Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute

Dragana Radosavljevic
Department of Law and Criminology, University of Greenwich, London, UK

1. Introduction

Investigating the nature of criminality, particularly in the context of ICC core crimes, seems fundamental in a quest to discover the truth and produce an accurate historical record; both of these aims are in the long term interests of justice, the international as well as local communities. Whilst the ICC is based on strong punitive ideals, similar to those endorsed by ICTY and ICTR in particular, the ICC is in a unique position to depart from a merely pragmatic/administrative exploration of facts and history. In fact, in recent prosecutions rehabilitation aims have frequently been substituted with an “attempt to stigmatise the most serious violations of international humanitarian law.”\(^1\) The results orientated approach of ICTY/ICTR, which includes, inter alia, charge bargaining in alleged genocide cases, should be departed from in ICC proceedings in favour of more holistic and interdisciplinary justice methods which strive to not only achieve punitive goals but also promote rehabilitation of offenders and ultimately reconciliation.

In this context, the inclusion of a specific diminished responsibility deference in the ICC Statutes and its Rules of Procedure and Evidence would not in any way be incompatible with the overall objectives of the Court which are fundamentally

to punish war criminals, vindicate victims and deter future crimes. This defence
is often described as being inadequate, for its alleged leniency, in the context of
international crimes. On the contrary, this study seeks to identify reasons for this
inclusion on the basis that, notwithstanding evidentiary complexities, it is both
morally defensible and legally achievable. The nature of crimes within the jurisdic-
tion of the ICC demands greater procedural and trial rights for the suspects, not
compromised standards of justice. Expert evidence for the purposes of determining
guilt or exculpating an accused person before the Court is crucial and

eminently appropriate to rebut allegations about the plausibility of the appellant’s account\(^2\)
and to ‘conclude that something is plausible in the light of conditions in the country of origin,
and consistent with or explicable by cultural or mental health factors.\(^3\)

Rationalization for the absence of diminished responsibility as a defence, based on
procedural/evidentiary difficulties and inadequacy of the same in the context of
ICC crimes, is difficult to sustain when one considers the ideological indecisiveness
of the ICC system overall. For instance, an accused person is unable to invoke
diminished responsibility as a defence for crimes he/she committed, but another
person, accused of the same crime(s) may not face prosecution if that person admits
guilt for another, lesser crime. Here, the ICC Prosecutor, under ICCSt. Art. 65(1)
(c), has discretion to charge and sentence bargain.\(^4\) Moreover, depending on the
implementation method of the Rome Treaty at a national level, two defendants
accused of the same crime may face inconsistent outcomes; one may earn a reduced
long-term sentence and the other may walk free under a national/peace amnesty
provision. Some ICC implementing laws stipulate that when a State has effectively
initiated or is conducting an investigation with regard to a person sought by the
Court, the State has the right to ask the ICC Prosecutor to restrain its competence

\(^3\) Ibid.
\(^4\) See e.g. D. Radosavljevic, ‘Restorative Justice under the ICC Penalty Regime’, *The Law and Practice
ICTY and ICTR include: *Prosecutor v. Erdemovic*, Case No. IT-96-22-T bis, Sentencing Judgment,
05 March 1998; *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001; *Prosecutor
Sentencing Judgment, 30 March 2004; Prosecutor v. Rajic, Case No. IT-95-12-S, Sentencing Judgment,
08 May 2006; *Prosecutor v. Bisengimana*, Case No. ICTR- 00-60-T, Judgment and Sentence, 13 April