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Doctrine of Fitness to Stand Trial in International Criminal Law

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This study analyzes the doctrine of fitness to stand trial in international criminal law. The doctrinal legal analysis method was used to study fitness to stand trial doctrine in international criminal law. The principle of competency to stand trial is recognized in international criminal law. A person who is incompetent to stand trial cannot be prosecuted in the International Criminal Court for his crime(s). A mental health evaluation of the accused is mandatory to determine his competence to stand trial. An accused must prove on the balance of probabilities standard of evidence that he is incompetent to stand trial. Presenting expert witnesses is common in determining the pleas of unfitness to stand trial in the International Criminal Court and tribunals. The capacity building of relevant stakeholders, i.e., psychiatrists, psychologists, lawyers, judicial officers, and researchers, is recommended.

1. Introduction

The doctrine of fitness to proceed deals with the procedural law about the trial of a person who is not competent to proceed with a criminal charge due to his abnormal mental condition. This doctrine can be found in all the jurisdictions in the world in one way or another. Accordingly, a person who cannot understand the criminal proceedings against him cannot be prosecuted for a criminal charge (Weiner & Otto, 2013). A criminal trial of a mentally incompetent person cannot be considered a fair trial (Ajmal & Rasool, 2023).

International criminal law upholds the doctrine of fitness to proceed, as rule 135 of the Rules of Procedure and Evidence (2005) makes it binding for the International Criminal Court to adjourn the trial of a defendant who is incompetent to proceed due to his mental condition. However, the jurisprudence on the competence to stand trial has complexities due to the crimes tried under international criminal law. Furthermore, applying the doctrine of incompetency to stand trial in an international judicial forum has its unique challenges (Freckelton & Karagiannakis, 2014).

2. Literature Review

A defendant must be competent to understand the criminal legal proceedings. A person with compromised mental health who is not able to understand the proceedings cannot be adjudicated (Weiner & Otto, 2013). It is illegal to proceed against a person who cannot understand criminal proceedings against him (Melton et al., 2018). The criminal proceedings against a mentally incompetent person must be postponed unless such a person regains sufficient mental capacity to understand legal proceedings (Ajmal & Rasool, 2024b).

The doctrine of fitness to proceed is not a product of modern jurisprudence; rather, it can be found in ancient times. However, the modern usage of the concept of the competency to stand trial in legal proceedings can be found in the 17th century in English law (Brown, 2019). The principle of competency to stand trial is one of the common features of the legal systems in the world, though the law on fitness to stand trial varies among different national jurisdictions. The doctrine of competency to proceed has general acceptance in jurisdictions across the world. International criminal law, which in essence is based on the legal principles from jurisdictions across the world, adopted the principle of competency to stand trial, and this principle is interpreted and implemented in international criminal proceedings like most jurisdictions in the world (Ajmal & Rasool, 2024a).

In common law, the principle of fitness to proceed is considered an integral part of the procedural rights of an accused. The US Supreme Court decided that an accused must be capable of comprehending the charges against him and assisting his counsel to declare fit to stand trial (*Dusky v. United States,* 1960). In the case of a mentally incompetent accused, the trial in absentia principle can also be evoked, as the trial of a mentally incompetent accused is if the accused physically appears in the court when his mind is not present, which makes his physical presence in the court meaningless (*Drope v. Missouri,* 1975).

The competence of a defendant to stand trial is determined by his capability to understand the legal proceedings and to instruct his lawyer. It was decided, by an English court, that an accused must be capable of his defense and instruct his counsel to be considered fit to stand trial (*Dashwood v. Reg,* 1943). Furthermore, it was decided by the Australian Courts that an accused must be capable of comprehending the nature of charges and proceedings, pleading, and assisting his counsel to declare mentally fit to stand trial (*R v. Presser,* 1958; *R v. Masin,* 1970; *R v. Bradley,* 1986; *R v. Allen,* 1993; *Kesavarajah v. R,* 1994). The minimum standard of competency to proceed is that a defendant must be able to communicate comprehensively with his lawyer about the proceedings (*R v. Miller,* 2000; *R. v. Whittle,* 1994; *Kunnath v. the State,* 1993; *Public Prosecutor v. Misbah Bin Saat,* 1997; *R v. John M,* 2003).

In civil law jurisdictions, similar criteria of competency to stand are adopted (German Federal Constitutional Court, 1995; Japan Supreme Court Decision, 1991; Code of Criminal Procedure of the Republic of Korea, 1983; Code of Criminal Procedure Netherlands, 1921). The countries of former Yugoslavia have provisions for the postponement of the trial of a defendant incompetent to proceed subject to the mental health evaluation (Code of Criminal Procedure of Bosnia and Herzegovina, 2009; Criminal Procedure Act of Croatia (2008); Code of Criminal Procedure of the Republic of Montenegro, 2004); Criminal Procedure Act of the Republic of Serbia, 2013).

The criteria of incompetence to stand trial is different from the criteria of having a mental disorder (*R. v. Whittle,* 1994; *Wilson v. United States,* 1968). Mere having a mental disorder cannot be taken as incompetence to stand trial (*R v. Steele*, 1991). International criminal law has developed its jurisprudence on the competency to proceed (*Prosecutor v. Pavle Strugar,* 2004). Although the jurisprudence on the competency to proceed in international law is developing, as it was not long ago when the International Criminal Court was founded under Article 1 of the Rome Statute (2002), the principle of competency to stand trial is applied in letter and spirit in international law like most of the jurisdictions in the world (Ajmal & Rasool, 2024a).

3. Method

The doctrinal legal analysis method was employed to study the doctrine of unfitness to stand trial in international criminal law.

4. Analysis

4.1 Statutory Provisions Dealing with Competency to Stand Trial in International Criminal Law

The doctrine of competency to proceed is recognized in international law by the statutory provisions that deal comprehensively with the competency of the accused. Article 64 para 8 (a) of the Rome Statute (2002) makes it obligatory for the trial chamber to make sure that the defendant comprehends the nature of the charge against him during the trial. Rule 113 (1) of the Rules of Procedure and Evidence (2005) deals with the right of the mental health examination of an accused at the pre-trial chamber. Rule 135 of Procedure and Evidence (2005) deals comprehensively with

the competency to proceed. Rule 135 (1) provides that the trial chamber can order the mental health assessment of a defendant. Rule 135 (2) makes it obligatory for the trial chamber to place reasons for such a mental health evaluation order. Rule 135 (3) allows the appointment of experts for the mental health evaluation of the defendant. Rule 135 (4) deals with the postponement of the trial of a defendant found incompetent to stand trial after his mental health examination.

4.2 Jurisprudence of International Criminal Court and International Tribunals on Fitness to Stand Trial

The International Criminal Court considers the rule of competency to stand trial as an element of a fair trial. The criminal trial of a mentally incompetent defendant must be adjourned if such a person is unable to participate in the legal proceedings given the medical opinion in this favor (*The Prosecutor v. Laurent Gbagbo and Charles Ble Goude,* 2015). The mental capacity of an accused must be viewed reasonably to assess his fitness to proceed. The defendant must be capable of comprehending the charges levelled against him and exercising his procedural rights (*Prosecutor v. Goran Hadzic,* 2015).

It is unfair to proceed against an accused who is unable to comprehend the nature of the proceedings against him. An accused who does not comprehend the proceedings, the charges levelled against him, who is unable to instruct his attorney, and unable to appreciate evidence presented in favor of or against him; the trial of such an accused is against the principles of justice. The principle of fitness to proceed is applicable in all the civilized jurisdictions across the world, and the same principle is upheld by the International Criminal Court too. Although both the insanity defense and the competency to proceed involve the mental condition of an accused, these two are different and are grounded on the different mental capacities of an accused (Ajmal & Rasool, 2023).

4.3 Criteria of Determination of Competency of an Accused to Stand Trial in International Criminal Law

The criteria to ascertain the competency of a defendant to stand trial was explained in various judgments of the International Criminal Court. In the Pavle Strugar Case (2004), the trial chamber explained that the matter of competency to proceed must be determined based on the capacities of an accused at the time of the trial rather than on the presence or absence of mental disorders. To ensure the procedural rights of an accused, he must possess a certain mental capacity. Without a certain level of mental capacity of an accused, his procedural rights cannot be protected. Thus, the trial chamber made a list of the capacities of an accused to determine his fitness to proceed. These capacities include the capacity to plead, to comprehend the charges and the proceedings, to understand the evidence, to instruct the lawyer, to comprehend the consequences of the criminal proceedings, and to testify. The trial chamber further highlighted that all these capacities must be viewed in a reasonable, commonsense, and holistic manner to assess the competency of a defendant to stand trial. Merely having mental disorders is not enough to determine the competency of a defendant to proceed; rather, it is determined by the adverse effects of the mental disorders and mental conditions of an accused on his functioning and capacities.

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The International Criminal Tribunal for Rwanda interpreted the fitness of an accused to stand trial as based on his capacity to participate in the criminal trial against him and capacity to communicate with and instruct his defense lawyer (*The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* 2003). One of the criteria based on which a defendant was declared unfit to proceed was that the accused lost his memory, his ability to comprehend statements, and his life could be at risk because of his medical condition if the prosecution continues (Gustav Krupp von Bohlen Case, International Military Tribunal (IMT) in Nuremberg, 1945). Another criterion of unfitness to stand trial was based on the intellectual capacity of the defendant and his ability to consult with the defense attorney (*The United States of America et al., v. Sadao Araki et al.,* 1998).

In the Nahak Case (2004), it was established that to determine the competency of a defendant to stand trial, the test is whether the accused satisfies the minimum criteria of mental functioning to consider them competent to stand trial instead of whether the accused is possessing higher mental functioning. Moreover, the terms competence to stand trial and fitness to plead were interpreted as the same. In the Rudolf Hess case, it was determined that merely having a psychological condition does not make a person incompetent to proceed. It was further decided that the condition of a defendant at the time of the trial is relevant while determining his fitness to stand trial. In contrast, the condition of a defendant at the time of the crime is relevant in an insanity defense (Woltmann, 1948).

4.4 Standard and Burden of Proof of Competency to Stand Trial in International Criminal Law

As a rule, and as per the customary practice in international criminal law, the burden of proof of the crime committed by an accused lies with the prosecution (Article 66 (2) of the Rome Statute of International Criminal Court, 2002). Moreover, a defendant is considered innocent until proven guilty (Article 21 (3) of the Statute of International Criminal Tribunal for the Former Yugoslavia, 1993). However, the onus of proof of unfitness to proceed lies with the defendant. The accused must prove his incompetency to stand trial on the standard of balance of probabilities of evidence (*Prosecutor v. Pavle Strugar,* 2004).

The standard of proof of fitness to stand trial adopted by international criminal law is the same as in the national jurisdictions. The criterion of proof to prove the fitness to trial is the preponderance of the evidence (*Cooper v. Oklahoma,* 1996). The one who claims unfitness to stand trial must prove it on the standard of evidence of the balance of probabilities (*R v. Podola,* 1959). Moreover, the principle of presumption of sanity, i.e., every person is presumed to be of sound mind unless otherwise proved, is upheld in the practice of international law (*The Prosecutor v. Delalic, Mucic, Delic, Landzo,* 1998).

4.5 Mental Health Evaluation and the Role of Expert Witnesses in the Plea of Fitness to Proceed

The mental health assessment of a defendant to ascertain his competency to proceed is mandatory (*The Prosecutor v. Dominic Ongwen,* 2021). The criteria to determine the competency to stand trial are not specified in the statutes, either in the Rome Statute (2002). However, Rules 113 and 135 of the Rules of Procedure and Evidence of the International Criminal Court (2005) are the relevant statutory provisions for the mental health examination of an accused to determine his fitness to stand proceed.

The importance and relevance of mental health assessment of an accused to ascertain his fitness to proceed is obvious from various decisions of the International Criminal Court. At the Nuremberg Trials (1945), the matter of competency to proceed was addressed when the three accused, Gustav Krupp von Bohlen, Rudolf Hess, and Julius Streicher, raised the plea of incompetency to stand trial. The tribunal ruled that the fitness of these accused to stand trial must be tested based on their mental health evaluation reports.

There are several instances where the accused were declared fit/unfit to stand trial based on their mental health evaluations. A defendant, Shumei Okawa, based on his mental health evaluation report, was found incompetent to proceed and freed by the International Military Tribunal for the Far East (1948). In the Ongwen case, the plea of unfitness to stand trial, along with other pleas, was raised, but the court decided Ongwen was competent to stand trial based on his mental health evaluation (Hiromoto & Sparr, 2023). Esad Landzo was tried before the International Criminal Tribunal for the Former Yugoslavia. At the request of the prosecution, the accused, Esad Landzo, was mentally examined and found competent to proceed (Case No. IT-96-21-T, 1997). Julius Streicher, based on his mental health examination report, was found mentally fit to proceed (Priemel, 2016). In the Goran Hadzic Case, the defense took the plea of unfitness to stand trial, which was accepted based on the mental health evaluation of Goran Hadzic, and his trial was postponed indefinitely (*Prosecutor v. Goran Hadzic,* 2015). The mental health evaluation in the Gbagbo case was carried out. Experts were taken on board for the mental health evaluation, and considering the mental health assessment reports, the court found Mr. Gbagbo fit to proceed (*The Prosecutor v. Laurent Gbagbo and Charles Ble Goude,* 2015).

It is an established practice of presenting expert witnesses in the plea of unfitness to stand trial in the international criminal court and international tribunals, as evident from the Ongwen Case (2021), Landzo Case (1998), Gbagbo Case (2015), and Hadzic Case (2015), where both defense and prosecution were allowed to present expert witnesses. Both the defense and the prosecution can present expert witnesses to further their claims of the fitness/unfitness of a defendant to proceed. In the Landzo (2001) and Talic (2002) cases, the trial chamber relied solely on expert opinions to ascertain the fitness of the defendant to proceed. An expert witness must discuss the nature of the mental disorder(s) an accused is having and particularly how these mental disorders are affecting the capacities of the accused that make him incompetent to stand trial. A

mere diagnosis of the mental health condition of a defendant is not sufficient (Article 110(3), the Criminal Procedure Code of Bosnia and Herzegovina, 1998).

4.6 Recommendations

The doctrine of competency to stand trial in international law deals with the procedural law regarding the trial of a mentally incompetent accused of crimes. This doctrine is recognized and implemented in international criminal law, like in all civilized national jurisdictions. However, implementing the doctrine of unfitness to stand trial in the International Criminal Court has its unique challenges due to the nature of the crimes prosecuted under international law.

It is recommended that the relevant mental health professionals performing mental health evaluations of the defendant to determine their fitness to proceed must be trained to perform their functions in the international arena, as the mental health evaluations of the defendants who take the pleas of incompetency to proceed in crimes dealt with under Article 5 of the Rome Statute (2002) pose unique challenges. Likewise, there must be specialized training of the lawyers to make them better equipped to deal with the issues that involve the mental health of an accused, such as the competency to stand trial and insanity defense.

Although there is extensive jurisprudence developed by the International Criminal Court and international tribunals on unfitness to stand trial. Yet, there is a lot left on unfitness to stand trial that needs to be addressed by these forums. It is recommended that researchers be encouraged to study issues like insanity defense, incompetency to stand trial, and diminished responsibility in international criminal law. Moreover, multidisciplinary research needs to be promoted to address the intricacies of unfitness to stand trial and its implementation before the relevant international judicial forums.

5. Conclusion

International criminal law recognizes the doctrine of unfitness to stand trial. An extensive jurisprudence of the International Criminal Court and international tribunals on competency to stand trial was developed over the last few decades. A defendant who is incompetent to stand trial cannot be prosecuted in the International Criminal Court. A mental health evaluation of the defendant claiming incompetency to stand trial is mandatory. Moreover, the accused must prove his incompetency to stand trial on the standard of evidence of balance of probabilities. The practice of presenting expert witnesses to determine the fitness/unfitness to stand trial is common before international judicial forums. The specialized training of mental health and legal professionals is recommended to deal with matters related to incompetency to stand trial in international judicial proceedings.

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