He Who Shattered Our "Delicate Mosaic": Why Insanity as an Affirmative Defense Does Not Belong in the International Criminal Court

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In response to the terrible international conflicts of the twentieth century, a group of States came together in 1998 to establish the International Criminal Court (ICC). In this Note, I argue that the ICC should change their current rule, which lists insanity as an affirmative defense. The current insanity test is conceptually problematic, as the defense is particularly inapplicable to the special context of war crimes and genocide. Further, complete acquittal under insanity is unsatisfactory in practice, as a false positive in this context is particularly detrimental to the goals of the ICC. Therefore, the issue of a defendant's insanity is best reserved for sentencing instead.

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Introduction

When faced with perpetrators of war crimes, we often assume that these perpetrators are monsters.[1] It is easy to call them monsters, because doing so puts a great distance between us and them.[2] We console ourselves with this syllogism: "ordinary people could not have done what these monsters did; we are ordinary people, therefore we cannot commit such crimes."[3] Another way of putting this common intuition: "the perpetrators of mass atrocity must be insane."[4] Indeed, a connection between the insane and monsters goes back centuries, when jurists analogized the insane to wild beasts.[5] However, the consensus among experts is that "the most outstanding common characteristic of perpetrators of extraordinary evil is their normality, not their abnormality."[6] Experts in the fields of psychology, psychiatry, and social science for the most part reject our intuition.[7] Psychologist Ervin Staub concluded that "evil that arises out of ordinary thinking and is committed by ordinary people is the norm, not the exception;"[8] Christopher Browning identified the perpetrators of the "Final Solution" in Poland as "Ordinary Men;"[9] and Hannah Arendt "famously concluded from her observations of the Eichmann trial that he was 'terribly and terrifyingly normal.'"[10] She called it "the banality of

1. SLAVENKA DRAKULIÆ, THEY WOULD NEVER HURT A FLY: WAR CRIMINALS ON TRIAL IN THE HAGUE 188 (2003).
2. *Id.*
3. *Id.*
4. Isabelle Xavier, *The Incongruity of the Rome Statute Insanity Defence and International Crime*, 14 J. INT'L CRIM. JUST. 793, 793–94 (2016). The reason: "Our reflex when confronted with the ugly side of humanity exposed by their actions is to distance ourselves as far as possible. Pinning their behavior down to a psychological abnormality, some concrete and observable sense in which they differ from the rest of humankind, aids us in rationalizing and containing their inhumanity." *Id.*
5. Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123, 146 (2018).
6. Xavier, *supra* note 4, at 794 (quoting social psychologist James Waller).
7. *Id.*
8. DRAKULIÆ, *supra* note 1, at 191.
9. *See generally* CHRISTOPHER R. BROWNING, ORDINARY MEN: POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND (1994).
10. Xavier, *supra* note 4, at 794.

evil."[11]

Our intuitive desire to label perpetrators as "insane," juxtaposed with the consensus that most of these perpetrators are simply ordinary, sets the stage for an important question: how should we deal with the issue of insanity when trying these perpetrators for their crimes?

I. Background—History and Current Law

A. History

On July 17, 1998,[12] one hundred and twenty States adopted the Rome Statute of the International Criminal Court (ICC).[13] The purpose of the Rome Statute was to establish an independent and permanent International Criminal Court (ICC) to handle the most serious international crimes,[14] put an end to impunity for the perpetrators, and prevent these crimes from occurring again.[15] The ICC was established in response to conflicts of the twentieth century and the heinous crimes committed during such conflicts. After WWII (which was followed by the Nuremberg and Tokyo tribunals), the United Nations General Assembly recognized the need for a permanent international court to deal with these atrocities. Decades later, while the UN was negotiating over the ICC Statute, more atrocities occurred in the former Yugoslavia and Rwanda. The UN Security Council established an *ad hoc* tribunal for both Yugoslavia and Rwanda and convened the conference which established the ICC just a few years later.[16]

B. Current Law

The ICC can apply three sets of rules. First, the Court looks to the Rome Statute, Elements of Crimes, and its Rules of Procedure and Evidence; second, to the applicable treaties and international law; and third, if the former both fail, the Court can look to "general principles of law derived from national laws of legal systems of the world, provided that those principles are not inconsistent with the Rome Statute, international law, and internationally recognized norms and standards."[17]

While the insanity defense in international criminal law has more or

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11. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253 (1963).

12. The Statute entered into force on 1 July 2002. International Criminal Court, *Understanding the International Criminal Court* 1, https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf [https://perma.cc/79ME-4BFU].

13. *Id.*

14. The ICC's jurisdiction is limited to (1) the crime of genocide, (2) crimes against humanity, (3) war crimes, and (4) the crime of aggression. Rome Statute of the International Criminal Court art. 5.

15. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

16. International Criminal Court, *supra* note 12, at 3.

17. Rome Statute, *supra* note 15, art. 21, ¶ 1.

less "slid quietly under the radar,"[18] Article 31(1)(a) of the Rome Statute does exclude criminal responsibility if "the person suffers from a mental disease or defect that destroys the 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."[19] This test incorporates both volitional and cognitive components and borrows heavily from domestic formulations of insanity.[20] The insanity defense was not included in the Statutes of either the tribunal for the former Yugoslavia (ICTY) or that for Rwanda (ICTR), although the Rules of Procedure and Evidence (RPE) of both Tribunals make explicit reference to the defense. For example, Rule 67(B)(i)(b) for the ICTY states that "the defence shall notify the Prosecutor of its intent to offer any special defence, including, that of diminished or lack of mental responsibility."[21] Of note, other grounds for exclusion of criminal responsibility include involuntary intoxication, self-defense, duress, and any other ground "where such a ground is derived from applicable law as set forth in article 21."[22]

II. Problems with the Current Test

A. The Mental Disease or Defect Requirement—This Requirement is Ripe for Abuse by Defendants and Political Groups

The insanity defense is sometimes criticized because of the fear that defendants might feign illness to avoid punishment.[23] There is a fear that the insanity defense might acquit more defendants than it should, and that fear is understandably heightened when dealing with appalling atrocities such as genocide, crimes against humanity, and war crimes.[24] At the same time, mental defects, such as PTSD,[25] are abundant in the wartime context.[26] One study concluded, on the basis of a meta-analysis, that about 354 million adult war survivors suffer from post-traumatic stress disorder (PTSD) and/or major depression (MD).[27] So, we are faced with a situation

18. Xavier, *supra* note 4, at 793 (arguing that the insanity defense was "all but ignored during the Rome Conference negotiations").

19. Rome Statute, *supra* note 15, art. 31, ¶ 1(a).

20. Xavier, *supra* note 4, at 793.

21. *Id.* at 794.

22. Rome Statute, *supra* note 15, art. 31.

23. Dr. John Tobin, *The Psychiatric Defense and International Criminal Law*, 23 MED., CONFLICT & SURVIVAL 111, 112 (2007).

24. *Id.*

25. A note on PTSD: "Given that this illness is more frequent in situations of conflict, it may be that a defendant can claim that their criminal behaviour was related to the dissociative component of this illness . . . Legally, as well as medically, it is very difficult to prove its occurrence, especially retrospectively." Tobin, *supra* note 23, at 113.

26. Thole Hilko Hoppen & Nexhmedin Morina, *The Prevalence of PTSD and Major Depression in the Global Population of Adult War Survivors: A Meta-Analytically Informed Estimate in Absolute Numbers*, 10 EUR. J. PSYCHOTRAUMATOLOGY 1, 1 (Feb. 22, 2019).

27. *Id.* The researchers "reviewed all countries that suffered at least one war within their own territory between 1989 and 2015. [T]hen [they] conducted a meta-analysis of current randomized epidemiological surveys on prevalence of PTSD and/or MD among war survivors. Finally, [they] extrapolated [their] results from the meta-analysis on the

in which there is heightened suspicion of feigning mental illness and an increased opportunity for an unscrupulous defendant to believably do so.[28]

The ICTY Court has already come across this problem. In the Celebici Trial, the indictment alleged that the four defendants, with the Bosnian Muslim and Croat forces, took control of Bosnian Serb villages in central Bosnia-Herzegovina.[29] The defendants captured Serbs, held them in a prison camp in the village of Celebici, and subjected them to torture, sexual assault, cruel and inhuman treatment, and death.[30] One of the defendants, Esad Landzo, was a young camp guard charged, for example, with "beating several detainees to death with wooden planks, baseball bats, chains, and other items and with torturing prisoners by inflicting burns and suffocation."[31] Landzo was the first recent international defendant to ask an international body of law to consider reduced mental capacity as it applies to international criminal law.[32] Landzo raised the defense of "diminished, or lack of, mental responsibility," from the ICTY Rules of Procedure and Evidence (Rule 67(A)(ii)(b)),[33] which is similar to the insanity defense in the ICC Rome Statute. The Trial Chamber established a two-part test:[34] "at the time of the alleged acts, the accused must have been suffering from an 'abnormality of the mind' that 'substantially impaired' his ability to control his actions."[35]

Three court-appointed European psychiatrists evaluated Landzo to assess whether he had a diminished or a lack of mental responsibility. The psychiatrists initially diagnosed Landzo with PTSD, leading Landzo's attorneys thought to use that diagnosis as the basis for Landzo's defense.[36] However, subsequent evaluations reflected a "quasi fishing expedition by

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global population of adult war survivors by means of using general population data from the United Nations." The researchers acknowledge that they are working with a "slim available evidence base" and their results therefore contain a large margin of uncertainty. *Id.*

28. Landy F. Sparr, *Mental Incapacity Defenses at the War Crimes Tribunal: Questions and Controversy*, 33 J. AM. ACAD. PSYCHIATRY & L. 59, 59 (2005). And of course, that leaves a large number of defendants who might rightly claim that they have a mental disease or defect. However, I assert later that the best way to treat those defendants is not with an affirmative defense, but with an opportunity to have their mental disease or defect considered as mitigating during sentencing.

29. *Id.*

30. *Id.*

31. *Id.*

32. Tobin, *supra* note 23, at 114.

33. Sparr, *supra* note 28, at 60.

34. Sparr argues that because the text of the mental-incapacity defense in the ICTY statute was relatively slim, the possibilities for its use were expansively wide. Sparr, *supra* note 28, at 68. Although her argument is specific to the ICTY statute, this issue of expansiveness is something to keep in mind as it relates to the ICC rule. She notes the contrast between this expansiveness and the fact that these defenses have often been the subject of debate and of periodic calls for their elimination, especially as they are seen posing a threat to achieving "justice, redress, protection, and prevention . . . [and] accountability" for serious humanitarian law violations. *Id.*

35. *Id.* at 60.

36. *Id.* at 63.

the defense to find a suitable psychiatric diagnosis for the defendant."[37] Psychiatrists in subsequent evaluations generally avoided official DSM-IV and ICD-9 diagnostic criteria to tailor a "personality disorder" which ultimately became the basis for Landzo's defense.[38] Instead of using the formal criteria, the psychiatrists described Landzo as "narcissistic, antisocial, schizoid, compliant, borderline, inadequate, immature, impulsive, unstable, and deprived" in both their reports to the Court and their testimony at trial.[39]

Ultimately, the Trial Chamber found that Landzo did suffer from an abnormality of mind at the time of his acts but found that he had not satisfied the second prong of the test.[40] Landzo was convicted of seventeen counts of war crimes.[41] The Trial Chamber sentenced Landzo to fifteen years' imprisonment, citing Landzo's mental condition as a mitigating factor.[42] The lesson to take from the Landzo case is that applying the mental disease or defect requirement to defendants charged with war crimes should give us pause. Although it ultimately did not support an affirmative defense for Landzo, the requirement is ripe for abuse in this particularly important context.

Further, there is a real danger in allowing an international body to decide what counts as a mental disease or defect. There is an odious history of political groups weaponizing psychiatric diagnoses. These groups intentionally misused psychiatric diagnosis, treatment, and detention to obstruct the human rights of certain individuals or other groups.[43] In the Soviet Union, for example, there was systematic abuse of psychiatry, where approximately one third of political prisoners were locked up in psychiatric hospitals.[44] Available records suggest that thousands of dissenters were hospitalized for political reasons, and some estimate that the numbers were even larger than those records suggest.[45] This abuse also took place on a systematic scale in Romania and in the People's Republic of China.[46] The International Association on the Political Use of Psychiatry (IAPUP)'s investigative committee concluded that there were several hundred victims in Romania.[47]

In China, the abuses appear even more extensive than in the Soviet Union.[48] Beginning in the early 2000s, followers of the Falun Gong movement, trade union activists, human rights workers, and those complaining

37. *Id.* at 68–69.
38. *Id.* at 63–64.
39. *Id.* at 64.
40. Sparr, *supra* note 28, at 64.
41. *Id.*
42. *Id.*
43. Robert van Voren, *Political Abuse of Psychiatry–An Historical Overview*, 36 SCHIZOPHRENIA BULL. 33, 33 (2009) (giving the Global Initiative on Psychiatry's definition of "political abuse of psychiatry").
44. *Id.*
45. *Id.* at 34.
46. *Id.* at 33.
47. *Id.* at 34.
48. van Voren, *supra* note 43, at 34.

against injustices by local authorities were incarcerated in this way.[49] This issue is not unique to dictatorial or totalitarian regimes; well-established, democratic societies are also susceptible to the opportunity to use psychiatry as a means to stifle opponents or solve conflicts.[50] Similarly, the ICC is not necessarily immune to this problem. Where an international, political body has the power to define a particular label for criminal defendants, especially a label as imprecise as "mental disease or defect," there is always the risk of abuse for political gain.[51] One can imagine a scenario where ICC defendants are labelled insane and put away simply for having a "crazy" worldview or philosophy.

B. The *M'Naghten* Test—Most Defendants Cannot Understand the "Unlawfulness" of Their Actions

The first prong of the Rome Statute insanity test, the cognitive component, is strongly reminiscent of the *M'Naghten* rule.[52] In *M'Naghten*, the defendant shot and killed Edmund Drummond, private secretary to the Prime Minister, because M'Naghten was suffering from delusions and believed that members of the Prime Minister's political party were persecuting him.[53] The verdict: not guilty on the ground of insanity.[54] The Queen at the time, Queen Victoria (the year was 1843), asked the judges of the common law courts to explain what made a person insane under English law.[55] From this inquiry, the *M'Naghten* rule was born. The rule says: "to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong."[56] Similarly, the Rome Statute excuses by reason of insanity where "the person suffers from a mental disease or defect that destroys the person's capacity to appreciate the unlawfulness or nature of his or her conduct."[57] Simply stated, both excuse by reason of insanity if, as a result of mental disease or defect, the person lacked the capacity to know the criminality of his conduct at the time of the conduct.[58]

A major problem with this test arises when it is applied to the international criminal context. The problem arises with the interpretation of what it means to "appreciate the unlawfulness or nature of his or her conduct." Like *M'Naghten*, the language drives at knowing the difference between

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49. *Id.*
50. *Id.* at 33.
51. The question of what counts as a "mental disease or defect" is generally a legal, moral, and policy question—not one of medical judgment. U.S. v. Lyons, 731 F.2d 243, 246 (5th Cir. 1984).
52. Xavier, *supra* note 4, at 795.
53. Garvey, *supra* note 5, at 123–24.
54. Queen v. M'Naughten 8 Eng. Rep. 718, 718 (1843)
55. Garvey, *supra* note 5, at 127.
56. *M'Naughten* 8 Eng. Rep. at 719.
57. Rome Statute, *supra* note 15, art. 31, ¶ 1(a).
58. Garvey, *supra* note 5, at 129.

right from wrong. Unlike *M'Naghten*, there is no ambiguity as to whether that wrongness is moral or legal: the Rome Statute resolves any ambiguity in favor of legal wrong. What is wrong is what is "unlawful."[59] But even in this relatively unambiguous statement of the test, the unlawfulness test remains problematic.

> In a context where the vast majority of sane individuals in a society do not regard participation in atrocity as unlawful, defining insanity by reference to an inability to appreciate the 'unlawfulness' of one's actions fails to accurately define the normal by reference to the abnormal. That is, participating in atrocity without viewing such participation as unlawful can only be taken as evidence of insanity in a context where the vast majority of sane individuals do regard it as unlawful. Absent such a context, the 'unlawfulness' test is unworkable.[60]

Consider, for example, Nazi Germany, where participation in atrocity was formally prescribed by law.[61] Or, Rwanda and the former Yugoslavia, where formal law was used, to some extent, to advance genocide.[62] Even informally, state actors legitimized participation in atrocities through media, education, and propaganda.[63] In these contexts, the individual acts that collectively lead to mass atrocity are not so deviant.[64] Take, for instance, the former Yugoslavia, where "nobody had told [the perpetrators] that what they did — killing Serbian civilians, for example — was wrong. On the contrary, these same men had been awarded decorations, apartments, pensions, and other privileges."[65] More specifically, consider the defendants who were the center of the ICTY trials, as described by respected Croatian journalist Slavenka Drakuliæ. Speculating about what the defendants thought of their presiding judge, a woman from Zambia, she writes, "besides, she was not even from Europe, so what could she know about that war? . . . [S]he could not understand that Serbs and Muslims were enemies and that therefore to dishonor Muslim women was, well, somehow legitimate. Everybody was doing it. In their own country, Republika Srpska, they were treated like heroes."[66] Most of the defendants pleaded not guilty, which prompts Drakuliæ to ask, "when the defendants say they are not guilty, do they think that the prosecution won't be able to prove their guilt, or are they convinced that there is nothing to feel guilty about?"[67] She postulates, "hundreds of thousands [of people] had to have believed that they were right in what they were doing. Otherwise, such large numbers of rapes and murders simply cannot be explained."[68]

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59. Rome Statute, *supra* note 15, art. 31, ¶ 1(a).
60. Xavier, *supra* note 4, at 802.
61. *Id* at 799.
62. *Id.*
63. *Id.* at 799–800.
64. *Id.* at 798.
65. DRAKULIÆ, *supra* note 1, at 43.
66. *Id.* at 61.
67. *Id.* at 59.
68. *Id.* at 56.

Further, saying that individuals should be aware of international norms and therefore be able to recognize the unlawfulness of their actions, even as those actions conform to their country's laws, does not solve the problem. First, realistically, individuals living in societies where atrocities are normalized are unlikely to be exposed to conflicting international norms. In this context, "it is unreasonable to expect that individuals within the society would view the international norms as prevailing over the domestic norms."[69] Second, even if they were aware of the international norms, these individuals would still lack the capacity to understand the wrongfulness of their actions. In essence, these individuals are functionally delusional. "After all," writes Morse, "shedding one's deepest attitudes and predispositions may be beyond the capacity of most people."[70] In this context, the vast majority of sane individuals are unaware of the international legal norm and cannot act in accordance with it. Where this is true, "a failure to acknowledge and comply with such a norm cannot be taken as evidence of exculpating insanity."[71]

C. The Volitional Test—Excusing for Lack of Control is Incompatible with International Law and the Rome Statute and Denies Agency; Conforming to the "Requirements of the Law" is Too Vague a Standard; "Crimes against Humanity" is Incompatible with "Control" & Policy Considerations Weigh Against Excusing for Lack of Control

The second prong of the Rome Statute insanity test, the volitional component, is strongly reminiscent of the volitional/loss of control test.[72] The Statute provides that "a person shall not be criminally responsible if, at the time of that person's conduct. . . the person suffers from a mental disease or defect that destroys that person's. . . capacity to control his or her conduct to conform to the requirements of law."[73] We can understand this test as excusing those who have defects of control.[74] The salient question becomes whether the defendant could have avoided the choice she made. Otherwise put, would the defendant have had "unreasonably great difficulty" making a different choice under the conditions in which she was operating?[75]

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69. Xavier, *supra* note 4, at 803–04.

70. Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205, 210 (2008). Discussing, "acculturated psychopaths," those who have been taught to despise certain groups, he ponders, "how does one learn to love or even to have concern for a person an agent believes is 'subhuman' or entirely unworthy for concern?" Morse acknowledges that this is a difficult problem for responsibility theory. *Id.*

71. Xavier, *supra* note 4, at 798.

72. *Id.* at 796.

73. Rome Statute, *supra* note 15, art. 31, ¶ 1(a).

74. *See* Michael Corrado, *The Case for a Purely Volitional Insanity Defense*, 42 TEX. TECH L. REV. 481, 484 (2009).

75. *Id.* at 507. An objector might suggest that the volitional test is meant not to apply to defendants who find it *difficult* to conform, but who rather find it *impossible* to conform, and that I have watered down the test to make my thesis easier to prosecute. In response, I offer that there is no accurate basis for measuring a person's capacity for

This brings us to our first issue with the volitional prong: setting aside the limiting principle that the lack of control must be related to a mental disease or defect, an excuse due to "control over one's actions" is incompatible with the ICC.[76] Corrado argues that "where a person, whether or not he knows the nature of the act, cannot avoid performing the act, he should be excused—unless he himself is responsible for not being able to avoid it."[77] But excusing those who could not practically control their action contradicts international law[78] and other provisions of the Rome Statute. For example, many defendants in the ICC may not have had "control" over their actions, in the sense that they may have been subordinates in a military structure. Even so, the Statute allows for individual criminal responsibility where the defendant "aid[ed], abet[ted] or otherwise assist[ed] in [a crime's] commission or its attempted commission"[79] and where the defendant "in any other way contribute[d] to the commission or attempted commission of such a crime by a group of persons acting with a common purpose"[80] *without* a carveout for those defendants who were ordered to do so. If the defendant's contribution was "made in the knowledge of the intention of the group to commit the crime," practical ability to control that contribution is not relevant.[81] More explicitly, Article 33 provides that "the fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility."[82] Article 33 does provide a carveout where the person was legally obligated to obey the orders in question, but only if "the person did not know that the order was unlawful" *and* "the order was not manifestly unlawful."[83] Orders to commit genocide are crimes against humanity and are considered manifestly unlawful.[84]

In sum, express language outside the excusing provisions of the Rome Statute contradicts the idea that a person may escape criminal liability for committing acts of genocide and crimes against humanity by virtue of not being able to practically control their actions.[85] As long as the "superior

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self-control, U.S. v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984), and so the best we can do with what we have is use the somewhat stretchy standard of "reasonableness." "Impossible" is simply not a workable standard.

76. I set this aside easily because I discuss the problems with the "mental disease or defect" requirement in detail above.

77. Corrado, *supra* note 74, at 508.

78. Tobin, *supra* note 23, at 111 ("International criminal law has emphasized that the individual responsibility of the perpetrator is independent of the group from which the perpetrator may originate.").

79. Rome Statute, *supra* note 15, art. 258, ¶ 3(c).

80. *Id.* art. 258, ¶ 3(d).

81. *Id.* art. 258, ¶ 3(d)(ii).

82. *Id.* art. 33.

83. *Id.*

84. *Id.*

85. On a procedural note, if one worries about extreme circumstances where someone is ordered to commit an atrocity or must do so to save himself or his family, the Rome Statute would excuse those defendants under its provisions for duress and self-defense. *Id.* art. 31, ¶ 1(c), (d).

orders" defendant is sufficiently analogous to the "insanity" defendant, we can conclude that if the former is not shielded from liability, then neither should the latter be. One example that highlights how the two might be sufficiently analogous is that of James Hadfield. Hadfield thought that he needed to die in order to bring about the Second Coming of Christ.[86] In order to ensure his own execution, Hadfield shot at the king.[87] This is an example of an incoming delusion, which we might conceive of as an order, overcoming a rational countervailing desire (to not commit treason), and resulting in an action over which he may be said to have had no control. In the case of a soldier, he too has an incoming order, which overcomes a rational countervailing desire (to not commit an atrocity), and results in an action over which he may be said to have no control. Because both defendants' actions were the result of external influence overcoming rational countervailing desires, and because the ICC Statute refuses to excuse one, the other must also not be excused.

A second issue with the volitional prong: excusing those who could not practically control their actions denies those offenders the agency due to them and contradicts professional consensus.[88] Offenders who have perpetrated the most appalling atrocities are not less human, but there is a tendency to deny them their human strengths and weaknesses[89]–metaphorically, we expect to see horns and pointed ears when we are in their presence.[90] But we must acknowledge their agency to breathe life into the international criminal justice system. It may be more comfortable to do the opposite: "our reflex when confronted with the ugly side of humanity . . . is to distance ourselves as far as possible."[91] We would rather identify "some concrete and observable sense in which [the perpetrators] differ from the rest of humankind" in order to "rationaliz[e] and contain[ ] their inhumanity."[92] But, if we deny the perpetrator's agency we excuse the bystander, casting perpetrators as helpless cogs in an evil wheel. And in fact, research suggests that the perpetrators have more agency than we are comfortable admitting: "psychologists, psychiatrists and other social scientists have flocked to scrutinize this intuition, and have for the most part rejected it."[93] The consensus among experts is that "the most out-

86. Garvey, *supra* note 5, at 155–56.

87. *Id.*

88. This abuts an alternative view of insanity, the theory that insanity is a lost sense of agency. *See* Garvey, *supra* note 5. As I explain, ascribing a lack of agency to perpetrators is equally incompatible with the ICC context.

89. Tobin, *supra* note 23, at 112.

90. Drakuliæ, *supra* note 1, at 18–19. Describing her surprise at how common the defendants, Miroslav Kvoèka, Dragoljub Præac, Milojica Kos, Mladjo Radiæ, and Zoran _igiæ, who were accused of murder and torture in the Omarska and Keraterm camps in Bosnia, appeared to her. She also describes the "normal" appearance of defendants Dragoljub Kunarac, Radomir Kovaè, and Zoran Vukoviæ, who were sentenced to 28, 20, and 12 years in prison, respectively, for the "torture, slavery, outrages upon the dignity, and mass rapes of Bosnian Muslim women as crimes against humanity." *Id.* at 51, 55.

91. Xavier, *supra* note 4, at 793–94.

92. *Id.*

93. Xavier, *supra* note 4, at 794.

standing common characteristic of perpetrators of extraordinary evil is their normality, not their abnormality."[94] In sum, what professionals know about perpetrators weighs against denying their agency and excusing them for lack of control.

A third issue with the volitional prong lies in its language about conforming "to the requirements of law."[95] The question arises: to whose law must the defendant have been able to conform? A Syrian delegate raised this question at a 1998 Working Group meeting.[96] Even setting aside that initial problem that each State may have different laws and expectations, the context of war creates an insurmountable obstacle. The law of wartime is astronomically different from the rule of law when at peace. In general, a person is not normally permitted to intentionally take the life of another. By contrast, soldiers in wartime are encouraged to take the lives of their enemies. To frame a defense around conforming one's behavior to law, in a context in which the rules of engagement are so fundamentally backwards, seems nonsensical. Further, even if we were to say that one must conform one's behavior to international law, a defendant's inability to do that "can only be taken as evidence of insanity if the sane do so appreciate and guide their behavior,"[97] as an insanity defense "is coherent only where the abnormal is accurately defined by reference to the normal."[98] An international insanity defense only makes sense where the sane conform to international law rather than conflicting legal or social norms.[99] As explained above, this is unlikely to be the case, especially among those individuals living under genocidal or totalitarian regimes.

Fourth, the particular crime of "crimes against humanity" appears to be incompatible with the control test.[100] The definition reflects the Drafter's intention to exclude isolated and sporadic attacks. The issue: "Insofar as an attack perpetrated by a person who has lost all control over his actions. . . may uncontroversially be categorized as both isolated and sporadic, it seems that we may conclude that the 'control' test and crimes against humanity are, at best, difficult to reconcile and, at worst, mutually exclusive." Further, where the defendant has committed a crime to pursue the aims of the conflict, this is "inconsistent with the *sine qua non* of the 'control' test, that is, lack of ability to control and direct one's actions

94. *Id.*

95. Rome Statute, *supra* note 15, art. 31, ¶ 1(a). Further, we might also consider Morse's augment that even where "hard choice cases in which we cannot expect the agent to behave differently undeniably exist . . . what does the excusing work is . . . a moral judgment about when options are so constrained that it is simply unfair to require the agent to behave otherwise." Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1605 (1994). Considering here the overriding interest in not supporting bystanders, it would not be unfair to require the perpetrator to behave otherwise and therefore the perpetrator should not be excused.

96. The result was "the insertion of an explanatory footnote specifying that the applicable 'law' was that as described in Article 21." Xavier, *supra* note 4, at 803.

97. Xavier, *supra* note 4, at 803.

98. *Id.*

99. *Id.*

100. *Id.* at 811.

towards a given objective."[101]

Lastly, policy considerations also suggest against excusing for lack of control. If we excuse perpetrators based on a lack of control, we tacitly approve indifference to the suffering of others and bystanders' inaction. When accepting his Nobel Peace Prize, Holocaust Survivor and internationally acclaimed author, Elie Wiesel, called indifference "the most insidious danger of all."[102] Wiesel also said, "[l]et us remember: what hurts the victim most is not the cruelty of the oppressor but the silence of the bystander."[103] Excusing based on inability to control one's actions allows the bystander safety in his silence. This, we cannot do.

III. Special Considerations & A Proposal

A. Special Considerations in the International War Crime Context

Any suitable international criminal court must do more than import a test from domestic jurisdictions, as "the contexts in which violations of international and domestic law take place are materially different."[104] A proper insanity rule must consider the special context in which it will operate. Important context-specific considerations include the gravity of the situation, the ideal role of international criminal law, and international policy.

1. The Gravity of the Situation

The rule must function, and should mirror our collective intuition, in the gravest of situations. The States Parties to the Rome Statute recognized that the crimes that would make their way to the ICC were "the most serious crimes of concern to the international community as a whole [and] must not go unpunished," and that "such grave crimes threaten the peace, security and well-being of the world."[105] In its metaphorical hands, the ICC holds the "delicate mosaic [of peoples and cultures, which] may be shattered at any time." Its metaphorical voice renders a judgment on the "unimaginable atrocities that deeply shock the conscience of humanity."[106] Of course, this is not to say that everything we know about justice should be forgotten in pursuit of persecuting the persecutors.[107] Instead, I

101. *Id.* at 812.

102. Katie Reilly, *'Action is the Only Remedy to Indifference': Elie Wiesel's Most Powerful Quotes*, TIME (Jul. 2, 2016, 5:39 PM), https://time.com/4392252/elie-wiesel-dead-best-quotes/ [https://perma.cc/KXQ9-7KTE].

103. Nicholas D. Kristof, *The Silence of Bystanders*, N.Y. TIMES (Mar. 19, 2006), https://www.nytimes.com/2006/03/19/opinion/the-silence-of-bystanders.html [https://perma.cc/Q4TU-BGUV].

104. Xavier, *supra* note 4, at 796.

105. Rome Statute, *supra* note 15, pmbl.

106. *Id.*

107. If we did, we might be throwing out the baby with the bathwater. If, in order to get rid of the evil perpetuated by war criminals, we throw out the good that is inherent in a fair justice system, we are no better off than we were before. Responding to a time of horrible state-sponsored persecution with a different form of state-sponsored persecution is hardly the right move.

mean to say only that this gravely important context may compel us to craft our rules differently, so that we may achieve the right result.

2. The Ideal Role of International Criminal Law

The rule should reflect and promote those goals in furtherance of which the drafters of the Rome Statute created the ICC. These goals include: "put[ting] an end to impunity for the perpetrators" and preventing the most serious crimes of concern to the international community.[108] The drafters affirmed that these crimes "must not go unpunished."[109] "[T]o these ends and for the sake of present and future generations," they established the ICC.[110] Where the Rome Statute clearly sets out to prevent serious crimes for the sake of present and future generations, its message is a utilitarian one. Utilitarianism holds that punishment ought to be admitted insofar as it promises to exclude some greater evil[111] and is often cast in contrast with retributivism, which rejects the theory that punishment may be justified by future benefits that such punishment may obtain.[112] The Rome Statute clearly identifies such future benefits, benefits which any rule used by the ICC should advance in order to exclude greater evil.[113]

First, the Drafters wanted to benefit the present generations.[114] To benefit the present generations, the rules should reflect the theory of retaliation and vengeance. Retaliation and vengeance, as a theory of punishment, "focus[es] less on the blameworthiness of the past offense than on the harm it caused." Rules which rest on retaliation and vengeance benefit the present generation by bringing about the consequences which emphasizing harm brings.[115] For example, using the law to emphasize harm gives definite expression to the public's moral outrage. That benefit is a valid goal in itself. As James Fitzjames Stephen put it in 1883, "the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment."[116] Punishment may, for example, express repudiation of the perpetrator's claim of superi-

108. Consider this related, and interesting, comment from the Nuremberg Tribunal: "Crimes against international law are committed by men, not abstract entities and only by punishing individuals who commit such crimes can the provision of international law be enforced.'" Tobin, *supra* note 23, at 111.

109. Rome Statute, *supra* note 15, pmbl.

110. *Id.*

111. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), *reprinted in* CRIMINAL LAW AND ITS PROCESSES, 97, 97 (Rachel E. Barkow et al. eds., 2017).

112. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 99–100 (Rachel E. Barkow et al. eds., 10th ed. 2017).

113. In contrast, the insanity defense in domestic law is largely based on a retributivist justification. Xavier, *supra* note 4, at 797.

114. Rome Statute, *supra* note 15, pmbl.

115. KADISH ET AL., *supra* note 112, at 107.

116. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883), *reprinted in* CRIMINAL LAW AND ITS PROCESSES, 107, 107 (Rachel E. Barkow et al. eds., 2017).

ority over the victim.[117] The ICC should, therefore, adopt a rule which benefits the present generations by reflecting moral sentiment.

We can look to testimony from the present generations, those who survived the atrocities, to decide what kind of sentiment the rules should reflect. The difficulty is in defining a public sentiment when those of individuals are mixed. Console Nishimwe, a Tutsi survivor of the Rwandan genocide, wants to forgive. She describes forgiveness as the start of a journey to healing, to live again.[118] But some survivors, such as Edward Mosberg, a Jew who survived the Holocaust, feel differently. Describing his visit to the extermination camp where his whole family was killed, Mosberg said, "when I walked through this place I could hear the cries of my family, 'Don't forget us.'" He continued, "How can we forget or forgive the murderers? We have no right to forget or forgive. Only the dead can forgive."[119] Theary Seng, survivor of the Cambodian genocide, offers yet another perspective. For her, forgiveness is "the conclusion of hate and not the conclusion of anger."[120] She never wants to stop being angry because, according to her, the alternative to not getting angry when she sees injustice is to be apathetic. Anger, in contrast to apathy, can fuel positive results.[121]

But even while we can recognize that forgiveness is unique to the individual, and that survivors all cope differently,[122] we can still see a common thread for each of these survivors. Each explicitly rejects what happened to them as something outside the bounds of proper morality. If morals are defined by what is normal, Nishimwe puts it well when she acknowledges, "what happened to [her and other survivors] it's not a normal thing . . . you have to find a way to make everything seem normal again."[123] As part of her healing process, Nishimwe gradually found ways to share what she was feeling.[124] In order to benefit the present generation, the rules must facilitate survivors in sharing the sentiment that is common among them: censure of the perpetrators and a clear moral rejection of the perpetrators' actions. The benefits that follow this censure might even outweigh our need not to inappropriately condemn someone who would be found insane. Although I cannot fully resolve this tension here, I look to Seng, who reminds us that "the theoretical perfect justice is the target" and that this perfect justice should provide our direction.[125]

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117. KADISH ET AL., *supra* note 112, at 113 (citing Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution* 39 UCLA L. REV. 1659 (1992)).

118. Videotape: Consolee Nishimwe, Segments 365-68 (USC Shoah Foundation 2017) (on file with the Visual History Archive Online).

119. Videotape: Edward Mosberg, Segments 15-6 (USC Shoah Foundation 2016) (on file with the Visual History Archive Online).

120. Videotape: Theary Seng, Segments 257-63 (USC Shoah Foundation 2011) (on file with the Visual History Archive Online).

121. *Id.*

122. Nishimwe, *supra* note 118, at segments 365-68.

123. *Id.*

124. *Id.* at segments 370-71.

125. Seng, *supra* note 120, at segments 257-63.

Second, the drafters wanted to benefit the future generations.[126] To benefit the future generations, the rules should reflect the theory of social cohesion. Rules which rest on social cohesion benefit future generations by reinforcing society's morality. A community derives advantage from a close link between criminal law and moral sentiment.[127] When the perpetrator has offended society's morality, reinforcing that morality is valuable in itself. According to some theorists, punishment is intrinsically good when it reinforces a morality which "affirms the dignity of the victim and communicates respect for the offender as a responsible moral agent."[128] As Emile Durkehim put it in 1893, punishment's "real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour."[129] We might, therefore, consider a rule which furthers a particular morality: one which champions the victim and acknowledges the perpetrator's responsibility. Social cohesion is about community healing and the rule should promote that as best as it can.

Third, the drafters wanted to prevent, or deter, the most serious crimes of concern to the international community.[130] Improving the certainty of punishment has been shown to be a better strategy for deterrence than increasing the severity of punishment.[131] International criminal law may also deter by influencing the powerful social forces of normative behavior which are the most powerful determinants of conduct. Considering the diversity of the international context, there is little pre-existing consensus on condemnable conduct.[132] However, the Drafters assert that "all peoples are united by common bonds."[133] In the international context, there is space to solidify and express our shared beliefs of what is truly condemnable.[134] Any rule the ICC uses should seek to alter corrupt social forces and thereby deter conduct that threatens to shatter the "delicate mosaic"[135] of our shared culture.

3. International Policy

In the Preamble, the States Parties to the Rome Statute "determined . . . for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole," but at the same time,

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126. Rome Statute, *supra* note 15, pmbl.
127. STEPHEN, *supra* note 116, at 120.
128. KADISH ET AL., *supra* note 112, at 113 (citing DAN MARKEL, *What Might Retributive Justice Be?* 49 RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY (Mark D. White ed. 2011)).
129. Emile Durkheim, *The Division of Labor in Society* (1893), *reprinted in* CRIMINAL LAW AND ITS PROCESSES, 111, 111–12 (Rachel E. Barkow et al. eds., 2017).
130. Rome Statute, *supra* note 15, pmbl.
131. KADISH ET AL., *supra* note 112, at 121.
132. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 U. L. Rev. 453 (1997), *reprinted in* CRIMINAL LAW AND ITS PROCESSES, 121, 121–22 (Rachel E. Barkow et al. eds., 2017).
133. Rome Statute, *supra* note 15, pmbl.
134. Robinson & Darley, *supra* note 132, at 121–22.
135. Rome Statute, *supra* note 15, pmbl.

> "emphasiz[ed] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Indeed, Article 1 echoes this.[136] The States further "recall that it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes."[137] In fact, the ICC can only intervene where a state is "unable or unwilling genuinely" to investigate and prosecute perpetrators.[138]
>
> Here lies a tension between the International Court's powers and the powers of each sovereign nation. This tension can be particularly sticky in the context of war crimes. Veteran soldiers of the war in the former Yugoslavia, for example, staged protests against extradition to The Hague and the arrest of those who had perpetrated the Gospiæ massacre.[139] Because they had been celebrated at home for their wartime service, the veterans perceived the international prosecution of war crimes as a great injustice.[140] The ICC has to be careful in how it resolves this tension – its rules must not be so soft that they neglect victims and undermine the Court's legitimacy,[141] but at the same time, the rules must not be so harsh toward defendants that they alienate those nations with whom the Court shares power.

Further, the rule ideally would not favor one State's legal tradition over another.[142] Drafters must combat the reality that the ICC is an international body, and as such, is necessarily a mixture of different legal systems and approaches.[143] According to one of the drafters, "[Article 31] was particularly difficult to negotiate because of the conceptual differences that were found to exist between the various legal systems."[144] As much as possible, a rule should be defined clearly enough to temper the "natural tendency for the judges to interpret the international legal system in the light of their own national legal experiences, [which] can lead to inconsistencies in how different cases are handled."[145] At the same time, the rule should allow enough discretion so that each decision reflects people's "common bonds . . . [and] shared heritage"[146] and any intuition that we may share as humans as to what is just.

B. The Proposal — Insanity Evidence as Sentencing Mitigation

Although some commentators doubt that there may be any workable

136. *Id.* art. 1.
137. *Id.* pmbl.
138. International Criminal Court, *supra* note 12, at 1.
139. DRAKULIÆ, *supra* note 1, at 42–43.
140. *Id.*
141. Tobin argues that for the ICC "to gain acceptance and credibility around the world it is important that it is absolutely fair not only to the victims of these monstrous crimes but also to the perpetrators." Tobin, *supra* note 23, at 122. While I agree with that sentiment, I disagree with Tobin's conclusion that not having an insanity defense in the ICC would be unjust to perpetrators.
142. Mental incapacity defenses have been highly debated in various national jurisdictions, "with periodic calls for their elimination or, at least, restriction, particularly after high-profile trials." Sparr, *supra* note 28, at 68.
143. Tobin, *supra* note 23, at 121.
144. *Id.* at 116.
145. *Id.* at 113.
146. Rome Statute, *supra* note 15, pmbl.

definition of the insanity defense in the international criminal context,[147] I maintain that evidence of insanity does belong in sentencing.[148] This idea has been applied in the international criminal context before. For example, in concluding the Celebici trial (discussed above), the ICTY Appeal Chamber interpreted their diminished responsibility rule to mean that "a defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defense leading to an acquittal in a true sense,"[149] and cited defendant Landzo's mental condition as a mitigating factor when they pronounced his sentence.[150] The Rome Statute explicitly mandates that the Court shall take into account "the individual circumstances of the convicted person" in determining the sentence.[151]

Further, we can look to the United States' capital punishment system to see a similar practice in action.[152] There are two distinguishing features that the ICC could adopt. First, in the U.S. system, the sentencer must consider all mitigating factors, both statutory and non-enumerated, before imposing a death sentence.[153] Many states list mental impairment as a mitigating factor.[154] Second, the U.S. system distinguishes between convicting a mentally ill person and inflicting punishment on them. In the U.S., the State may not execute a convicted defendant who is determined to be insane,[155] because such punishment would have neither retributive nor deterrent value.[156] A court may find a mentally ill person guilty where that finding has value, and still decline to inflict punishment if that punishment would have no additional value.[157] The conviction censures the perpetrator for committing the worst of crimes, but recognizes that mental illness might dictate that the most extreme punishment is not warranted.

147. Xavier, *supra* note 4, at 814.

148. Others have considered this question as it relates to diminished responsibility. *See* Sparr, *supra* note 28, at 64 ("A key question is whether diminished responsibility is better considered as an affirmative defense or a sentencing mitigating factor.").

149. Tobin, *supra* note 23, at 114.

150. Sparr, *supra* note 28, at 64.

151. Rome Statute of the International Criminal Court art. 78, ¶ 1.

152. Although we should be wary of superimposing domestic "solutions" onto the international context, the United States' capital punishment system is relevant, despite its domestic nature, because it too is supposed to punish only the most severe crimes. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that a death sentence cannot be constitutionally imposed on a defendant who raped a child where that defendant neither killed nor intended to kill the child); Enmund v. Florida, 458 U.S. 782 (1982) (holding that death sentences for defendants who did not intend to kill the victim are unconstitutional) and Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that death sentences for the rape of an adult woman are unconstitutional).

153. Lockett v. Ohio, 438 U.S. 586 (1978).

154. Sparr, *supra* note 28, at 67.

155. Ford v. Wainwright, 477 U.S. 399, 411 (1986).

156. *Id.* at 409.

157. A capital defendant may also present evidence of insanity at the guilt phase, so what I am assuming here is that a court might know that the defendant suffers from mental illness, and while that evidence might not rise to the level of exculpation, the court may later find that that same defendant's mental illness is mitigating. This system is analogous enough to my proposed system because, in both, introducing evidence of mental illness at the guilt phase would be insufficient to acquit, but that same evidence might be sufficient to mitigate the sentence later.

This system, where an "insane" person might be convicted but not punished beyond which is appropriate, fits exactly with the goals of the ICC. If the goals of the ICC are to express the community's moral sentiment against the perpetrators while still achieving a just result, this solution manages both. First, the conviction allows for expression of the community's moral sentiment. Second, considering mitigating evidence of insanity leads to a lesser punishment where that result is the most just.

It is true that the United States capital punishment system, for all its talk about punishing the worst of the worst, does not always deliver on its promise, and so might not be a model to follow. The recent execution of Lisa Montgomery is an example. Despite suffering from severe mental illness[158] (both at the time of the crime and at the time of her execution), Lisa received the ultimate punishment.[159] Lisa's sister described the injustice poignantly when she said, "she is not the 'worst of the worst' for whom the death penalty was intended. She is the most broken of the broken."[160] Some might worry that the proposed system mirrors a flawed system and would too easily result in injustices like Lisa's. That worry is neither insignificant nor completely unwarranted. However, my proposal does not inherently increase the risk of error. Eliminating insanity as an affirmative defense and moving the issue of insanity to the sentencing phase is not supposed to orchestrate a wholesale elimination of the issue of insanity. Instead, the idea is to allow for a conviction, where deserved, to serve justice for the victims while still allowing for fair sentencing to maintain justice for defendants. Insanity would remain a mitigating issue; it would just be considered post-conviction.[161] Clemency advocates for Lisa, for

158. Sandra Babcock, *Lisa Montgomery - A Victim of Incest, Child Prostitution, and Rape Faces Execution*, CORNELL CTR. ON DEATH PENALTY WORLDWIDE (Oct. 19, 2020), https://deathpenaltyworldwide.org/lisa-montgomery-a-victim-of-incest-child-prostitution-and-rape-faces-execution/ [http://proxy.westernu.edu/login?url=https://deathpenaltyworldwide.org/lisa-montgomery-a-victim-of-incest-child-prostitution-and-rape-faces-execution/]. Lisa first endured brain damage as an infant and developed multiple brain disorders as she aged, including bipolar disorder and temporal lobe epilepsy. Maybe most relevant to the ICC context, she also suffered from dissociative episodes and Complex Post-Traumatic Stress Disorder, which developed after years of horrific abuse. *Id.*

159. For the crime of killing Bobbie Jo Stinnett, a pregnant woman, and abducting the child. *Id.*

160. Diane Mattingly, Opinion, *My Sister, Lisa Montgomery, Took a Life. Her Own Was Scarred by Unimaginable Abuse. Spare Her*, NEWSWEEK (Nov. 19, 2020, 1:34 PM), https://www.newsweek.com/lisa-montgomery-life-sentence-death row-abuse-1548750 [http://proxy.westernu.edu/login?url=https://www.newsweek.com/lisa-montgomery-life-sentence-death row-abuse-1548750].

161. Further, it would be relevant to *mens rea* under Article 30 of the Rome Statute, which provides, "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." "Intent" means "in relation to conduct, that person means to engage in the conduct; in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." "Knowledge" means "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." Rome Statute of the International Criminal Court art. 30.

instance, did not advocate that she receive no censure for her actions. Instead, they argued that the death penalty was not the proper punishment, in part because her mental illness was a mitigating factor that the sentencing jury never considered.[162]

It is also important to note that the ICC does not allow for capital punishment to be imposed on those defendants it convicts. Applicable penalties include (1) "imprisonment for a specified number of years, which may not exceed a maximum of 30 years"; or (2) "life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person"; (3) additional fines, and; (4) "forfeiture of proceeds, property and assets derived directly or indirectly from [their] crime."[163] The stakes are high, but not quite as high as in the capital punishment context.

One possible safeguard would be to enumerate evidence of a mental disease or defect as a factor that the sentencer must consider as mitigating. Currently, the Rules of Procedure and Evidence state that, in determining a sentence, the Court must "bear in mind that the totality of any sentence of imprisonment and fine . . . imposed under article 77 must reflect the culpability of the convicted person."[164] The Court must "balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and the crime."[165] The Rules list a number of factors to be considered,[166] but specifically enumerate only two as mitigating.[167] The first: "circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress."[168] The second: "the convicted person's conduct after the act, including any efforts by the court to compensate the victims and any cooperation with the Court."[169] If the insanity defense was no longer a ground for exclusion of criminal responsibility, insanity could be considered mitigating under the first enumerated factor. Expressly labeling it as mitigating should prevent the problem that arises with psychopaths, for instance—that sentencers may find evidence of mental illness to be aggravating instead.[170]

Lastly, my proposal echoes concerns that courts have had for decades. In *U.S. v. Lyons*, for example, the court rejected their jurisdiction's version

162. Rachel L. Snyder, *Punch After Punch, Rape After Rape, A Murderer was Made*, N.Y. TIMES (Dec. 18, 2020), https://www.nytimes.com/2020/12/18/opinion/sunday/lisa-montgomery-execution.html [https://perma.cc/DC32-4Y5W].

163. Rome Statute of the International Criminal Court art. 77.

164. INT'L CRIM. CT. R. P. & EVID. 145(1)(a).

165. *Id.* 145(1)(b).

166. *Id.* 145(1)(c) (the Court must consider "the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person").

167. *Id.* 145(2)(a).

168. *Id.* 145(2)(a)(i).

169. *Id.* 145(2)(a)(ii).

170. Morse, *supra* note 70, at 207–08.

of the insanity defense because of the perceived heightened risk for false positives.[171] The Court put forth a pragmatic argument, specifically noting the difficulty in measuring a person's capacity for self-control[172] and the risk of fabrication and moral mistakes.[173] While the dissent in that case quipped that "a decision that virtually ensures undeserved, and therefore unjust, punishment in the name of avoiding moral mistakes rests on a peculiar notion of morality,"[174] I assert that the majority's version of morality is closer to that of the ICC. Given the ICC's stated goals, the best approach is a pragmatic one that minimizes both the conceptual problems with the test and the risk of false positives.

Conclusion

In crafting an argument against having insanity as an affirmative defense in the special context of the ICC, I worried at first that I was letting the exception define the rule: looking at the worst cases and crafting a rule that flouts common practice and traditional notions of culpability. However, in this context, the exception *is* the rule – the ICC was designed to handle the worst crimes imaginable. Despite the theory-based arguments that may be made in support of an affirmative insanity defense in other contexts, a pragmatic approach is proper for the ICC. Too much is at stake to do otherwise, and the current approach is just too flawed. Of course, ideally, neither approach would be necessary, as the need for the ICC would cease. But we do not live in an ideal world. As long as humanity continues its pattern of fighting our neighbors, and the ICC continues to prosecute those who inflict the most damage on our "delicate mosaic," I submit that insanity should not be included as an affirmative defense.

171. U.S. v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984).
172. *Id.*
173. *Id.* at 249.
174. U.S. v. Lyons, 739 F.2d 994, 999 (5th Cir. 1984) (dissenting).