

# Intoxication and Criminal Liability in International Criminal Law

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### Abstract

The principle of *actio libera in causa* or the effect of a perpetrator's voluntary intoxication on the existence of a criminal act is controversial in international criminal law. The present legislation, as contained in the Rome Statute, is a compromise between different legal systems. It allows the exclusion of a criminal act based on the fact that the perpetrator was involuntarily intoxicated and he or she cannot be ascribed guilt for the act of intoxication and the criminal act. In the Rome Statute the *actio libera in causa* principle has three elements, composed similarly of the insanity defence due to biological (intoxication), or psychological (the inability to control actions or understand their consequences), and the third negative condition (nonexistence of guilt for the criminal act).

The Rome Statute does not deal with diminished mental capacity due to intoxication and also does not contain stipulations regarding the conditions of a generally diminished mental capacity. I propose that the International Criminal Court finds support in the above-mentioned three elements of the principle of *actio libera in causa* by acknowledging that a perpetrator's capacity to understand or control his or her actions is partially diminished, not totally absent.



### Keywords

international crime, criminal responsibility, intoxication, Rome Statute, diminished responsibility, the International Criminal Court, incapacity

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## Introduction

This article addresses the conceptualisation of intoxication in international criminal law from the perspective of a general conceptualisation of a criminal act. The scope of my review is limited to criminal law and does not take into consideration psychological or medical aspects of a criminal act. Also, my interest is focused on the conceptualisation of intoxication and how or whether the existence of such concepts affects the existence of criminal acts in international criminal law.

The term "intoxication" (*der Rausch* in German) applies to those cases in which the perpetrator perpetrates elements of a criminal act in a diminished or absent capacity due to voluntary intoxication. In a comparative legal sense the concept of intoxication can either be subsumed under the rule of incapacity or diminished capacity or can be regulated independently.

I will first address the concept of intoxication in a comparative sense. I will present German and English criminal law as typical representations of two systems: continental or civil law and

common law. This comparative analysis is relevant because international documents — including the Rome Statute<sup>1</sup>, which is the foundation of the International Criminal Court (hereinafter, the ICC) — are usually the result of a compromise between common and civil law. In order to fully understand this compromise, we must know the original provisions within national legal systems.

The core part of my article deals with the conceptualisation of intoxication in international criminal law, specifically in the Statutes of the International Criminal Court (also the Rome Statute), the international war crimes tribunals in operation after World War II (hereinafter, the Nuremberg Trials), and the International Criminal Tribunal for the former Yugoslavia (hereinafter, ICTY).<sup>2</sup> I chose the Nuremberg Trials and the ICTY because their case law has, so far, contributed the most to the development of international criminal law. I chose the Rome Statute because it is the foundation for the operation of the first permanent international criminal court. The critical — comparative and historical — presentation of statutes pertaining to both institutions will be followed by an analysis of their case law, especially regarding their elements and effect, adding a proposal in regard to the missing regulation in the Rome Statute.

## 1. A comparative review of intoxication

The German legal system does not legally define intoxication (*der Rausch*). Nonetheless, the so-called *actio libera in causa* theory is applied to create the criminal liability of a perpetrator who was in a state of incapacity due to intoxication at the time he or she perpetrated the criminal act, despite the fact that there is no legal foundation for this concept in the German Penal Code (*Strafgesetzbuch* — StGB).<sup>3</sup> Furthermore, Art. 323 of the StGB recognizes the special criminal act of complete intoxication (*Vollrausch*), which incriminates voluntary intoxication as a special act perpetrated by the perpetrator, but does not incriminate the act carried out in such a state of intoxication.

The application of *actio libera in causa* is admissible only in an instance when the perpetrator was in a state of mental incapacity while he or she was perpetrating the criminal act, but not if his or her capacity was just diminished. In such a case, the perpetrator is considered mentally capable, albeit in a diminished way, and his or her mental capability does not have to be established.<sup>4</sup> In principle, the perpetrator who was "insane" because of voluntary intoxication at the time he or she perpetrated the criminal act would not be legally culpable according to Art. 20 of the StGB. This conceptualisation foresees legal culpability in the following cases:

- if the perpetrator voluntarily intoxicates himself or herself and induces "insanity" to intentionally commit an act with the elements of a criminal act; in this instance, the perpetrator must answer for the intentionally perpetrated act;<sup>5</sup>

<sup>1</sup> *The Statute of the International Criminal Court* (UN Doc. A/CONF.183/9), 17 June 1998.

<sup>2</sup> *Ad hoc* international criminal courts established in accordance with the binding resolution of the UN Security Council based on chapter 7 of the Charter of the United Nations; UN Security Council, Resolution 827 (1993), adopted by the Security Council at its 3217th Meeting, on 25 May 1993 (S/RES/827), 25 May 1993.

<sup>3</sup> *Strafgesetzbuch* (Germany), available at <http://www.gesetze-im-internet.de/bundesrecht/stgb/gesamt.pdf>; A. Schonke & H. Schroeder, *Strafgesetzbuch, Kommentar (Criminal Code, Commentary)*, Verlag C H Beck, Munich: 2010, p. 384.

<sup>4</sup> H. H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil (Textbook of Criminal Law, General Part)*, Duncker & Humblot, Berlin: 1996, p. 448.

<sup>5</sup> C. Nill-Theobald, *"Defenses" bei Kriegsverbrechen am Beispiel Deutschlands und der USA, zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrafrechts (Defenses with War Crimes — Examples of Germany and USA)*, Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg im Breisgau: 1998, p. 383;

- if the perpetrator intentionally or out of negligence intoxicates himself or herself, and has knowledge that he or she, when in a state of diminished capacity, can do something that has legal elements of a criminal act (for the perpetrator to be liable for a criminal act, he or she must commit such an act, with the knowledge that it could have happened<sup>6</sup>) — in this case the perpetrator is liable because he or she committed a criminal act out of negligence.<sup>7</sup>

The conceptualisation is relevant only in an instance when the perpetrator's mental capacity had been totally absent. If the voluntarily intoxicated perpetrator suffers only diminished mental capacity, this fact does not comprise an exculpatory circumstance. If anything, it is an aggravating circumstance. In this case, the perpetrator would not be able to get a lighter sentence.<sup>8</sup>

There is a special section on intoxication in the German Military Criminal Code (*Wehrstrafgesetz* — WStG)<sup>9</sup> where it is stated that voluntary intoxication due to alcohol or other substances cannot be the legal basis for a mitigation of punishment if a criminal act was perpetrated while the perpetrator was on military duty, or when a military criminal act was perpetrated and this act represents a breach of military regulations and rules of war.<sup>10</sup> This means that Art. 21 of the StGB is bypassed, but circumstances can be classified as exculpatory within the scope of the proscribed punishment;<sup>11</sup> moreover, the general rules for "insanity" are also applicable.

As described above, the German StGB recognizes the special criminal act of complete intoxication (*Vollrausch*). This type of criminal act is committed by a person who wilfully or out of negligence becomes intoxicated through the consumption of alcohol or other substances and then commits an unlawful act. In this instance, the perpetrator cannot be punished because he or she was incapable of liability or because this cannot be excluded. It must be at least predictable that a person would commit a criminal act in a state of intoxication.<sup>12</sup>

In such a case, the perpetrator is not responsible for his or her actions, even though they may include signs of a criminal act; and the act was committed while the perpetrator was intoxicated and incapacitated. But the perpetrator is held accountable for the ingestion of alcohol or other intoxicating substance. The criminal act supposedly incriminated abstract danger,<sup>13</sup> and the perpetrator is responsible for voluntary intoxication or intoxication out of negligence.<sup>14</sup>

In Great Britain, intoxication is also not defined in legislation; but it is present in case law. Diminished mental capacity caused by voluntary intoxication represents an aggravating circumstance when considered in sentencing. Only involuntary intoxication can be considered an exculpatory circumstance.<sup>15</sup>

Jescheck & Weigend, *supra* note 4, p. 447; C. Roxin, *Strafrecht, Allgemeiner Teil (Criminal Law, General Part)*, C.H. Beck, Munich: 1994, p. 756.

<sup>6</sup> Jescheck & Weigend, *supra* note 4, p. 448; Roxin, *supra* note 5, p. 756; Schonke & Schroder, *supra* note 3, p. 388.

<sup>7</sup> Roxin, *supra* note 5, p. 756, 754.

<sup>8</sup> Jescheck & Weigend, *supra* note 4, p. 448.

<sup>9</sup> Wehrstrafgesetz (Germany), available at <http://www.gesetze-im-internet.de/bundesrecht/wstrg/gesamt.pdf>.

<sup>10</sup> Nill-Theobald, *supra* note 5, p. 383; Jescheck & Weigend, *supra* note 4, p. 448; Roxin, *supra* note 5, p. 751; Schonke & Schroder, *supra* note 3, p. 399.

<sup>11</sup> Roxin, *supra* note 5, p. 751.

<sup>12</sup> Jescheck & Weigend, *supra* note 4, p. 449.

<sup>13</sup> *Ibid.*

<sup>14</sup> Schonke & Schroder, *supra* note 3, p. 2790.

<sup>15</sup> Christopher M. V. Clarkson et al., *Clarkson and Keating Criminal Law, Text and Materials*, Sweet and Maxwell, London: 1998, p. 411.

According to British case law, we must make a distinction between voluntary and involuntary intoxication. If the perpetrator was intoxicated involuntarily, he or she is not legally culpable for committing a criminal act because he or she is not liable (*mens rea*) and this excludes the element of a criminal act.<sup>16</sup> Exceptionally, in such an instance, intoxication can be used as a complete defence or cause to rule out criminal act.

The situation is different if the perpetrator got intoxicated to the point of insanity voluntarily. This rarely influences criminal liability, and only in the form of changing the classification of the criminal act or by changing the severity of the punishment. In Britain voluntary intoxication with the intent to commit a criminal act (*Dutch courage*) does not constitute grounds for a defence.<sup>17</sup>

The predominant opinion in British case law and theory is that voluntary intoxication can only influence criminal acts committed with a specific or special intent.<sup>18</sup> Nonetheless, several issues remain controversial. For example: What is considered to be specific or special intent? Which criminal acts call for such intent?<sup>19</sup> What is the effect of voluntary intoxication on this type of criminal act? Despite certain opinions that special intent means that voluntary intoxication only has an effect in cases of premeditated criminal acts and not in cases of criminal acts committed out of negligence,<sup>20</sup> the currently prevailing opinion in British law is that special intent is present in those intentional criminal acts for which the perpetrator has to have a special motive or purpose of action.<sup>21</sup> In continental legal theory this is known as *dolus coloratus*. The consequence of taking into account voluntary intoxication in such criminal acts is a mutation of the intentional criminal act (the perpetrator could not create *mens rea* necessary for the perpetration of the criminal act) into a criminal act perpetrated out of negligence. So far the courts have taken this fact into account only in dealing with intentionally perpetrated criminal acts that can be paired with a criminal act perpetrated out of negligence.<sup>22</sup> With intentionally perpetrated criminal acts where there is no appropriate variation of criminal act perpetrated out of negligence taking into account such a fact would mean perfect defence and acquittal.<sup>23</sup> The decision of the British courts in the *Majewski* case<sup>24</sup> illustrates the opposite position: voluntary intoxication can be taken into account for all criminal acts, no matter whether variation of the criminal act out of negligence exists or not. It is unlikely that other courts will follow this example<sup>25</sup> because in certain cases it can guarantee acquittal.

German and British legal regulation of intoxication is roughly similar. In both cases involuntary intoxication means that a criminal act is non-existent, while voluntary intoxication with

<sup>16</sup> *Ibid.*; D. Ormerod, *Smith and Hogan's Criminal Law*, Oxford University Press, Oxford: 2011, p. 313.

<sup>17</sup> Clarkson et al., *supra* note 15, p. 411, 431.

<sup>18</sup> Ormerod, *supra* note 16, p. 314.

<sup>19</sup> *Ibid.*, p. 317.

<sup>20</sup> Clarkson et al., *supra* note 15, at 41.

<sup>21</sup> Cunningham, *supra* note 15, p. 416.

<sup>22</sup> Clarkson et al., *supra* note 15, p. 424.

<sup>23</sup> *Ibid.*

<sup>24</sup> *United Kingdom v. Majewski*, 1976, House of Lords: "In my opinion the passage cited does no more than to say that special intent cases are not restricted to those crimes in which the absence of a special intent leaves available a lesser crime embodying no special intent, but embrace all cases of special intent even though no alternative lesser criminal charge is available." Available at <http://www.bailii.org/uk/cases/UKHL/1976/2.html>.

<sup>25</sup> Clarkson et al., *supra* note 15, p. 424.

the intent to facilitate the perpetration of a criminal act is not a defence (the perpetrator must answer for the (intentional) criminal act he or she has perpetrated). Outcomes are similar in other cases of voluntary intoxication with the intent to induce "insanity". The perpetrator is liable for criminal acts committed out of negligence: in Britain, if the case is a criminal act with special intent and in Germany, if the perpetrator can be accused of negligence. The effect is the same, but the argumentation is different. In Britain, the argument sets out that the perpetrator could not form special intent required for *mens rea*, while in Germany, the perpetrator's liability is grounded in the use of the principle of *actio libera in causa*. While in Britain the test is focused on the concept of (in)voluntariness, the test in Germany is focused on weighing the perpetrator's culpability for intoxication and perpetration of a criminal act. The position on diminished capacity due to intoxication is clear in both countries: it does not constitute an exculpatory circumstance.

## 2. The regulation of intoxication in international criminal law

International criminal law deals with the concept of intoxication within the scope of substantive criminal law, including its general provisions and principles which negate the existence of a criminal act. Under the influence of common law legal systems, the approach to the reasons for justification and excuse in international criminal law is procedural. Especially relevant is its influence on the existence of a criminal act (acquittal), rather than on which element within the general concept of criminal act the acts exclude. In most legal sources, it is possible to find just the term *defences*.<sup>26</sup>

The Rome Statute represents the first complete codification of the concepts of justification and excuse in international law. Previous statutes regulated only specific reasons for a justification and an excuse or, to be more exact, only prohibited the effect of these reasons on a criminal act. The statute of the Nuremberg Trials, the Tokyo Statute, the statute of the ICTY, and the International Criminal Tribunal for Rwanda (ICTR) similarly deal with several principles, particularly the execution of orders from superior officers, but do not address all the reasons for justification and excuse.

Art. 31 of the Rome Statute addresses those reasons which eliminate the criminal liability of perpetrators. This article also regulates issues of insanity, insanity due to intoxication, self-defence, extreme force and threat.<sup>27</sup> These principles are not named taxatively,<sup>28</sup> but when sentencing the ICC can use other reasons to exclude criminal liability. The Rome Statute already defines the mistake of law and fact (Art. 32) and superior orders and prescription of law (Art.

<sup>26</sup> See the Draft Code of Crimes against Peace and Security of Mankind, International Law Commission, 1996; Report by the Secretary-General of the UN pursuant to Paragraph 2 of the Security Council Resolution 808, (S/25704), 3 May 1993, para. 58; *Prosecutor v. Aleksovski*, 24 March 2000, International Criminal Tribunal for Former Yugoslavia, Judgment IT-95-14/I-A, para. 54.

<sup>27</sup> Art. 31(1) of the Rome Statute.

<sup>28</sup> H. Satzger, *Das neue Völkerstrafgesetzbuch — eine kritische Würdigung (New International Criminal Code)*, *Neue Zeitschrift für Strafrecht* 132 (2002), p. 128; M Scaliotti, *Defences before the International Criminal Court, Substantive Grounds for Excluding Criminal Responsibility, Part I*, *International Criminal Law Review* 172 (2001), p. 119; O. Triffterer, *Commentary on the Rome statute of the International Criminal Court*, Springer Verlag, Vienna: 2008, p. 553; G. J. A. Kooops, *Defenses in Contemporary International Criminal Law*, Martinus Nijhoff Publishers, Leiden: 2008, p. 82; V. Sancin et al., *Mednarodno Pravo Oboroženih Spopadov (International Law of Armed Conflict)*, Poveljstvo za doktrino, razvoj, izobraževanje, Ljubljana: 2009, p. 445; S. Nash & I. Bantekas, *International Criminal Law*, Routledge Cavendish, London: 2007, p. 54; W. Schabas, *The International Criminal Court, a Commentary on the Rome Statute*, Oxford University Press, Oxford: 2010, p. 484.

33). It is also possible to use applicable treaties and principles and rules of international law, as well as principles derived from the national law<sup>29</sup> (legal sources as determined in Art. 21 of the Rome Statute).

Art. 31 of the Rome Statute constitutes a compromise between common law and the continental legal system, largely deriving from the fact that EU legislators did not want to give the impression that they were assigning preference to one specific legal system. It is evident from the prepared materials that this compromise was quite difficult to accomplish.<sup>30</sup>

If we look at these concepts from a purely procedural perspective, that is, if we view them just as principles which perpetrators can use to avoid a conviction, and completely separate them from elements of the general concept of a criminal act (unlawfulness and culpability), on which these principles have an effect, then a compromise is still acceptable. But if we decide upon a certain general concept of a criminal act and look upon the reasons for justification and excuse from a substantive law perspective and connect them to the very elements of the crimes, then it is more difficult to visualize such a conglomerate of characteristics and principles from different legal systems. In my opinion, it is impossible to reconcile the general concept of a criminal act from one legal system with an exculpatory principle with that of another legal system where the concept of crime is totally different. Furthermore, because the exculpatory principles at the international level are a compromise between different legal systems, it is difficult to fit them under one or another general concept of a criminal act. The result is, at best, a poorly functional collage of different systems, and, in the worst case, a compromise which weakens the strong general concept of a criminal act as applied in the continental legal system, making it impossible to clearly classify a certain principle among reasons for justification or excuse. At the same time, such a compromise introduces concepts which are useless and thwarts the evolution of a systematic, consistent and substantive international criminal law.

## 2.2. "Insanity" caused by intoxication

### 2.2.1. Introduction

The concept of intoxication is already controversial in national legal systems, but it is even more controversial in international criminal law. Some hold the view that such a defence in international criminal law is unnecessary<sup>31</sup> because: (1) we are dealing with perpetrators who have perpetrated the most aggravated crimes (heads of state, governments, the military);<sup>32</sup> (2) the purpose of international criminal law is not to prosecute common, direct perpetrators;

<sup>29</sup> Art. 21 of the Rome Statute; Scaliotti, *supra* note 28, p. 120; Triffterer, *supra* note 28, p. 544, 554; A. Cassese, P. Gaeta, R. W. D. Jones, *Rome Statute of International Criminal Court*, Oxford University Press, New York: 2002, p. 1009; Knoops, *supra* note 28, p. 82; Sancin, Svarc, Ambroz, *supra* note 28, p. 445; M. Neuner, *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries*, Berliner Wissenschafts-Verlag GmbH, Berlin: 2003; Nash & Bantekas, *supra* note 28, p. 54.

<sup>30</sup> Schabas, *supra* note 28, p. 484.

<sup>31</sup> E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Asser Press, The Hague: 2003, p. 253; K. Ambos, *Internationales Strafrecht (International Criminal Law)*, C. H. Beck, Munich: 2011, p. 196; Schabas, *supra* note 47, p. 486; M. Scaliotti, *Defences before the International Criminal Court, Substantive Grounds for Excluding Criminal Responsibility, Part 2*, *International Criminal Law Review* 46 (2002), p. 37.

<sup>32</sup> Ambos, *supra* note 31, p. 196; Scaliotti, *supra* note 31, p. 37; Knoops, *supra* note 28, p. 139.

(3) it is a typical national concept<sup>33</sup>. There are also those with opposing views who argue that this principle is relevant because many members of armed forces operate under the influence of drugs.<sup>34</sup>

For the first time in the history of international criminal law, the Rome Statute addresses "insanity" due to intoxication from a positivistic legal perspective.<sup>35</sup> The path to this was not easy because the approaches used in different legal systems to deal with this issue are quite diverse. Some systems accept diminished mental capacity due to negligence based on the principle of subjective culpability as a reason for justification,<sup>36</sup> or accept diminished mental capacity due to intoxication as an exculpatory circumstance. Other systems consider this an aggravating circumstance.<sup>37</sup> Because of these existing different approaches and the absence of concrete provisions in the Rome Statute, it would be difficult to justify the application of this principle simply on the basis of general principles derived from legal systems.

Despite the differences among legal systems and all the different drafts of the Rome Statute, Art. 31(1)(b) of the Rome Statute now stipulates that a perpetrator who committed a criminal act in a state of intoxication, which 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, is not criminally responsible, 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 ICC. This provision governs the institute of *actio libera in causa* in a way that is similar to the way it is governed in Germany.

Contrary to the Rome Statute, diminished capacity due to intoxication is not mentioned either in the Statute of the ICTY or the Regulations on Procedure and Evidence. Based on the Report of the Secretary-General of the United Nations it would theoretically be possible to take it under consideration on the foundation of general principles derived from legal systems, but it would be difficult to accomplish in practice because of the different approaches to this concept used across the many legal systems across the world. The ICTY did deal with cases in which the accused tried to draw attention to the fact they were intoxicated (especially due to alcohol consumption) when they committed a criminal act,<sup>38</sup> but there was never a case of complete "insanity", only diminished mental capacity.

Also, after World War II courts had to deal with the issue of intoxication. The most notorious is the *Chusaburo* case, which was tried before the British courts in Kuala Lumpur. It is unclear whether this was a case of "insanity" or only diminished mental capacity, but it is still possible to discern some legal positions regarding the institute of intoxication, which I present below, focussing specifically on the prosecutor's perspective.<sup>39</sup>

<sup>33</sup> Scaliotti, *supra* note 31, p. 28.

<sup>34</sup> Shiedregt, *supra* note 31, p. 253; Scaliotti, *supra* note 31, p. 38; S. Darcy, *Defences to International Crimes*, in W. Schabas & N. Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge, London: 2011), p. 236; Knoops, *supra* note 28, p. 139.

<sup>35</sup> 31(1)(b) of the Rome Statute.

<sup>36</sup> For example, Germany.

<sup>37</sup> For example, Germany and Great Britain. See G. Werle, *Volkerstrafrecht (International Criminal Law)*, Mohr Siebeck, Tübingen: 2012, p. 292; Ambos, *supra* note 31, p. 195; Scaliotti, *supra* note 31, p. 36.

<sup>38</sup> *Kvočka, (Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcac*, 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1, para. 707.

<sup>39</sup> Scaliotti, *supra* note 31, p. 29; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 3: *Trial Of Yamamoto Chusaburo* (HMSO, London, 1946), p. 78.

### 2.2.2. Conditions of the principle of *actio libera in causa*

According to the Rome Statute, an intoxicated perpetrator is not criminally liable if he or she is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or his or her capacity to control his or her conduct to conform to the requirements of the 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 ICC's jurisdiction.<sup>40</sup>

The definition has three parts, but is similar to the double structure of the concept of insanity. The psychological condition (the inability to comprehend the unlawfulness or criminal nature of one's actions, or the inability to control one's actions in accordance with legal order) is the same — intoxication takes the place of the biological condition in the manifestation of a mental disease or impairment — but a third, normative condition is added. This condition is determined in its negative form, i.e., as the absence of guilt.<sup>41</sup>

The Rome Statute firstly requires for the perpetrator to have been intoxicated (biological condition) at the time he or she committed the criminal act.<sup>42</sup> This qualification is quite wide since it does not cover just intoxication due to alcohol consumption but also intoxication as a consequence of consuming any illegal drug.<sup>43</sup> All the drafts of the Rome Statute contained more or less the same stipulations.<sup>44</sup>

In the ICTY case law, this condition was defined as diminished mental capacity due to the influence of alcohol or drugs,<sup>45</sup> but in practice the ICTY deals mainly with criminal acts perpetrated under the influence of alcohol. In the *Vasiljevic* case, the defendant said he had a psycho-neurosis caused by chronic alcoholism and fatigue<sup>46</sup>, while in the *Chusaburo* case, which was tried after World War II, the defendant argued that he was an alcoholic, and the prosecutor followed this line.<sup>47</sup>

The second condition is psychological, and in the Roman Statute it is equal to the psychological condition of insanity. The perpetrator's capability to comprehend the unlawfulness or the criminal nature of his or her actions (component of conscience), or to control his or her actions in accordance with the legal order (component of will), is diminished or absent.<sup>48</sup> It is also important for the perpetrator's capability to be completely destroyed or absent, not just diminished.<sup>49</sup>

<sup>40</sup> Art. 31(1)(b) of the Rome Statute.

<sup>41</sup> Triffterer, *supra* note 28, p. 876.

<sup>42</sup> Sliedregt, *supra* note 31, p. 249.

<sup>43</sup> Triffterer, *supra* note 28, p. 876; Knoops, *supra* note 28, p. 116.

<sup>44</sup> C. Bassiouni, *The Legislative History of the ICC: an Article by Article Evolution of the Statute*, Transnational Publishers, New York: 2005, p. 230.

<sup>45</sup> Knoops, *supra* note 28, p. 141; *Kvočka, (Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcac)*, 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1, para. 706; *Kvočka, (Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcac)*, 28 February 2005, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1-A, para. 707.

<sup>46</sup> Knoops, *supra* note 28, p. 141.

<sup>47</sup> Scaliotti, *supra* note 31, p. 29; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, vol. 3: Trial Of Yamamoto Chusaburo* (HMSO, London, 1946), p. 77.

<sup>48</sup> Triffterer, *supra* note 28, p. 876; Knoops, *supra* note 28, p. 116, 140.

<sup>49</sup> Sliedregt, *supra* note 31, p. 249; Cassese *et al.*, *supra* note 29, p. 1031; Bassiouni, *supra* note 44, p. 230.

The prosecution team in the *Chusaburo* case decided to use the British variant and argued that intoxication can influence a criminal act if it negates culpability or *mens rea* for criminal acts for which special intent is necessary to change the legal qualification or sentence.<sup>50</sup>

In accordance with the next condition, the perpetrator is liable for a criminal act if he or she voluntarily became intoxicated in circumstances in which he or she was aware of the risk or accepted the risk that he or she can, in this state of intoxication, commit a criminal act that comes under the jurisdiction of the ICC.

It is evident that the perpetrator is not liable when he or she is in a state of intoxication and has involuntarily committed elements of a criminal act.<sup>51</sup> This situation is incontestable<sup>52</sup>, which, in my opinion, is correct because we are dealing with a (biological) reason for incapability that is not under the perpetrator's control, just as he or she is not in control of mental illness or true insanity. Voluntariness of intoxication is the key term for judging in cases when the perpetrator did not know that he or she has ingested a certain intoxicating substance, and while he or she was excusably mistaken regarding his understanding of the fact that he or she was coerced or forced to become intoxicated.<sup>53</sup>

Cases of voluntary intoxication are especially difficult. Comparative law and the Rome Statute recognize two possibilities. The first possibility includes the perpetrator intoxicating himself or herself to insanity, in order to be able to use intoxication as a defence later, if he or she were ever to be accused of perpetrating a criminal act. The second possibility includes the perpetrator intoxicating himself or herself to muster the courage to commit a criminal act (*Dutch courage*)<sup>54</sup> In this case, the perpetrator had the intent to become intoxicated and to perpetrate a crime; therefore, he or she is criminally liable.

The perpetrator is also criminally liable if he or she has become intoxicated voluntarily and intentionally, and had no intent to perpetrate a crime, but did commit such an act in a state of intoxication and was aware of the risk or accepted the risk that he or she could commit a criminal act under the jurisdiction of the ICC. The basic dilemma that arises in regard to this issue among authors is whether the perpetrator is culpable if he or she can be accused of negligence, or only if it can be proven that he or she had eventual intent. Triffterer<sup>55</sup> is of the opinion that this is a standard which lies somewhere between negligence and eventual intent. However, most authors believe that this is negligence, and it suffices for the existence of criminal liability.<sup>56</sup>

In its case law, the ICTY decided that only involuntary intoxication can be accepted as a mitigating circumstance. The perpetrator must not have become intoxicated voluntarily or intentionally.<sup>57</sup> Intent counts as an aggravating circumstance.<sup>58</sup>

<sup>50</sup> Scaliotti, *supra* note 31, p. 29; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, vol. 3: Trial Of Yamamoto Chusaburo* (HMSO, London: 1946), p. 78.

<sup>51</sup> Shiedregt, *supra* note 31, p. 248; Werle, *supra* note 37, p. 290; Ambos, *supra* note 31, p. 195; Knoops, *supra* note 28, p. 117.

<sup>52</sup> Werle, *supra* note 37, p. 292; Ambos, *supra* note 31, p. 195; Scaliotti, *supra* note 31, p. 28; Knoops, *supra* note 28, p. 117.

<sup>53</sup> Knoops, *supra* note 28, p. 118.

<sup>54</sup> Knoops, *supra* note 28, p. 117, 123 about the so-called *Dutch courage*.

<sup>55</sup> Triffterer, *supra* note 47, p. 877.

<sup>56</sup> Werle, *supra* note 56, p. 293; Knoops, *supra* note 47, p. 117; Ambos, *supra* note 50, p. 195.

<sup>57</sup> *Kvocka, (Prosecutor v. Kvocka, Kos, Radic, Zigic and Prcac)*, 28 February 2005, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1-A, para. 707, 708; *Kvocka, (Prosecutor v. Kvocka, Kos, Radic, Zigic and Prcac)*, 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1, para. 706.

<sup>58</sup> Knoops, *supra* note 28, p. 123; *Kvocka, (Prosecutor v. Kvocka, Kos, Radic, Zigic and Prcac)*, 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1, para. 706.

In the *Chusaburo* case the prosecutor expressed his opinion that in relation to this principle, it is mostly relevant whether the perpetrator's intoxication excludes special intent necessary for criminal act.<sup>59</sup>

### 2.3. Diminished capacity due to intoxication

The Rome Statute does not govern either diminished mental capacity or diminished capacity due to intoxication, or the effect of diminished capacity on the criminal act. In my opinion, it would be simplest and most appropriate for the ICC to adopt the conditions from the provisions on insanity due to intoxication by accepting that the intensity of the psychological condition and the perpetrator's capability to comprehend and control his or her actions is just diminished, not excluded. This way, the ICC could take into account only involuntary intoxication; the effect of this principle, of course, should not be the exclusion of a criminal act — because capacity exists, only in a diminished form — but, at most, could influence the determination of punishment, like in "ordinary" cases of diminished mental capacity.<sup>60</sup>

The ICTY accepted intoxication in its case law as an exculpatory circumstance<sup>61</sup> only if the defendant was intoxicated involuntarily or was forced to become intoxicated.<sup>62</sup> In my opinion, this approach is correct because it equalizes the effects of diminished capacity and diminished capacity due to involuntary intoxication. From the perpetrator's perspective, both biological causes for this institute are involuntary — general intoxication due to a mental abnormality and intoxication by alcohol because it was involuntary.

On the other hand, the ICC counted voluntary or intentional intoxication (by alcohol or drugs), which has diminished a perpetrator's mental capacity, as an aggravating circumstance in the process of sentencing, because international crimes are usually carried out in typically violent environments where weapons are easily available;<sup>63</sup> therefore, one should be more careful of one's actions and take preventive measures. With this decision the ICC declined to use the case law of courts in Yugoslavia where diminished mental capacity due to intoxication was accepted as a mitigating circumstance.<sup>64</sup> In most cases the ICTY refused to accept diminished mental capacity due to intoxication as an exculpatory circumstance, and did so

<sup>59</sup> United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 3: *Trial Of Yamamoto Chusaburo* (HMSO, London: 1946), p. 77; Knoops, *supra* note 28, p. 139.

<sup>60</sup> Bassiouni, *supra* note 44, p. 237.

<sup>61</sup> Schabas, *supra* note 28, p. 487; *Kvočka*, (*Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcać*), 28 February 2005, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1-A, para. 707; *Kvočka*, (*Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcać*), 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1, para. 706.

<sup>62</sup> *Kvočka*, (*Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcać*), 28 February 2005, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1-A, para. 707; *Kvočka*, (*Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcać*), 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1, para. 706.

<sup>63</sup> Knoops, *supra* note 28, p. 123; *J Kvočka*, (*Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcać*), 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1, para. 706.

<sup>64</sup> *Kvočka*, (*Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcać*), 2 November 2001, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1.

*a priori*,<sup>65</sup> because the defendant was not able to prove that his or her intoxication was truly involuntary.<sup>66</sup>

In the *Chusaburo* case, the use of the "drunkenness" defence as an attempt to influence the determination of punishment was implicitly denied,<sup>67</sup> with the court convicting the defendant and giving him the death penalty.<sup>68</sup> Despite this decision the prosecutor stated some of his views on this principle. In his opinion, diminished capacity due to intoxication could warrant a mitigation of punishment or lightening of the legal qualification if the perpetrator was so incapacitated that he was unable to form intent for a criminal act.<sup>69</sup>

## Conclusion

The principle of *actio libera in causa* or the effect of the perpetrator's voluntary intoxication on the existence of a criminal act is controversial in international criminal law. Existing legislation, as contained in the Rome Statute, is a compromise between different legal systems across the world, and it allows for the exclusion of a criminal act based on the fact that the perpetrator was involuntarily intoxicated and he or she cannot be ascribed guilt for the act of intoxication or the criminal act. This application is compatible with continental penal codes. But the so-called intoxication in bad faith (*mala fidae*) does not exclude criminal liability.<sup>70</sup> The effect of this principle under the Rome Statute is the exclusion of a criminal act in accordance with the exemplary continental legislations. This represents a departure from British court case law in which this principle has an effect primarily on the legal qualification when the criminal act is equivalent to a criminal act perpetrated out of negligence. If this is not so, then it represents a perfect defence. So far the courts have not supported this practice.

In the Rome Statute, the *actio libera in causa* principle has three elements, composed similarly of insanity due to biological (intoxication), or psychological (the inability to control actions or understand their consequences), or the third negative condition (nonexistence of guilt for the criminal act).

The Rome Statute does not deal with diminished mental capacity due to intoxication and also does not contain stipulations regarding the conditions of a generally diminished mental capacity. I propose that the ICC finds support in the three above-mentioned elements of the principle of *actio libera in causa* by acknowledging that a perpetrator's capacity to understand or control his or her actions is partially diminished, not totally absent. The ICC could accept that diminished mental capacity due to intoxication could be understood as an exculpatory circumstance without the elimination of criminal liability. Such a solution would be in accord with exemplary continental legal systems which do not, in principle, admit voluntary intoxication in bad faith as an exculpatory circumstance, as well as with the present jurisprudence of international courts.<sup>71</sup>

<sup>65</sup> Schabas, *supra* note 28, p. 487.

<sup>66</sup> *Kvočka*, (*Prosecutor v. Kvočka, Kos, Radic, Zigic and Prcać*), 28 February 2005, International Criminal Tribunal for Former Yugoslavia, Judgment IT-98-30/1-A, para. 708.

<sup>67</sup> United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 3: *Trial Of Yamamoto Chusaburo* (HMSO, London: 1946), p. 76.

<sup>68</sup> *Ibid.*, p. 79.

<sup>69</sup> Scaliotti, *supra* note 31, p. 29; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 3: *Trial Of Yamamoto Chusaburo* (HMSO, London: 1946), p. 78.

<sup>70</sup> Knoops, *supra* note 28, p. 117.

<sup>71</sup> See the cases of *Kvočka* and *Todorovic* from the International Criminal Tribunal for Former Yugoslavia.



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