including “an abnormality manifested only by repeated criminal or otherwise antisocial conduct.” See Model Penal Code § 4.01(2).

142 See infra II.C., pp. 12-14.
Article 67(1)(i) suggests that the burden may not be shifted to the accused, a result that presents certain difficulties given that certain defenses are founded upon evidence which the accused is in the unique position to provide.\textsuperscript{144} However, commentators are quick to point out that article 67(1)(i) does not appear to be addressing the issue of defenses, but only stating a corollary of the presumption of innocence.\textsuperscript{145}

B. ICTY & ICTR

The question of psychiatric defenses and evidence received little attention in international law prior to the establishment of the institutional structures for international prosecution in the 1990s. The ICTY Statute is itself silent on the question; however, the draft statute adopted by the Security Council, did include this comment: “The International Tribunal itself will have to decide on various personal defenses which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.”\textsuperscript{146}

1. Defenses and Evidentiary Procedure

In the ICTY and ICTR, the content of the psychiatric defenses is minimal, consisting of RPE 67(A)(ii)(b) and the ICTY’s definition of the “diminished responsibility” component in \textit{Celebici Camp}.\textsuperscript{147} The first step began with the ICTY’s recognition of the

\textsuperscript{143} See SADAT, \textit{supra} note 141 at p. 215. The ICTY has taken the position that at least some defenses such as “diminished” or “lack of mental capacity” must be established by the defense “on the balance of probabilities.” See John R.W.D. Jones, \textit{THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND RWANDA} 143 (2d ed., 2000).
\textsuperscript{144} See SADAT, \textit{supra} note 141 at 215.
\textsuperscript{145} Id.
\textsuperscript{147} See infra III.B.1.a., at pp. 31-33.
general principle in its Rules of Procedure and Evidence. Rule 67(A)(ii)(b) states simply: “As early as reasonably practicable and in any event prior to the commencement of the trial . . . the defense shall notify the Prosecutor of its intent to offer: . . . (b) any special defense, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defense.”

The ICTR adopted the same formulation in its RPE, Rule 67(A)(ii)(b). However, these rules fail to list prima facie elements required by the defense. Further, they fail to define other defenses that qualify as “special,” rather they allude to the fact that others exist because of the phrase “any special defense.” RPE Rule 2, which provides definitions for terms utilized throughout the Rules, also fails to define special defenses. Thus, the Rules do not specify whether the defense of insanity qualifies as a permissible defense in the ICTY. However, the Trial Chamber in Delalic held that because the framers of the Rules did not qualify or define special defenses in Rules 2 and 67, the term should be construed broadly to include the insanity defense. This paper now turns to examine the significance of the Delalic decision.

**a. Prosecutor v. Delalic: The Celebici Camp Case**

In Prosecutor v. Delalic, the ICTY Trial Chamber held that special defenses should be construed broadly to include the affirmative defense of insanity. Although the

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148 The ICTY adopted the RPE in plenary session on February 11, 1994, pursuant to the Security Council’s delegation of authority in Article 15 (“Rules of procedure and evidence”) of the ICTY Statute. ICTY RPE, supra note 68, at Art. 15.

149 See ICTY RPE, supra note 68.


151 ICTY RPE, supra note 68.

152 Celebici Camp Judgement, supra note 71, at para. 1157.

insanity defense can be raised, the ICTY has not formalized a legal standard for the defense. This lack of a legal test is unfairly prejudicial to the accused because they must meet the burden of proof in establishing the elements of the defense. An insanity defense has never been raised in the ICTY, and therefore the possibility of success, absent evidentiary guidance, would conceivably depend on the judicial interpretation of what the legal standards for the defense should be.

The Trial Chamber in Celebici Camp case was the first attempt in a war crime’s prosecution to take the “diminished or lack of mental responsibility” defense and evaluate it against the psychiatric evidence offered at trial. One of the four defendants, Mr. Esad Landzo, was charged under Articles 2 and 3 of the ICTY Statute with the commission in 1992 of multiple war crimes, including willful killing, murder, and torture, while he was a guard in an internment camp housing Bosnian Serbs. He raised the mental incapacity defense in the form of a “diminished responsibility” plea. Five psychiatrists testified in the Trial Chamber concerning Landzo’s mental state at the time of the acts. With the exception of the prosecution’s expert, all of the psychiatrists testified that Landzo had suffered from mental disorders at the time of the acts. The psychiatrists disagreed, however, concerning the specific identification of the disorders.

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154 See Celebici Camp Judgement, supra note 71, at para. 1157.
155 See id. at p. 1161.
156 See KRUG, supra note 7 at 321.
157 See Celebici Camp Judgement, supra note 71, at paras. 6-10.
158 Id. at para. 78
159 Id. at paras. 1173 and 1180. The interviews were conducted approximately six years after the acts in question occurred. See id. para. 1181.
160 Id. at 1174.
161 Id. paras. 1173-1180.
During the course of the proceeding, the Trial Chamber ruled that it would not define the elements of “diminished responsibility” under Rule 67(A)(ii)(b). In its judgment however, the Trial Chamber established a two-part test of “diminished responsibility”: at the time of the alleged acts, the accused must (1) have been suffering from an “abnormality of mind” that (2) “substantially impaired” the ability of the accused to control his or her actions.

The Trial Chamber determined that Landzo suffered from an “abnormality of mind” at the time of his acts, but rejected his claim of diminished responsibility because “Esad Landzo was quite capable of controlling his actions.” The Trial Chamber did not directly dispute the testimony of the psychiatrists; however, they determined that Landzo’s interviews with the psychiatrists could not be relied upon. The Trial Chamber found Landzo guilty of seventeen counts of war crimes and sentenced him to fifteen years imprisonment. However, they noted that Landzo’s mental condition was a mitigating factor in the sentencing.

The Trial Chamber does its best to avoid a direct critique of the psychiatric evaluations and evidence offered by the defense. Rather, they chose to focus their critique on the basis upon which the psychiatric evidence was derived: Landzo’s truthfulness to the psychiatrists. The Trial Chamber, however, remarks that the experts were “suffering from the natural handicap of having to render their assessment

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162 Id. at para. 78.
163 See Celebici Camp Judgement, supra note 71, at paras. 1165-1170.
164 Id. at paras. 1185-1186.
165 Id. at para. 1182. The Trial Chamber notes that Mr. Landzo told the psychiatrists several stories about himself which he later changed or disavowed. Id.
166 Id. at para. VI.
167 Id. at 1283.
approximately six years after the relevant period.”168 They go on to state that the experts failed to verify Landzo’s story from any other sources.169 It is clear from the record that the Trial Chamber was interested in evaluating the psychiatric evidence and expert opinion, however, without a basis from which to evaluate they had to focus their critique on the accused’s veracity.

At this embryonic stage, there are many questions about psychiatric defenses and evidence that remain unresolved. For example, what is the role of mental health professionals in the gathering and evaluation of evidence? By what standard should judges evaluate and admit psychiatric evidence? How should the judges evaluate psychiatric evidence that is novel? What are the consequences of a determination of full incapacity or reduced capacity? Is there a normative and procedural structure for the medical disposition of the accused suffering from mental illness or disorders? These issues remain largely unexplored in the context of international prosecution and until they are dealt with by the United Nations or their tribunals, they will continue to remain so.


The need for a scientific standard from which to assess psychiatric defenses and evidence is urgently needed if the ad hoc tribunals and the ICC are going to move forward in advancing the fundamental principles of due process in international criminal prosecutions. Currently, these institutions lack the sufficient standards necessary in order for the accused to meet the burden of proof required to put forth these types of defenses.

168 Id. at 1181.
169 The Trial Chamber did find that “Dr. Gripon did visit Konjic to make some local inquiries, but he too admitted that he had based his report on what he had been told by Mr. Landzo himself.” Id.
Another issue that further compounds this process is the relative infancy of psychiatry itself. As was discussed above, psychiatry often relies on the categorization and defining of symptoms into groups of illnesses. This approach to medicine is somewhat different from other specialties because often times, there is no observable organic/physical abnormality that presents itself to the psychiatrist. This approach of diagnosis and categorization of mental illness, primarily serves as a means for clinicians and researchers to better communicate and make a determination as to someone’s illness. Furthermore, it enables them to give a prognosis and course of treatment. In the final synopsis, however, there is often no possible definitive interpretation as to what is going on in the mind of the mentally ill person. One can often only speculate as to the severity of symptoms from which they suffer or their impact on the psyche. Thus, trying to make judicial determinations from these diagnoses can often be difficult.

These lack of standards fail to give justices the necessary criteria by which to judge this scientific evidence. In order to avoid the pitfalls of having to rely on judicial interpretation of vague statutes, the United Nations, the ICC and the *ad hoc* tribunals should seek to provide uniformity and clarity by establishing and defining these psychiatric defenses and set standards for evaluating evidence in such cases where it is offered. One suggestion in determining which standards would work best is to look at the U.S. courts and the development of how they handle such cases and evaluate psychiatric evidence.
A. Standards for Evaluating Psychiatric/Scientific Evidence

Before scientific evidence can be introduced during a trial in the United States, it must satisfy established legal standards. Like all evidence, it must be relevant to the litigation; meaning that it must be based upon conditions that existed when the cause of action arose. Scientific evidence must also be reliable. Courts in the United States have established two standards to determine reliability.

1. The Frye and Daubert Standards in U.S. Courts

   a. The Frye Test

   The most important early decision treating novel scientific evidence differently from other types of evidence was *Frye v. United States*. The test that emerged from this case, called the “Frye test,” requires that scientific evidence be “generally accepted” in the particular scientific field in which it belongs before it is admissible:

   
   Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

   
   Amongst the most important and relevant functions that the *Frye* test serves is to promote a degree of uniformity of decision, to assure that scientific evidence introduced

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171 Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”).
172 293 F. 1013 (D.C. Cir. 1923).
173 Id. at 1014.
will be reliable and thus relevant; and to provide a filter against the natural inclination of a jury to assign significant weight to scientific techniques.\textsuperscript{174}

\textit{b. The Daubert Decision}

In the 1993 decision of \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.},\textsuperscript{175} the United States Supreme Court, considered standards applicable for the admissibility of expert testimony and rejected the Frye test in federal trials.\textsuperscript{176} The Court sustained the trial judge as the authority to screen scientific evidence and insisted that expert testimony pertaining to “scientific knowledge” establishes a standard of evidentiary reliability.\textsuperscript{177} The Court, in flushing out a benchmark for establishing scientific reliability, mentioned four factors to consider. These four factors consider whether the theory or technique at issue is: testable or has been tested, has been subjected to peer review and publication, has an error rate, and is widely accepted.\textsuperscript{178} This establishes a basis to evaluate the particular scientific evidence and assess its reliability. Also, it did not hamper the fact finding role of the jury by limiting scientific evidence to only that which is generally accepted under \textit{Frye}.

The Court was criticized for abandoning the “general acceptance” standard, as the standard for evaluation and admission. Most concern centered on the idea that there would be a “free-for-all” in terms of admissible scientific evidence unnecessarily confusing juries. The Court emphasized that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, were the appropriate

\textsuperscript{175} 113 S. Ct. 2786, 2792 (1993).
\textsuperscript{176} \textit{Id}. at 2794.
\textsuperscript{177} \textit{Id}. at 2795.
\textsuperscript{178} \textit{Id}. at 2796-7.
means of countering scientific evidence. Although this decision left many questions unanswered, it can be hoped it will encourage courts to develop appropriate factors for evaluating the reliability of expert psychiatric testimony.

2. An Acceptable Standard in War Crimes Prosecutions

The obvious question for the international courts is how to adequately assure the reliability of expert testimony. In the common law system, courts attempt to assure reliability of expert testimony by filtering the scientific techniques and testimony through a prism of defined parameters to exclude unreliable information. These filters include the Frye standard of general scientific acceptance, requiring disclosure of an expert witness’s basis with a hypothetical question, requiring that the facts on which an expert relies be admitted in evidence, establishing a benchmark standard of “reasonable degree of ... certainty,” and generally prohibiting opinions on the ultimate issues. The U.S. courts impose these filters for admissibility because they are aware a jury’s general inability to evaluate expert witnesses’ opinions. Courts also recognize the difficulties faced by opposing counsel, even when adequately prepared, in attacking an expert witness’s opinion on cross-examination. However, the Federal Rules of Evidence have eroded these common law evidentiary filters, and thus, exacerbated the difficulties counsel face in persuading a jury that opinions rendered by an opposing expert witness lack adequate

179 Id. at 2798.
180 See ASKOWITZ & GRAHAM, supra note 174 at 2083. The authors explain these filters help U.S. courts to sift through evidence and exclude unreliable information. Id. would help the jury in determining whether the expert witness relied on an explanatory theory which experts in the discipline substantially accept. Id. at 2072-73.
181 This filter would require counsel to pose questions to experts in terms of a “reasonable degree of scientific, medical, or other technical certainty.” Id. This also help the jury in determining whether the expert witness relied on an explanatory theory which experts in the discipline substantially accept. Id. at 2072-73.
182 Id.
assurance of reliability.\textsuperscript{183} Now, anyone with scientific, technical, or specialized knowledge, including knowledge gained through experience, which will assist the trier of fact, is an expert.

International courts must take care to ensure that expert witness’ opinions possess adequate assurance of reliability. In the battle of the experts, the criticism is that expert witnesses will testify to almost anything the client pays them to say. Furthermore, even when completely honest experts testify, the fear is that each party will have the best witness for its side, not necessarily the best qualified expert. In such an atmosphere it is often difficult to decide which of two competing scientific, medical, or technical theories are correct. Thus, Judges and juries depend on the experts themselves to explain their own testimony, and consequently perhaps, they cannot independently measure the reliability of expert testimony on the basis of experience, intuition, or common sense.\textsuperscript{184}

Determining the reliability of expert psychiatric testimony requires consideration of a multitude of factors.\textsuperscript{185} This places a heavy burden on the trier of fact in any international prosecution. However, it is unlikely that the \textit{ad hoc} tribunals will institute any changes regarding psychiatric testimony. The fact is that they are winding down their work and it is unlikely that they will be faced with this type of evidence in the remaining prosecutions. Added to this prognosis, is the fact that there just is not much in the way of judicial precedent in this area. Nonetheless, there is a real possibility that the ICC will face such a task in the future. The fact remains that there are no standards by which to

\textsuperscript{183} \textit{Id.} at 2084.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.} at 2100. These factors might include: degree of acceptance within the professional community involved in diagnosis, treatment, and care of mental illnesses, the existence of specialized literature dealing with a specific illness, subjection to peer review and publication of any theories of behavior, the novelty of the explanatory theory, whether the testimony has been received in earlier cases, the extent to which the basic data may be verified by court, the availability of other experts to evaluate the testimony and whether there are standards and known or potential error rates for the testimony. \textit{Id.}
evaluate what effect a mental disease or illness will have in determining the culpability of a criminal defendant. The ICC can choose to rectify this situation by implementing a standard similar to the ones used in U.S. courts or they can simply deal with the evidence in a psychiatric defense as it comes up, running the real risk that such a decision can create chaos, confusion and undermine the legitimacy of the court.

V. Conclusion

At this embryonic stage of international war crimes courts, it is clear that the many substantive and procedural questions concerning defenses and evidence remain unresolved. Psychiatric evidence, in particular, is one area where the law is still evolving. Whether this will continue to be the case within the legal framework of war crimes prosecutions remains to be seen. With the potential for increased criminal prosecutions at the international level, precedents established by the ad hoc tribunals will invariably extend well beyond the current international legal realm. In other words, current substantive and procedural law in the ad hoc tribunals will have a profound impact on the ICC.

Psychiatry is a rapidly evolving field of medicine and will present a multifaceted challenge to the ICC. As has been demonstrated from the few cases involving psychiatric evidence which reached the ad hoc tribunals, it represents a struggle between two different fields of discipline in search of the truth. The courts must struggle with psychiatric methodologies and diagnostic categories all within the framework of substantive, procedural, and evidentiary issues. Rather than provide guidance on how to confront these issues however, the Trial Chamber in Celebici Camp case chose to avoid a critique of the psychiatric evidence and instead challenged the veracity of the defendant
in the context of how the psychiatric evidence was collected. Unfortunately, this does nothing to provide guidance to future courts in evaluating psychiatric evidence and its methodologies. Thus, the current legal atmosphere does nothing to clarify standards necessary in order for a defendant to meet the burden of proof required to put forth psychiatric defenses or attack eyewitness testimony. These lack of standards fail to give justices the necessary criteria by which to judge this scientific evidence. Thus defining the legal standard for psychiatric defenses in the tribunals and ICC is necessary to fully establish it within the practice of international criminal law.

In looking at the common law system, in particular the United States’ legal system, the *Frye* and *Daubert* standards establish a basis to evaluate the particular scientific evidence and assess its reliability. Given the changing nature of psychiatric medicine it is often difficult to decide which of two or perhaps more, competing theories are correct. If this is the case, then it would seem to be imperative that courts establish some basis of sifting the proverbial “wheat from the chaff.” This begs the question then of why the international courts have not yet taken the procedural steps to ensure reliability of psychiatric testimony.

To be fair, perhaps one way of looking at the *Celebici Camp* case is that the Trial Chamber let the experts explain their own testimony, rather than trying to measure the reliability on the basis of expertise or scientific research. The judges chose to critique the methodology by which such information was gathered, rather than evaluate the underlying scientific basis for their conclusions. Thus, not trying to make sense of something of which they had no expertise, the Trial Chamber simply chose to take a common sense intuitive approach to evaluating the reliability of complex evidence.
However, the danger in this situation is that without some standard of evaluation, these decision can create chaos, confusion and undermine the legitimacy of the court.

The international courts’ and tribunals’ development of substantive law in the area of psychiatric evidence, especially on questions of defining the nature and parameters of psychiatric defenses will take time. But some related questions concerning procedure and the consequences of a successful defense are more immediate. Thus, the importance of understanding the interaction between law and psychiatry exceeds merely a localized or regional issue. It is the eventual consensus and harmonization of procedures dealing with mental disease and illness that will demonstrate the war crimes tribunals’ and the International Criminal Court’s (ICC) legitimacy and leadership in this important area of human rights law.