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Grounds for Excluding Criminal Responsibility Relating to the Mental Capacity of the Accused Person

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ABSTRACT

Under the Rome Statute (the Statute of the International Criminal Court (ICC)), the grounds for excluding criminal responsibility (defences) are catalogued mainly under Articles 31 and 32. It is a fundamental principle of the Rome Statute that in order to establish criminal responsibility, the Prosecutor must prove three elements, the material element, the mental element and the contextual element. As concerns the mental element, Casten Stahn argues that cotemporary international criminal law recognizes a number of grounds for excluding criminal responsibility, which generally acknowledge that punishment is only justified if the underlying act is unwarranted and the offender is blameworthy. In this paper, it is argued that some of the grounds for excluding criminal responsibility provided in the Rome Statute are classified as grounds for excluding criminal responsibility relating to the mental capacity of the accused person. They are based on the contention that each of them shows that the accused person lacked the ability to act autonomously due to lack of mental capacity. The said grounds are insanity, automatism and other involuntary conduct, epilepsy, sleepwalking, diabetes, intoxication and mistakes that negative mens rea. The definition, the scope, the burden, the conditions for admissibility, the effect for each of the grounds when admitted have been examined. In conclusion, it is submitted that in spite of the importance of these grounds they are not usually invoked before the ICC because of the egregious nature of the crimes and the high profile of the accused persons who are held responsible because of their leadership role (being the brain behind the crimes) rather than for having carried out the material elements of the crimes.

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1. INTRODUCTION

The Rome Statute is the first Statute of an international criminal Tribunal to recognize defences in international criminal law. Under the Rome Statute which is the Statute of the International Criminal Court (ICC), the grounds for excluding criminal responsibility for the crimes under the jurisdiction of the court[2] are catalogued mainly under Articles 31 and 32. It is a fundamental principle of the Rome Statute that in order to establish criminal responsibility the prosecutor must prove three elements, the material element, the mental element and the contextual elements. According to Casten Stahn the grounds for excluding criminal responsibility can be grouped under two broad categories: those relating to the material elements and the circumstances under which the offender committed the criminal acts,[3] and those relating to the mental capacity of the accused person. As concerns the second category which is the focus of this paper, Casten Stahn argues that cotemporary international

[2]Rome Statute, Article 5, the crimes within the jurisdiction of the Court are: the crime of genocide; crimes against humanity; war crimes; the crime of aggression.

[3] Carsten Stahn, A *Critical Introduction to International Criminal Law*, (Cambridge, Cambridge University Press, 2019), p. 146.

criminal law recognizes a number of grounds for excluding criminal responsibility,[4] which generally acknowledge that punishment is only justified if the underlying act is unwarranted and the offender is blameworthy.[5] In addition he points out that while grounds for excluding criminal responsibility challenge the nominative ambition to end impunity, they promote a culture of accountability.[6] Unlike under domestic law where defences are classified as justifications or excuses, in international criminal law because international crimes are by their nature systematic, organized and stretched out over time, it is difficult to justify or excuse them, normally or on legal grounds. This explains why defences have played a more limited role in international criminal law than in domestic law.[7]

Moreover, under the Rome Statute grounds for excluding criminal responsibility are not classified at all. It is noteworthy that the Statute is formulated in a hybrid manner because it neither follows the civil law classification of defences into justifications and excuses,[8] nor the common law distinction between complete or partial defences. It leaves the determination of the consequences of a ground for excluding criminal responsibility to the judges.[9] This is an enormous contribution to the exposition and understanding of grounds excluding criminal responsibility under the Rome Statute. This article is underpinned by the neo-classical criminological theory[10] and the natural law theories, and challenges the concept of autonomy,[11]

The grounds for excluding criminal responsibility examined in this article are: insanity, automatism, epilepsy, sleepwalking, diabetes, intoxication and mistakes (that negative *mens rea).* Each defence has been defined, the scope delimited; the requirements for admissibility, the burden of proof and the effect of admissibility have also been examined. Most of the grounds are inter-related. However, due to their peculiarities and for purposes of clarity, they are examined as separate grounds for excluding criminal responsibility.

1.1. INSANITY

Insanity, otherwise known as mental incapacity, refers to a broad array of conditions, including diseases of the mind, congenital problems and damage resulting from traumatic injury.[12] It does not refer to a specific mental condition. Insanity is a legal jargon and not a medical term, because it is not a term used by psychiatrists who prefer to talk of mental disorder, mental illness, psychosis and neurosis.[13] This defence is more often invoked in domestic criminal law than in international criminal law.

1.1.1. SCOPE OF THE DEFENCE

It is necessary to distinguish between the issue of fitness to stand trial and insanity. As concerns the former, the question is whether at the time of the trial the accused person is able to assert his or her right to a fair trial; while the latter is concerned with the question whether he or she was sane at the time of the commission of the crime in question. While fitness to stand trial is a procedural bar, insanity is a defence. The insanity defence covers both acts and omissions.

Insanity deprives one of autonomy, *a fortiori* the ability to reason and to take decisions or to determine the nature and quality of one's acts, or whether one is right or wrong. However, neither sanity nor insanity is a permanent mental state. Insanity is a defence recognized in all major legal systems of the world. It can be established by showing that the accused person was labouring under a defect of reason due to a disease of the mind.[14]

The causes of a person's abnormality of mind may arise from a condition of arrested or retarded development of the mind, or from a disease or injury.[15] But it is not every abnormality of the mind that is considered as insanity, because it all depends on its severity. The defence is concerned with insanity in the legal sense and not in a medical sense. Insanity is a question of fact which is determined by

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[4] Carsten Stahn, A *Critical Introduction to International Criminal Law*, (Cambridge, Cambridge University Press, 2019).

[5] *Ibid.,* p. 146.

[6] *Ibid.*

[7] *Ibid*

[8] Carsten Stahn, *op. cit*., p. 146.

[9] *Ibid.,* p.148. See Rome Statute, Article 31 (2) states 'The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.'

[10] This theory argues that crimes are influenced by biological factors like gene mutation, mental deficiency, mental illnesses and other diseases (like mental illness, sleepwalking, epilepsy and diabetes), which affect the freewill of the accused person. The accused person is not criminally responsible for such inborn weaknesses or afflictions which alter or affect his or her freewill.

[11] This concept requires that an individual is responsible for his or her acts because he or she is endowed with a free will.

[12] Bryan A. Garner, A Dictionary of Modern Legal Usage, *op. cit*., p. 453, citing: Windfred Overholser, Psychiatry and the Law, 38 Mental Hygiene 243 244 (K54).

[13] *Ibid.*

[14] *Ibid.*

[15] Section 2(1) of the English Homicide Act 1957, 5&6 Eliz 2 ii.

the jury and not by a medical expert or other scientific means, although such evidence is relevant.

Insanity is recognized as a defence before the ICC by virtue of Article 31(1) (a) of the Rome Statute which states:

In addition to other grounds for excluding criminal responsibility provided for in this Statute, 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 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;…'

The ability to exercise self-control in relation to one's physical acts is a question of fact and should be distinguished from the ability to make a rational judgment, which indicates the accused person's level of intelligence.[16] One of the first cases in which insanity was invoked as a defence was during the Nuremberg Trial, when Rudolf Hess (Adolf Hitler's Minister in Charge of External Affairs), pretended that he was insane but the tribunal rejected his plea.[17] Insanity as a defence has long been recognized at common law in the M'Naghten Rules. The M'Naghten Rules were laid down by the House of Lords in the United Kingdom of Great Britain in its advisory role by the Law Lords in the M'Naghten case.[18] According to the rules, everyone is presumed sane until the contrary is proved. When the defence invokes the defence, it must be shown that the accused person was attacked by a disease of the mind, which rendered him or her incapable of appreciating the nature and quality of the relevant acts, [19] or made it impossible to distinguish right from wrong at the time of the commission of the offence.[20]

1.1.2. THE BURDEN OF PROOF

Generally, the accused person is presumed to be sane until the contrary is proven.[21] It is the defence that is primarily responsible to invoke the defence and establish it by adducing evidence. However, before the ICC the situation is different because the Prosecutor is obliged to act as an impartial agent of justice, not only during trial but also during investigation. Article 54 (1) (a) of the Rome Statute obliges the Prosecutor to investigate incriminating and exonerating circumstances equally. Hence, in principle the Prosecutor must not concentrate solely on proving the guilt of a suspect, but should equally gather any exculpatory evidence.[22]

It has been questioned whether the accused person should conclusively prove the defence of insanity or merely invoke the defence, so that the burden of negating it is shifted to the Prosecutor. In the ICTY case of *Delalic et al*.,[23] when one of the accused persons pleaded lack of mental capacity or insanity, the Trial Chamber held that he was presumed to be sane.[24]

This presumption can be rebutted on a balance of probabilities. The Trial Chamber held that this obligation is in accordance with the general principle that the burden of proof of facts relating to peculiar knowledge is on the person with such knowledge.[25] As concerns the ICC, the combined effect of Articles 66(2) and 67(1) (i) would render it appropriate to rule in such cases that the accused person is only required to raise a reasonable doubt as to his or her insanity.[26]

When the Prosecutor raises the defence of insanity, they must establish it with clear and convincing evidence. [27] But if the defence is raised by the accused person or by the judge, the accused person bears the burden of proof, but this burden, like that of proving mental disability mentioned above, can be discharged on a balance of probability.[28] however, if the persecution can raise the issue of the accused person's insanity, and in such a case it bears the burden of proving the allegation beyond reasonable doubt.[29]

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[16] *Prosecutor v. Zejnil Delalic et al (Celebici Case*). Case No IT . 96-21. T, ICTY CH II Quarter, 16 Nov. 1998, paras. 1167-8.

[17] Carsten Stahn, *op. cit*., p.149.

[18] *M'Naghten case*. (1843) 10CI and Fin 200. (*supra); Ibid.*

[19] *Ibid.*

[20] Mackay, R. D. (1987) "McNaghten Rules OK? The Need for Revision of the Automatism and Insanity Defenses in English Criminal Law," Penn State International Law Review: Vol. 5: No. 2, Article 3. p. 171 (Available at: http://elibrary.law.psu.edu/psilr/vol5/iss2/3 (Last accessed on 23/11/2019)).

[21] *Prosecutor v. Delalic et. al*, Case No. IT-96-21-T, TC II Judgment, 16 November 1998, para .1181.

[22] Kai Ambos, *op. cit*., p. 303.

[23] *Prosecutor v. Delalic et. al*, *(supra*)

[24] *Ibid.*

[25] See Case No. IT-96-21), ICTY T. Ch., P. 323 16 November 1998, paras, 78, 603, 1157-1160, 1 (72).

[26] Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher Brussel, 2017), p. 324.

[27] Michael J. Davidson, *A Guide to Military Criminal Law: A Practical Guide for all the Services*, (Annapolis, Naval Institute Press, 1999), p. 111.

[28] *Ibid.*

[29] Richard Card *et al*, *op. cit*., *ibid.,* p. 638.

As per the Rome Statute,[30] the standard of proof for the defence is a very high one because the defence must establish that the mental disease or defect destroyed the accused person's capacity to appreciate the unlawfulness or the nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.[31]

This provision is problematic because it implies that the accused person must be a hundred per cent insane when the acts were committed, otherwise the defence of insanity is inadmissible. This 'all or nothing' requirement poses special difficulties to child soldiers who may suffer from brainwashing or indoctrination at an early age; because indoctrination alters the perception of what is normal in relation to a reasonable adolescent or impedes the ability to question choices and prevents the ability to develop an adequate moral standard.[32]

1.1.3. CONDITIONS OF ADMISSIBILITY

In order for the defence of insanity to be admissible, it must be established that there was mental illness that was so severe that it destroyed the mental capacity of the accused person**.** The requirement of severe mental illness includes cases of multiple personality disorder, severe postpartum psychosis, involuntary intoxication, and post-traumatic stress disorder (when the accused person disassociates himself or herself from the reality). However, psychosis does not need to be proven. For the destructive insanity to be established, the accused person must prove that he or she was unable to understand the nature and quality or wrongfulness of his or her acts.[33]

1.1.4. EFFECT OF ADMISSION OF THE DEFENCE

Insanity is a defence that seeks to exonerate an accused person by showing that he or she was not responsible for the crime committed. This is because a degree of mental incapacity may negate the legal capacity of the defence.[34] The insanity plea is an affirmative defence because the defence the accused person admits having carried out the alleged criminal act, but denies criminal responsibility on the ground that he or she was suffering from insanity at the time of the offence.[35] As per Article 31, the defence is a complete defence or a justification; hence, when it is admitted the accused person must be acquitted.

Regrettably, Article 31(1)(a) of the Rome Statute does not provide a defence of diminished responsibility so that a special verdict of guilty but insane can be passed when an accused person pleads the defence of insanity unsuccessfully. This is unlike some domestic systems like in English law, where the accused person in such a case is detained in a mental hospital for psychiatric evaluation and treatment.[36] Further, Article 31(1) (a) places on the defence, the onerous burden of proving the total destruction of mental capacity as opposed to impairment to act voluntarily or rationally.[37]

1.2. AUTOMATISM AND OTHER INVOLUNTARY CONDUCT

Automatism is also known as the unconsciousness defence. Automatism and other involuntary conduct are likened to insanity. One's free will or autonomy can be altered by automatism. For a person to be criminally responsible, his or her act should be carried out voluntarily. A voluntary act is an act carried out under the exercise of one's free will. An act carried out otherwise is an involuntary act.[38]

The defence of automatism refers to an action taken by someone without thinking about it. An act is said to be done in a state of automatism, if it is done by the muscles without any control by the mind (such as a reflex action, or a spasmodic or convulsive act) or if it is done during a state involving a loss of consciousness.[39]

Automatism may occur when the mind is disrupted by an external factor e.g. an injection of insulin, a blow on the head, the injection of an anesthesia or even a reflex action resulting from a bee sting. The defence of automatism, is divided into two types – internal (insane automatism), or external (simple automatism)[40] or non-insane automatism.[41] An insane automatism occurs when the mind is disrupted due to an intrinsic factor which leads to a situation that is likely to recur and may lead to violence. Hence, any organic condition of the brain or the body resulting in a disruption of the mind, even if temporary, is an

[30] *Ibid.*
[31] Article 31(1) (a).
[32] Carsten Stahn, *op. cit*., p. 149.
[33] Michael J. Davidson, *op, cit., p. 119.*
[34] Dean John Champion, *Leading US Supreme Court in Criminal Justice Briefs and Key Term,s* (Pearson, Prentice Hall, New Jersy 2009), p. 416.
[35] *Ibid.*
[36] Robert Cryer *et al, op. cit*., p. 406.
[37] *Ibid.*
[38] Richard Card et al*, op. cit*., p. 665.
[39] *Ibid*. p. 666.
[40] *R v. Burgess* 1991 2 WLR 1206; Available at https://www.coursehero.com/file/p25ufoe/R-v-Burgess-1991-2-WLR-1206-The-defendant-visited-a-woman-to-watch-a-video-in/ (Last accessed on 06/05/2020).
[41] Richard Card et al*, op. cit*., p. 666.

insane automatism.[42] Non-insane automatism occurs when the mind is disrupted due to an external factor which leads to a situation that leads to violence but is unlikely to recur such as when one receives a serious blow.

1.2.1. SCOPE OF THE DEFENCE

Like insanity, automatism covers both acts and omissions. It is a defence that the act or omission with which the accused person is charged was involuntary. An act, omission or event on the part of the accused person is involuntary where it is beyond his or her control. For instance an act done or not done due to any of the examples of automatism mentioned above.[43]

The involuntary conduct of the accused person may also lead to an omission; that is when the omission of the accused person was involuntary due to the fact that he or she was physically restrained from acting or otherwise incapable of acting.[44]

In the case of *Leicester v. Pearson*[45] the court held that the accused person was not liable for the offence of failing to accord precedence to a pedestrian on a Zebra crossing because he was pushed onto the crossing by a bump from a car behind.[46] By analogy in the law of war, a pilot of a jet bomber whose jet aircraft is fired and it explodes over a civilian residential area, cannot be held guilty of failing to distinguish between civilian and military targets.

Examples of acts done in a state of automatism include acting unconsciously following a shock, and acting as a result of being compelled by an external physical force or a force majeure, and sleepwalking.

1.2.1.1. ACTING UNCONSCIOUSLY FOLLOWING A SHOCK

An automatic behavior, such as acting unconsciously following a shock if established, may be admitted under the defence of automatism. For example in the case of *United States v. Braley,*[47] a post-World War II case, a merchant marine sailor was drunk while serving with navy and suffered from a head injury after being knocked by the ships sentry who had been challenged by the sailor for a fight. While being carried to his room, the accused person woke up and in a confused and irrational state, pulled out a pistol and shot the ship's master, referring to the latter as a 'Nazi Jap.'[48] Although the accused person was convicted at trial, the appellate jurisdiction upheld the appeal upon finding that the accused person was involved in 'automatic behavior' due to his head injury. [49]

1.2.1.2. ACTING AS A RESULT OF BEING COMPELLED BY AN EXTERNAL PHYSICAL FORCE

An involuntary act done under compulsion is automatism, where a person is compelled by an external physical force,[50] for instance, if the accused person is holding a weapon in his or her hand and the hand is seized by another person and used to injure or stab someone who dies as a result of the 'act', he or she cannot be held criminally responsible because the offence was caused by the third party.[51]

Similarly, an external force may be a force *majeure*, for example if one were carrying explosives and his or her jet fighter is forced by a violent tornado to crash on a residential area he cannot be convicted for a war crime, crime against humanity or genocide (if the death that ensured was in the context of a State policy) because the act was not willful.

Sleepwalking that is examined below is another type of automatism.

1.2.2. THE BURDEN OF PROOF

Automatism is subsumed under insanity and as such the burden of proof is substantially the same. The accused person is presumed normal and when there is an allegation of abnormality caused by automatism, he or she who alleges such an abnormal state of mind is obliged to prove its existence.

1.2.3. CONDITIONS OF ADMISSIBILITY

Automatism is classified under insanity and as such the conditions of admissibility are similar. However, it should be noted that it is not every act or omission that is can be admitted under the defence of automatism. In order for this defence to be sustained, there must be total destruction of the accused person's will power that is 'loss of consciousness'. In English law, impaired or reduced awareness of a person's capacity will not suffice.[52]

Self-induced automatism occurs when a person provokes a situation or is reckless knowing that such an attitude may result to automatic acts; for instance,

[42] https://www.google.com/search?client=firefoxbd&q=Epilepsy+and+the+lawJOHN+S.+DUNCAN1+and (Last accessed on 01/04/2020).
[43] *Ibid.*
[44] *Ibid.,* p. 668.
[45] [1952] 2QB 668, DC; *Ibid.*
[46] *Ibid.*
[47] Michael J. Davidson, *op, cit.,* p. 113.
[48] *Ibid.*
[49] *Ibid.,* p. 124*;* US v. *Braley* C.M.O. 3-1944, 511 (26 October 1994).
[50] Richard Card *et al, op. cit*., p. 665.
[51] *Ibid.*
[52] A-G s' Reference (No. 2 of 1992) [1994] QB 91, CA), See also Richard Card *et al, op. cit*., p. 668.

a diabetic fully aware that by taking too much insulin or taking insulin and failing to eat enough food would cause insulin to react adversely, decides to undertake one of these courses of conduct so as to lose self-control and act as a automaton. By doing that the person wilfully indulges in criminal activities and cannot be regarded as having acted innocently.[53] If charged, whether he or she will be convicted and sentenced, will depend on whether the offence in question is one of 'basic intent' or 'specific intent'. An offence is of basic intent, if it does not require specific intent such as involuntary or unintentional manslaughter or unlawful wounding or infliction of grievous bodily harm.[54]

An accused person who was suffering from self-induced automatism at the relevant time, cannot be found guilty and be convicted of an offence of specific intent.[55] But if the accused person is found guilty of an offence of basic intent, he or she will be treated as person who suffered from non-insane automatism.[56]

1.2.4. EFFECT OF ADMISSION OF THE DEFENCE

The effect of the defence will depend on whether the automatism was sane or non-insane. A distinction is drawn between insane a non-insane automatism.

Automatism which arises not from a disease of the mind is non-insane automatism, while automatism which arises from defect of reason due to a disease of the mind is insane automatism. This distinction has an impact on criminal responsibility because, although both types of automatism constitute a defence, the consequences vary.[57]

If the accused person was suffering from non-insane automatism when he or she committed the act he/she must be acquitted, but if the offence was committed when the patient was suffering from a defect of reason due to a disease of the mind, the M'Naghten Rules apply and the verdict would be 'not guilty by reason of insanity' consequently an order will be made against the convict for confinement and treatment in a mental hospital or mental asylum.[58] In the case of *Brathy v. A-G for Northern Ireland,*[59] the accused person was charged with the murder of a girl. While the prosecution contended that the accused person strangled her, the defence argued that although the accused person committed the act, he did it involuntarily because he was suffering from psychomotor epilepsy[60] which is recognized as a disease of the mind. Upon conviction, in spite of his defences of automatism and insanity, the convict appealed to the House of Lords; it was held that where the only evidence of the cause of automatism is a disease of the mind, the case is one of insane automatism and the M'Naghten Rules apply.

On the other hand, where the evidence is that of automatism not caused by a disease of the mind (i.e. not internal cause) but rather by some other (external cause), such as a blow on the head, the case is one of non-insane automatism.[61] In such a case the accused person will be acquitted and will be released forthwith.

This defence has not yet been raised before the ICC, but it is well recognised in common law jurisdictions. That is why recourse is made thereto, to explain it. However, the authorities are merely persuasive.

1.3. THE EPILEPSY DEFENCE

Epilepsy is a disease of the mind which falls under automatism. An epileptic automatism is defined medically as:

A state of clouding of consciousness which occurs during or immediately after a seizure, during which the individual retains control of posture and muscle tone, but performs simple or complex movements without being aware of what is happening. The impairment of awareness varies. A variety of initial phenomena before the interruption of consciousness and the onset of automatic behaviour may occur.[62]

1.3.1. SCOPE OF THE DEFENCE

The term 'epilepsy' is wider than it is commonly known. It is 'not always manifested by the dramatic grand mal convulsions familiar to the layman'.[63] The

[53] *Ibid.,* p. 572.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] Section 5 the Criminal Procedure (Insanity) Act 1964; *ibid.* p. 669.
[59] [1963] AC 386,HL; *Ibid.*

[60] This is '[a]n epileptic seizure often associated with temporal lobe disease and characterized by complex sensory, motor, and psychic symptoms such as: impaired consciousness with amnesia, emotional outbursts, automatic behavior, and abnormal acts. psychomotor seizure temporal lobe epilepsy.' See https://www.google.com/search?client=firefox-b-d&q=psychomotor+epilepsy+meaning (Last accessed on 01/04/2020), p. 772.
[61] *Ibid.*
[62] https://www.google.com/search?client=firefoxbd&q=Epilepsy+and+the+lawJOHN+S.+DUNCAN1 (Last accessed on 01/04/2020).
[63] Carl D. Weinberg, 'Epilepsy and the Alternatives for a Criminal Defense.' 27 Case W. Res. L. Rev. 771(1977) (Available at: https://scholarlycommons.law.case.edu/caselrev/vol27/iss3/8 (Last accessed on 01/04/2020)), p. 772.

term is generic and covers numerous and diverse manifestations which cause a mental affliction. Although generally the insanity defence may be easily pleaded, epilepsy is an affirmative defence.[64] Epilepsy does not itself imply continuing insanity. While 'epilepsy may cause insanity', it 'does not constitute it, and the two should not be con-founded. During periods of remission, the epileptic is completely sane, and it is only the effects of a seizure which deprives the patient of any powers or faculties necessary for criminal responsibility.[65]

While dealing with epilepsy as a defence, defence counsel must utilize competent expert advice. Epilepsy manifests itself in innumerable ways which vary widely in intensity. The most important classification of epilepsy seems to be that which delineates the various forms of seizures brought about by different electrical discharges.[66] It is noteworthy that the various forms may appear alone or in combination, and that an individual may be vulnerable to different types of seizures, at different times. However, there are only four forms of seizures that are of any significant medico-legal interest viz: grand mal, petit mal, psychomotor, and furor attacks.[67] Be that as it may, 'all forms of epilepsy share one characteristic: during an attack, the usual pattern (or "rhythm") of the electrical impulses flowing through the brain is disturbed by an abnormal electrical discharge.'[68]

1.3.2. THE BURDEN AND STANDARD OF PROOF

The burden of proving an epilepsy defence is borne by the accused person pursuant to the presumption of sanity.[69] Although the most commonly accepted rule is that the accused person must raise a reasonable doubt as to his or her sanity to meet the burden of production, or the evidential burden, certain minority rules require only 'some evidence' or a 'scintilla' of evidence.[70] Generally, the quantum of evidence that is required must show that the accused person's mental capacity was destroyed, and there must be proof of not only the existence of epilepsy, but its causal connection to the criminal conduct.[71] The standard of proof of insanity is by a preponderance of the evidence.[72] Once the burden of production is discharged, a presumption of insanity is established and the prosecution must prove sanity and the offence beyond a reasonable doubt.[73] There is no shifting of the burden of proof.

A further limitation on the insanity defence is that the presumption of insanity will arise only if the accused person can prove that he or she was insane recently enough, to warrant the inference that the insanity continued to the time of the offence. This sometimes poses some problems because epileptic attacks are generally infrequent and irregular, but before the seizure the epileptic may be completely sane.[74] Furthermore, very often it is deemed 'unrealistically that the presumption of insanity will not arise unless the insanity is shown to be a permanent or chronic condition, as opposed to a temporary or recurrent one.'[75]

1.3.3. CONDITIONS OF ADMISSIBILITY

Evidence of epilepsy is generally based on a clinical diagnosis. The defence Counsel should take two steps before invoking the defence: firstly, it must be shown by medical evidence that the accused person is an epileptic, and secondly, a causal connection must be made between epilepsy and the offence.[76]

Any physician who appears before a court to substantiate the diagnosis on clinical grounds alone is likely to encounter some difficulties. The physician and Counsel should verify and confirm the following six points before attempting to substantiate diagnosis of epileptic automatism:[77]

The patient should have a previous diagnosis of epilepsy.

The act should be out of character for the individual and inappropriate for the circumstances.

There must be no evidence of premeditation or concealment.

If a witness is available, they should report a disorder of consciousness at the time of the act.

Because the act occurs during an automatism or post-ictal confusional state, a disorder of memory is the rule. It is unlikely that an epileptic automatism can occur in the setting of clear consciousness.[78]

Any competent physician must examine the patient and carry out the necessary tests before making a report. Following the above data, five guidelines to

[64] *Ibid.,* p.773.
[65] *Ibid.,* p.778.
[66] *Ibid.,* p. 777.
[67] *Ibid.*
[68] *Ibid.,* p.776.
[69] *Ibid.,* p. 789.
[70] *Ibid.,* p. 788.
[71] *Ibid.*
[72] *Ibid.,* p.789.
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.,* p. 782.
[77] *Ibid.*
[78] *Ibid.*

determine whether an act was an ictal event, have been proposed by expert investigators:

diagnosis of epilepsy by a competent specialist, documentation of automatisms by closed-circuit television and biotelemetry, verification of aggressive conduct during documented seizure, history that observed violence was characteristic of a person's previous seizures, and judgment by a competent specialist that the act was in fact part of a seizure.[79]

These are no clear-cut tests to determine causation. Hence, there is a danger that they may create more confusion than light, they are not intended as clear-cut tests of causation. There are several guidelines to identify a causal connection between an epileptic seizure and a criminal act.[80]

In order to take a decision concerning the defence to be adopted, the Court should determine the exact type and degree of the condition that was operative at the time of the alleged offence.[81]

1.3.4. EFFECT OF THE DEFENCE

Once the defence of epilepsy is admitted, the accused person, like in the case of insanity is acquitted because epilepsy is as an exculpatory defence. Hence the rest of the consequences follow.

1.4. THE DEFENCE OF SLEEPWALKING

Sleepwalking refers to automatic acts which are sometimes carried out during sleep (somnambulism).[82] However, on other occasions they are carried out during dissociated states, or due to a psychiatric or a medical condition that causes a disruption of brain function.[83] As a result a person acts unconsciously because he or she is asleep. The case of *R v. Parks*,[84] which is a leading Supreme Court of Canada decision on the automatism defence is very illustrative. Early in the morning on May 24, 1987, the accused person drove some 20 kilometers to the house of his in-laws. He entered the house with a key that they had previously given him and used a tyre iron to bludgeon his mother-in-law to death. Then he attempted to choke his father-in-law, to death. He returned to his car and, in spite of being covered with blood, drove straight to a nearby police station and confessed, by stating: 'I think I have just killed two people'.[85]

During the trial, the accused person argued that he suffered from automatism and was not criminally liable. A medical doctor testified as to his mental state at the time of the murder. From the doctor's evidence, it was held that the accused person was sleepwalking at the time of the offence, and was suffering from a disorder of sleep rather than neurological, psychiatric, or other illness. Five neurological experts also confirmed that he was sleepwalking during the time of the offence. As a result he was acquitted.[86]

1.4.1. SCOPE OF THE DEFENCE

Sleepwalking covers the situation where the accused person does not know what he or she is physically doing. For example, A gives B a fatal blow under the insane delusion that it is a jar that is being destroyed or a mad person cuts a woman's throat thinking that it is a loaf of bread that is being shared.[87]

Sleepwalking is most often invoked and admitted in cases of violent or sexual offences (often referred to as 'sexsomnia') and is an admissible legitimate defence to both.[88]

1.4.2. THE BURDEN OF PROOF

Like in the case of insanity, the evidential burden is borne by the accused person while the prosecution bears the burden of proving sanity beyond doubt.

1.4.3. CONDITIONS OF ADMISSIBILITY

It is the obligation of the defence not only to invoke the defence, but also to adduce evidence to establish it.[89] The defence must show that accused person lacked the capacity to understand what he or she was doing due to sleepwalking. The defence can only be admitted by producing cogent evidence from a forensic psychiatrist to show that the characteristics of a sleepwalking episode were present at the time of

[79] Beresford, H. Richard, "Legal Implications of Epilepsy" (1988). *Cornell Law Faculty Publications*. (Available at https://scholarship.law.cornell.edu/facpub/1641. (Last accessed on 07/05/2020)).
[80] *Ibid.,* p. 787.
[81] *Ibid.,* p. 803.
[82] *R v. Burgess* 1991 2 WLR 1206; (Available at https://www.coursehero.com/file/p25ufoe/R-v-Burgess-1991-2-WLR-1206-The-defendant-visited-a-woman-to-watch-a-video-in/ (Last accessed on 06/05/2020)).
[82] *Ibid.*
[83]https://www.google.com/search?client=firefoxbd&q=Epilepsy+and+the+lawJOHN+S.+DUNCAN1+and (Last accessed on 01/04/2020).
[84] [1992] 2 S.C.R. 871; (Available at https://en.wikipedia.org/wiki/R v. Parks (Last accessed on 06/05/2020)).
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] *R v. Burgess* (*supra*).
[88] *Ibid.*
[89] *R v. Burgess* 1991 2 WLR 1206; (Available at https://www.coursehero.com/file/p25ufoe/R-v-Burgess-1991-2-WLR-1206-The-defendant-visited-a-woman-to-watch-a-video-in/ (Last accessed on 06/05/2020).

the offence. The law on somnambulism like the one on automatism in England is not yet settled.[90]

Considering that somnambulism is a disease of the mind, it must be shown that it gave given rise to a defect of reason which had one of two consequences: either (a) the accused person did not know the nature and quality of the act, or (b) whether the act was wrong. The phrase 'defect of reason' seems to mean that the reasoning capacity must have been impaired not merely confusion or absentmindedness. The accused person must have been deprived of the capacity to understand what he or she was doing at the time the acts were carried out.[91]

1.4.4. EFFECT OF THE DEFENCE

An offence or a violent act performed while in a state of somnambulism is a typical example of an act not accompanied by the will of the actor.[92] Hence, somnambulism is an exculpatory defence like other cases of automatism. Once the defence is established, the accused person must be acquitted. Sleepwalking is considered in the same manner as automatism, hence when the defence is admitted the accused person is acquitted.[93] But because somnambulism is a mental illness[94] the accused person even though acquitted, should be sent to a mental hospital for treatment. In the above-mentioned case the accused person was acquitted.

This defence has not yet been invoked before the ICC. However, it can be explained by recourse to English law and authorities which have only persuasive authority.

1.5. THE DIABETES DEFENCE

Diabetes is a common chronic health problem. It begins when the pancreas cannot regulate the level of blood sugar in the bloodstream. Generally, sufferers require insulin injections to help them manage their condition. As mentioned above diabetes can cause a disease of the mind and seizures and as such falls under insanity or automatism.

There are two main types of diabetes: hypoglycemia and hyperglycemia.

Hypoglycemia occurs when a diabetic's blood sugar drops too low. Diabetes is generally a physical illness but it is also a disease of the mind[95] and is within the scope of the insanity defence. As such, it is a defence to a crime or a ground to exclude criminal responsibility.[96] Meanwhile, hyperglycemia occurs when there is high blood sugar and can also cause a similar mental impairment, to a lesser degree and with a much slower onset.[97] Both types of diabetes can be established by medical testimony.[98]

1.5.1. SCOPE OF THE DEFENCE

This defence covers both acts and omissions.

1.5.2. THE BURDEN OF PROOF

Like in the case of insanity, the burden is on the defence to invoke and adduce evidence to establish its existence and impact. It is not sufficient to establish that one suffers or has suffered from diabetes because a diabetic is generally not an insane person. Medical evidence must be adduced by the defence to show that diabetes affected the brain of the accused person at the time of the offence, so that the acts in question were involuntary. [99]

In *R v. Clarke,* [100] the accused person, a diabetic, was charged with theft of items from a supermarket. Her defence was that she had no intention to steal. She produced evidence that she had behaved absent-mindedly at home. She alleged that she must have put the items in her bag in a moment of absent-mindedness. There was expert evidence from her doctor and a consultant psychiatrist that she was suffering from a depression, which the consultant accepted to be a minor mental illness which could have caused absent-mindedness. The trial judge was convinced that the defence had established a defence of insanity and aquiited the accused person. Buthe Court of Appeal held that the M'Naghten Rules are inadmissible for those who retain their reasoning power but who in moments of confusion or absent-mindedness, fail to use those powers to the full. The Court held that she had the capacity to understand that what she was doing was wrong.

[90] https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2370050308 (Last accessed on 06/05/2020)).

[91] This refers to the physical nature and quality of the act.

[92] http://www5.austlii.edu.au/au/journals/MurUEJL/1996/4.htmlhttp://www5.austlii.edu.au/au/journals/MurUEJL/1996/4.html (Last accessed on 06/05/2020).

[93] https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2370050308 (Last accessed on 06/05/2020).

[94] In *R v. Burgess* (*supra*) the court held that sleep-walking is a mental illness.

[95] A disease of the mind includes physical disorders such as diabetes as well as psychiatric and neurological conditions.

[96] http://www.ncjrs.gov/App/publications/abstract.aspx?ID=94115 (Last accessed on 22/04/2020).

[97] https://www.inbrief.co.uk/motoring-law/diabetes-driving-laws/ (Last accessed on 24/02/20).

[98] *Ibid.*

[99] The defence must prove that the accused person lacked the capacity to know that what he or she was doing was legally wrong. See the English case of *R v Clarke* [1972] 1 All ER 219.

[100] *Ibid.*

1.5.3. CONDITIONS OF ADMISSIBILITY

The defence of diabetes will be inadmissible if the diabetic was reckless. The test of recklessness is based on a subjective rather than an objective standard; i.e., did the accused person foresee the risks and disregard them. One of the consequences of the legal doctrine of recklessness is that a well-controlled diabetic is more likely than a patient with poorly controlled diabetes to be convicted of an offence when the defence is invoked.[101]

If one has been reckless or negligent in relation to their diabetic condition, they may be convicted on the basis of self-induced incapacity. This means that an accused person who knew of the consequences but was reckless in managing their diabetic condition or refused to properly manage it, is deemed to have acted voluntarily like a voluntarily intoxicated person.[102] In such a case the accused person will be convicted for a crime of basic intent.

1.5.4. EFFECT OF THE DEFENCE

When the defence of diabetes is admitted the accused person will be found not criminally responsible and acquitted. In case where he or she has not yet been treated (like in the case of insanity), an order will be made for confinement and treatment in a competent hospital. Hence, the court may retain jurisdiction over the treatment of a diabetic in case of an acquittal.[103]

1.6. INTOXICATION

Intoxication is the inhibition or impairment of the brain due to the absorption, administration or consumption of substances (such as glues, drugs, alcohol or other causes), by a person.[104] Intoxication is a defence recognized under very strict conditions as per Article 31(1)(a)(b) of the Rome Statute.[105] Any person may become unable to have the normal use of his or her physical or mental capcity due to intoxication. In that state the person is incapable of behaving like an ordinary prudent and cautious person, in full possession of sound mental faculties or to take reasonable care.[106]

1.6.1. SCOPE OF THE DEFENCE

The defence covers both voluntary and involuntary intoxication. Intoxication is voluntary when it is due to the wilful act of a person and involuntary when it is accidental or due to circumstances beyond the person's willpower or knowledge. Unlike other mental conditions, intoxication is not generally recognized as a defence. That is why the defence is admissible only if certain strict conditions are fulfilled.

1.6.2. THE BURDEN OF PROOF

Intoxication is a special defence. Admission of a special defence by the court shifts the burden of disproving the defence beyond a reasonable doubt to the prosecution.[107].

1.6.3. CONDITIONS OF ADMISSIBILITY

The accused person's must not have been 'voluntarily intoxicated' in that the person 'knew or disregarded the risk' of being 'likely to engage in conduct constituting a crime within the jurisdiction of the Court'.[108] In other words, the accused person must not have been reckless.[109] Hence, the defence will be

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[101] https://www.inbrief.co.uk/motoring-law/diabetes-driving-laws/ (Last accessed on 24/02/2020).

[102] *Ibid.*

[103] https://www.inbrief.co.uk/motoring-law/diabetes-driving-laws/(Last accessed on 24/02/20).

[104] Bryan A. Garner, Black's Law Dictionary, *op. cit.,* p. 827.

[105] Article 31(1)(a)(b) provides:

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person 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;

(b) The person is in a state of intoxication 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, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

[106] *Ibid.,* p. 742.

[107] Michael J. Davidson, *op, cit.,* p. 111.

[108] Rome Statute, Article 31(1)(a)(b) .

[109] Albin Eser, *op. cit*., p. 878. It is striking that instead of denying any voluntary intoxication and exculpation, altogether, the Statute follows the principle of *actio libera in causa* where the accused person 'knew' or 'disregarded the risk' of getting involved in criminal conduct at the point of becoming intoxicated. See Albin Eser, 'Grounds for Excluding Criminal Responsibility [Article 31 of the Rome Statute]' in *Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Cour*t, 2 ed., (C.H. Beck/Munchen, Harti Volkach, Nomos/Baden-Baden, 2008), p. 877. Obviously, this bars intoxication as a ground for excluding criminal responsibility if the accused person intentionally sought "Dutch courage" to commit a crime.[109] see also Clare Frances Moran, op. cit., p. 66. In order to understand Article 31(1)(b), it is necessary to have recourse to the provision's controversial legislative history, which is said to be a hard-fought compromise between most Arab States, (which considered voluntary intoxication as an aggravating circumstance),

admissible when an accused person took a drug or substance under medical advice or a non-dangerous drug, (a drug that is known not normally to cause unpredictability or aggressiveness, for instance a sedative soporific drug).[110] In addition, the intoxication must have destroyed the acused person's 'capacity to appreciate the unlawfulness' or the 'capacity to control' his or her conduct.[111]

1.6.4. EFFECT OF THE DEFENCE

Under the Rome Statute, involuntary intoxication is a justification, a full or complete defence, and hence absolves the accused person from criminal responsibility and not merely a ground for mitigation of sentence.[112]On the other hand, voluntary intoxication is an excuse and only a ground for mitigation of sentence.

1.7. MISTAKES THAT NEGATIVE *MENS REA*

In common parlance a mistake is an error. Generally, 'a mistake in its legal sense is that which has misled the person to commit that which if he had not been in error, he would not have done.'[113] A mistake fact or law is not the same as ignorance. While a mistake admits knowledge and even knowledge that leads to the wrong conclusion, ignorance implies a total lack of knowledge in reference to the subject matter.[114] Therefore, ignorance is a broader term which also includes mistakes. Every mistake involves ignorance but not vice versa.[115] It is not always easy to draw such a distinction between a mistake of fact and a mistake of law, because according to Van Sliedregt, mistakes relating to normative elements can be qualified as any of these two. However, this depends on the nature of the mistake i.e. whether it is a failed recognition or as erroneous evaluation. Both defences are often intertwined, because their elements are seldom purely descriptive or purely normative. Further, normative material elements are not abstract legal definitions but legal evaluations of facts, the false perception of which can qualify both as mistake of fact and law.[116]

1.7.1. SCOPE OF THE DEFENCE

Article 32 of the Statute draws a distinction between a mistake of fact and a mistake of law.

A mistake of fact is recognised as a ground for excluding criminal responsibility under the Rome Statute.[117] A mistake of fact actually entails a false representation of a material fact.[118] For instance, if a soldier mistook a hospital for a military target provided that the mistake was reasonable. [119]

A mistake of law encompasses a normative element of the definition of a given offence.[120] This may arise when an accused person erroneously interpreted the law. For instance a soldier who throws a grenade on a cultural building cannot argue that he/she did not know that the law prohibits the destruction of cultural buildings during armed conflicts.[121]

There is no general defence of a mistake. Only two types of mistake are recognized as a defence under the Rome Statute (subject to a special condition that they must deprive the accused person of *mens rea*).[122] They are a mistake of fact and a mistake of law.

This defence covers both acts and omissions. An example of a mistake of fact is when a military pilot booms a civilian bunker believing it to be a military command centre.

The defence of mistake of law is very limited in scope. It does not cover a mistake that a particular type of conduct is a crime within the jurisdiction of the Court.[123] This defence does not include a mistake (or ignorance) as to whether the conduct is a crime or not, or whether a defence is provided by the law. This is justified because if accused persons could successfully defend themselves by arguing that they

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and most western countries which considered voluntary intoxication as a ground for mitigation if not exculpation. However, this perception is not always true because there are some western countries which also reject some forms of intoxication as a defence to a criminal charge.[109] See Clare Frances Moran (2015), Under Pressure: A Study of the Inclusion of the Concept of a Defence, Specifically Duress, in the Rome Statute, Ph D Thesis, University of Glasgow 2015, p. 66. Available at http://theses.gla.ac.uk/6805 (Last accessed on 23/11/2019).

[110] *Ibid.*

[111] *Ibid;*

[112] Article 31(1)(b).

[113] Bryan A. Garner, A Dictionary of Modern Legal Usage, *op. cit., p.* 568.

[114] *Ibid.*

[115] *Ibid.*

[116] Mark Klamberg (ed.), *op. cit.,* p. 331, citing E. van Sliedregt, 2003, p. 302.

[117] Article 32 (1).

[118] Michael J. Davidson, *op. cit., p. 120.*

[119] Mark Klamberg (ed.), *op. cit.,* p. 329, citing E. van Sliedregt, 2003, p. 303).

[120] Article 32 (2).

[121] Robert Cryer *et al, op. cit.*, p. 414.

[122] Article 32. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

1. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

[123] Robert Cryer *et al, (supra),* foot note No. 115.

were not aware of the existence of a legal ban, this would open the floodgates for a state of lawlessness.[124] Further, a mistake of law does not cover errors relating to the scope of a defence. The only admissible mistake of law under Article 32(2) is where an element of a crime requires a legal evaluation, and the mistake relates to this, for instance when a person takes property believing that he or she is the owner[125] and he or she is charge with plundering.

1.7.2. BURDEN OF PROOF

Any accused person who raises the issue of the defence of the mistake of fact, bears the evidential burden of adducing evidence to show that it was probable that he or she was honestly mistaken.[126] But once that is done, the burden of proof lies on the prosecution to disprove the defence and prove their case beyond reasonable doubt.

The evidential burden lies on is the defence which seeks to avail itself of this should invoke the special defence by adducing evidence. However, when the facts and evidence presented before the court reveal a mistake of law, it is the duty of the judge(s) to consider the defence. But because an accused person is always represented before the ICC, this will hardly arise because counsel should take care of it.

1.7.3. CONDITIONS OF ADMISSIBILITY

In case of a mistake of fact, the defence is admissible when no crime would have been committed if the facts of the case were as the accused believed them to be.[127] The defence of mistake of fact may only be admissible on two conditions, viz: if the mistake was reasonable and if it negates the mental element required of the crime.[128] This is so even though Article 32 does not expressly state that a mistake must be reasonable. The more reasonable the mistake, the more likely the chance of the court holding that it negates the mental element required by the crime.

Both the common law and civil legal systems treat the defence differently. While in the civil law legal system, the tendency is to be more generous with regard to mistake of law (by admitting mistakes if they are reasonable), in the common law legal system, a mistake of law is not a defence. It is only a mitigating factor.[129] The Rome Statute has adopted a new approach.[130] Article 32 does not expressly require that a mistake should be a reasonable one, but in practice the defence must prove that the accused person was honestly mistaken. This is because when a belief is less reasonable the chances that the defence will be admitted will be slim. It is doubtful if the defence will be admitted when the accused person was at fault. For example, if he or she was drunk or reckless at the time of taking the decision in question or belief. [131]

Further, it is not every mistake of fact that is admissible under Article 32; because it must be one which shows that the accused had no *mens rea*. Moreover, for some elements of the crimes e.g. under Elements of Crimes provided by Article 8(2) (b) (xxvi) of the Rome Statue and a mistake of fact are excluded by Article 28 of the Rome Statute (Command Responsibility). It is not a defence for a military commander or a person that he or she did not know

that the forces under his or her effective command and control, or effective authority and control as the case may be, were committing crimes within the jurisdiction of the Court or were about to commit such crimes, if owing to the circumstances at the time, he or she should have known that the forces were committing or about to commit such crimes; but the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[132]

In order for a mistake of law to be admissible, it must not be a claim of ignorance of the law, the accused must be of good faith, otherwise the mistake would not negative *mens rea,* [133] above all the defence must invoke the defence at the appropriate time, that is when the evidence is submitted to a Pre-Trial or Trial Chamber or after the issue has become known in accordance with Rule 64 of the RPE (Procedure relating to the relevance or admissibility of evidence) which states:

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion

[124] *Ibid.,* p. 330, citing Cassese, 2008, 295.
[125] Robert Cryer *et al, op. cit.*, p. 415.
[126] Mark Klamberg (ed), *op. cit.*, p. 330.
[127] Michael J. Davidson, *op. cit., p. 120*
[128] Rome Statute, Article 32.
[129] In the common law legal system, if a mistake undermines *mens rea,* it is a failure of prove defence.
[130] Article 32.
[131] Robert Cryer *et al, op. cit.,* p. 414.
[132] Article 28 (a) (i) (ii).
[133] Article 32 (1).

shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

1.7.4. EFFECT OF THE DEFENCE

When a mistake of fact or law negates *mens rea,* it is an absolute (complete) defence or a justification and the accused person must be acquitted. It is noteworthy that a mistake of fact or law that does not negate *mens rea* is not a defence; it can only recognized as a mitigating factor. Under Article 32 (2), it has been argued that that even if the defence is established, the ICC may still convict the accused person because the word 'may' in the said article implies that exculpation is not mandatory.[134] With due respect, this is an erroneous interpretation because the use of the word 'may' only means that there is an exception to the general rule that a mistake of law is no defence as stated in the sentence that precedes the word 'may '. If the argument is followed 'it would involve convicting someone when an element of the offence has not been proved by the prosecution.[135]

1.8. CONCLUSION

From the wording of Article 32 of the Rome Statute, there is no doubt that where a mistake of fact or law negates *mens rea,* it is an absolute defence or a justification that leads to the acquittal of the accused person. Even though the terms of the article are clear, it is not generally easy to identify such situations in practice. Although when admitted, the effect of the defence is acquittal, for some defences (insanity, intoxication, sleepwalking, epilepsy and diabetes), an order may be made for the convict to be hospitalised and treated or confined in a mental asylum pending treatment and recovery. Consequently, in some cases, the defence may be reluctant to invoke a defence for fear of prolonged detention for health reasons. In accordance with Rule 64 of the RPE, the defences should be invoked on time.

In practice before the ICC, grounds for excluding criminal responsibility relating to the mental capacity of the accused person can be invoked only in exceptional cases.[136] In most cases, only top or middle level perpetrators are prosecuted and they opt to challenge the basis of their convictions by arguing that the prosecution has failed to prove the guilt of the accused person beyond reasonable doubts, rather than invoke affirmative defences (justifications or excuses) for their behaviour.[137] Hence, it is difficult to rely on mental illness/incapacity, duress and necessity. Therefore, it is very difficult to evaluate the impact of such defences.[138] It is noteworthy that because Article 32 has not yet been invoked before the ICC, all analyses here are speculative and can only serve as persuasive suggestions or arguments.

[134] Mark Klamberg (ed.), *op. cit.*, p. 330.
[135] Robert Cryer *et al, op. cit.,* p. 415.
[136] Carsten Stahn, *op. cit.,* p. 146.
[137] *Ibid.*
[138] *Ibid.,* p. 147.