

Punishing Unfit Defendants for International Crimes Committed Decades Ago

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Abstract : On the one hand, while dealing with temporally distant international crimes (TDICs), prosecutors are likely to encounter many defendants suffering from severe physical or mental disorders. The concept of a defendant's "fitness," on the other hand, is based on the notion that an alleged perpetrator must be protected from a conviction resulting from a lack of participation or competence in making proper judgments. As a result, if a defendant is temporarily or permanently mentally ill, going through a formal criminal trial may be highly unlikely. The Extraordinary Chambers in the Courts of Cambodia (ECCC), for example, arrested and tried Ieng Thirith for crimes against humanity, grave breaches of the 1949 Geneva Conventions, and genocide. Still, the Trial Chamber found her incompetent to stand trial and released her in 2011. Although the prosecution had a lot of evidence against her, she was free from prosecution. It suggests that alleged war criminals may be granted immunity due to their unfitness, implying that unfitness is a hurdle to combating impunity. Given the absence of a formal criminal trial, international criminal law (ICL) should take steps to address this issue. ICL, according to Mark A. Drumbl, has yet to develop its penology; hence it borrows penological rationales from domestic criminal law. For example, international crimes tribunals such as the Nuremberg Tribunal and the Tokyo Tribunal, ad hoc tribunals have used retribution, utilitarianism, and rehabilitation as punishment justifications. On the other hand, like in the case of Ieng Thirith, a criminal trial may not always be feasible. As a result, instead of allowing impunity, this paper proposes informal trials. This paper, for example, suggests two approaches to dealing with unfit defendants: 1) trial without punishment and 2) punishment without trial. Trial without punishment is a unique method of expressing condemnation without incarceration. "Expressivism has a broader basis than communication of punishment and sentencing," says Antony Duff. According to Drumbl, we can untangle our understanding of punishment from "the iconic preference for jailhouses" to include a larger spectrum of non-incarcerative measures like "recrimination, shame, consequence, and sanction." Non-incarcerative measures allow offenders to be punished without going through a formal criminal trial. This strategy denotes accountability for unlawful behavior. This research concludes that in many circumstances, prosecuting elderly war crimes suspects is difficult or unfeasible, but their age or illness should not be grounds for impunity. They should be accountable for their heinous activities through criminal trials or other mechanisms.

Keywords : international criminal law, international criminal punishment, international crimes tribunal, temporally distant international crimes

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