

Mental Impairment as a Defence in International Criminal Law

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Abstract

As Mark Osiel points out, the mental impairment defence may only arise rarely in criminal prosecutions but it presents ‘the most fundamental issues concerning the purposes of punishment and the limits of moral culpability’.¹ If this is true in relation to domestic crimes committed in the context of relatively stable environments, it is surely even more pertinent in the context of the most serious crimes committed in the context of armed conflict. The contrasting demands of criminal justice are heightened in the cases of war crimes and crimes against humanity committed in the context of extreme environmental conditions. On the one hand, the vulnerability of the civilian population or surrendered soldiers is so great that the demand for justice is an imperative. Indeed one of the justifications for the right of the international community to step in and prosecute international crimes where national jurisdictions will not is the principle of ‘harm to humanity’: that in some sense international crimes injure us collectively. On the other hand, the importance of moral culpability to the normative framework of the criminal law demands that we punish only those who are truly blameworthy for harms inflicted. The insanity defence is an important means of creating the boundary between the purpose of punishment and the limits of moral culpability and becomes particularly pertinent where the perpetrators of crimes may themselves have been exposed to repeated traumatic experiences or brutalisation.

The prevalence of post traumatic stress disorders in returning soldiers highlights the impact even a small number of high intensity military engagements can have on the mental health of a soldier. In armed forces engaged in ongoing and long term conflict, where soldiers have seen multiple engagements, or in cases of former child soldiers, subjected to long term brutalisation, the incidents of mental health concerns might be presumed to be even greater. How does and should mental impairment brought about through extreme environmental traumas be taken into account in terms of moral culpability for international crimes?

The mental impairment defence is set out in Article 31(1) of the ICC Statute but it has been criticised as setting the bar too high in relation to the use of mental impairment as a complete defence. Tobin, for example, argues that the use of the term ‘destroy’ in terms of the degree of impairment of faculties that must be present to make out the defence goes ‘as close as can be got to a total rejection of an insanity defence’.² Conversely, in his comparison of the mental impairment defence in the ICC Statute with that adopted in the Australian Criminal Code, Yeo has pointed out that Australia likewise demands a very high degree of mental malfunctioning, total impairment, for the defence to be raised.³

This paper seeks to explore normative issues related to the defence of mental impairment as codified in the ICC Statute and to consider the justifiable parameters of the defence in relation to international crimes and whether the boundary has been set appropriately under the ICC Statute.

¹ Mark Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (1999), at 1.

² John Tobin, ‘The Psychiatric Defence and International Criminal Law’ (2007) 23 (2) *Medicine, Conflict and Survival* 111, at 121.

³ Stanley Yeo, ‘Commonwealth and International Perspectives on the Insanity Defence’ (2008) 32 *Criminal Law Journal* 7, at 11.