

Prosecuting elderly genocidaires: Why we should not reward the evasion of criminal justice

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Abstract

In recent years, individuals in their 80s and 90s have been put before courts for their role in the Holocaust. Some now argue such legal proceedings are a waste of time, as the punishment available cannot match the crimes of genocide that are alleged, that the accused are too old to imprison. This paper explores the role of the trials of elderly genocidaires in contemporary society and whether it is just to punish these perpetrators. This paper examines the traditional theoretical framework applied to criminal punishment (protection, rehabilitation, deterrence and retribution), and whether or not these pillars remain relevant. The more modern theories of restorative justice and catharsis and the role of victims are then considered. This paper argues that these trials should continue to occur due to the important role they play in general deterrence of war crimes, punitive theories of retribution and the restorative benefit they have for survivors and their families.

Introduction

In recent years, individuals in their 80s and 90s have been put before courts for their role in the Holocaust. Some now argue such legal proceedings are a waste of time, as the punishment available cannot match the crimes of genocide that are alleged; that the accused are too old to imprison (Smeulers, 2008; Porcella, 2007). On the other hand, refusing to try elderly genocidaires may be seen as rewarding them for the continual evasion of the justice system as their culpability remains unchanged (Zuroff, 2012). The traditional theoretical approach to justice, generally, revolves around four pillars of punishment: protection, rehabilitation, deterrence and retribution (Daly, 2016). The three distinct, non-contingent rationales for continuing to punish genocidaires, in particular, are: the principled, non-consequentialist approach of

retribution (that crimes should be punished) (Wood, 2010); the utilitarian rationale of general deterrence (Dressler, 2001); and the restorative approach, looking at the benefit to victims (Barton, 2003).

This paper takes the position that it is important to continue prosecuting these perpetrators so that they face consequences for their crimes and victims are finally able to obtain justice. I address criticisms of the genocidaire trials by examining the aims of the criminal justice system that are no longer deemed relevant. Some people oppose holding trials, as protection, rehabilitation and personal deterrence are inconsequential given the age of the perpetrators. I consider, though, how the roles of retribution and general deterrence remain pertinent in order to raise awareness and increase accountability. I also examine emerging restorative theories of justice, whereby trials can empower victims by providing a platform to speak, and punishment can help them achieve closure. This paper argues that these trials retain their importance and perpetrators should continue to be prosecuted because the three key principles of justice (retribution, deterrence and restoration) remain pertinent regardless of time delays and the age of the accused. I primarily rely on case studies of the Holocaust and Cambodian Genocide, while also making reference to the Rwandan genocide.

Punishment

For punishment to be justifiable, it must provide some social utility. The advanced age and health conditions of the accused means that several relevant sentencing considerations are not applicable. Research has found there is an almost non-existent risk of the sick and elderly reoffending (*Friedgood v NY State Bd*, 2007). As such, they are predominantly incapable of posing a threat to society (Lundstrom, 1994). The role of protection or personal deterrence is therefore irrelevant, as there is no future risk to the community (Porcella, 2007).

Consequently, arguments about public safety do not factor into sentencing considerations. Rehabilitation is irrelevant as the accused's age means that they are unlikely to be reintegrated into society (Dressler, 2001). While these aims may not be satisfied by trying elderly genocidaires, for punishment to be warranted and just, it need not meet all the aims (Daly, 2016). Moreover, no justification in isolation is sufficient to establish that there is still an imperative to punish elderly genocidaires. The first justification of these trials is that since perpetrators of genocide have committed crimes, their actions warrant punishment in order to provide retribution.

Retribution

The principle of retribution is ‘guilt deserves punishment for the sake of justice’ (Sadurski, 1985, 223). Retributivism is a theory of justice that seeks to punish offenders because they *deserve* to be punished (Walker, 1980, 25–6). This pillar of justice takes a non-consequentialist approach to sentencing, as punishment is awarded due to its own innate worth, rather than for any consequential good or benefit it is claimed will result (Wood, 2010). Punishment is seen to restore a moral balance through the repaying of a debt (Dressler, 2001). Given this theory revolves around community morality, it is not time-sensitive, and punishment can be applied so long as the action is deemed wrong. Genocide is still a crime and thus culpability is not mitigated by the passage of time.

The trial of genocidaires is critical to denounce criminal conduct and articulate the international community’s condemnation. For international law, punishment conveys ‘the indignation of humanity for the serious violation of international humanitarian law’ (Prosecutor v Miodrag Jokic, 2004). Perpetrators of genocide have committed a crime by attempting to cause the death of an entire culture, wherein their actions are in violation of humanity’s ethical code. As Lord Denning stated: ‘[t]he ultimate justification of any punishment is the emphatic denunciation by the community of a crime’ (cited in Cottingham, 1979, 245). Age does not impact culpability (Pertierra, 1995). Zuroff emphasises that the passage of time does not diminish Nazi criminals’ guilt, ‘they are just as guilty today as the day they committed their crime – and they do not deserve a prize for eluding justice for so long’ (2012). Not implementing punishment means that they are not held to account for the heinous crimes they have committed.

Retributive aims of justice are reflected in ongoing prosecutions of the Khmer Rouge. The Khmer Rouge controlled Cambodia between April 1975 and January 1979 in a genocidal regime where approximately 1.7 million people were executed or died from hunger, exhaustion or disease (Meyer, 2008). The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2006, delayed almost 30 years after the Khmer Rouge lost power (Menzel, 2007). The Court was responsible for prosecuting five of the main perpetrators of the genocide, including Pol Pot’s chief ideologist, and former president, Nuon Chea (Meyer, 2008). Although much time had lapsed, survivors have been at the heart of pushing for a trial. According to Menzel:

a court trial is a clear message that Cambodian society does not want to simply ‘reconcile’ with the Khmer Rouge, but that it wants perpetrators to be called to account and punished according to their crimes. (Menzel, 2007, 225)

It is apparent that Cambodia is incapable of restorative justice or moving forward without some degree of retribution for perpetrators (Kek Galabru, 2000).

These trials are important as they allow victims to feel vindication and even some level of forgiveness after those responsible have been punished. Retributive theories of justice highlight that actions that violate the norms and ethics of society must be punished as a signal that perpetrators have done something wrong. It goes some way to right that balance so that the world may move on (Pertierra, 1995). Retribution is also seen as a prerequisite for forgiveness. This is evident in the Rwandan tribunal where one aim was to ensure perpetrators receive their 'just desserts' (Maogoto, 2004, 211). These trials' ultimate goal is to express moral condemnation, both domestically and by the international community, and to impose punishment on those who perpetuated the genocide (Mutua, 2000).

A criticism of retribution is the idea of proportionality; however, this is not a justification to fail to prosecute and thus create a more disproportional response. Central to retributive theories is the idea that perpetrators receive a sentence that is just in relation to the 'gravity of the crime and blameworthiness of the individual' (Goh, 2013, 45). However, Smeulers asks whether a sentence for genocide can ever be just (2008, 984). He poses the rhetorical question that, if one murder can result in the punishment of life imprisonment, how long should a sentence for complicity in hundreds of murders be? (Smeulers, 2008). Drumbl (2007) also argues that it is impossible to understand the sheer immensity and brutal nature of the crimes as they are incomprehensible. If you try to attach a numerical figure to these deaths it becomes 'unintelligible and immeasurable' (Drumbl, 2007, 156).

Even if the punishment is insufficient, it is still preferable to allowing perpetrators to escape reprimand completely. In relation to the Holocaust, Hannah Arendt wrote: 'for these crimes, no punishment is severe enough ... That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems' (cited in Bass, 2000, 13). However, the logic that no punishment is equivalent to the crime is not an argument for then allowing perpetrators to go unpunished. According to Ranki (1997, 32), the necessity of prosecuting is that choosing *not* to implicitly denotes an acceptance of the actions. It sends the message that there is nothing to prosecute; that the conduct is not deemed a crime (Ranki, 1997, 32).

In line with retributivism, neither the time delay nor condition or age of the accused is sufficient justification to refrain from prosecution. By virtue of having committed a crime, perpetrators deserve punishment. This view is echoed by Arendt (1963, 254), who believed that even if a punishment is insufficient, it is still important, as 'evil' actions destroy the natural balance, and it can only be restored through retribution. Society owes a duty to the moral order to rectify the imbalance and punish the criminal. The other duty society owes is to deter crimes and prevent them from transpiring.

Deterrence

If the trial and punishment of elderly genocidaires can discourage further atrocities then, under a utilitarian framework, they have merit and should continue. Deterrence means that the threat of punishments can dissuade potential perpetrators from committing crimes (Hassan, 1983). The object of deterrence is to maintain social control (Hassan, 1983). Utilitarianism holds that punishment is desirable only if it benefits the public (Dressler, 2001). Therefore if punishment can help prevent crimes it is justified.

There are two types of deterrence, special and general. Special deterrence is the punishment of an individual to prevent them reoffending (Smeulers, 2008). Special deterrence is not a relevant consideration for genocidaires as the ‘likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes ... is so remote’ (Prosecutor v Dragoljub Kunarac, 2001). Furthermore, the age of the accused means they are unlikely to reoffend. However, general deterrence, the idea of preventing others committing crimes, remains pertinent (Smeulers, 2008). This holds that when potential offenders see others being punished, they are dissuaded from committing a similar crime. This is summarised by Bentham: ‘Punishment must be the object of dread more than the offense is an object of desire’ (1951, 332).

Deterrence was a major goal of post–First World War international criminal law, aiming to prevent people from committing future war crimes. Deterrence is especially relevant for international crimes, as there is a perception that international law is not enforceable and therefore actions will go unpunished (Hassan, 1983). Current trials are particularly effective deterrents, as they demonstrate that there is no impunity for offenders, regardless of age or delay (Carmichael, 2011). During the trial of the Auschwitz guards, Reinhold Hanning, a prosecution lawyer, commented that the trial was an opportunity to reaffirm the horror and prevent its repetition: ‘throwing light on what happened, with ensuring that something like this never happens again’, (Goldbach cited in Connolly, 2016). The idea that you could be punished at any moment, even after you think you have escaped punishment, is a powerful deterrent. The hope is that these trials will force people to realise their own security and freedom will be in jeopardy by punishment and this will prevent future crimes against humanity occurring (Schense and Carter, 2016).

The trial of the leadership of the Khmer Rouge shows the role of deterrence as a sentencing consideration. The Joint Statement of the Prosecutors of the ICC,¹ the ICTY,² ICTR³ and SCSL⁴ in 2004, stated:

People of the world are entitled to a system that will deter grave international crimes and hold to account those who bear the greatest responsibility. Only when a culture of accountability has replaced the culture of impunity can the diverse people of the world live and prosper together in peace (Joint Statement, 2004).

This statement is exemplified in the trial of Nuon Chea, Ieng Sary, Khieu Samphan and Hun Sen, four senior members of the Khmer Rouge, who were responsible for the Cambodian genocidal regime (Beachler, 2014). Although the defendants were elderly and frail, the court case was deemed important to combat the myth of Khmer non-liability pervading Cambodia (McCargo, 2011). According to McCargo, ‘the hope was that the imposition of legal processes and punishment against key Khmer Rouge cadre would undermine the culture of impunity in Cambodia’ (McCargo, 2011, 613–27). It was important to show that even the heads of regimes could be held accountable, and that everyone was subject to the rule of law. Neier notes the importance of trials like this in ensuring social cohesion, as they ensure the basic rules cannot be disregarded without consequences (1998). It is crucial that citizens respect the criminal justice system and trust in its efficiency in order for a nation to rebuild and to ensure stability.

The fear of social punishment acts to stop people committing crimes. From a utilitarian framework, these trials are warranted as they can prevent future deaths. This is also seen in Rwanda where punishments aimed to be harsh enough to ‘convince [the Rwandan people] that they have too much to lose if they succumb to illegal activities’ (International Centre for the Study and the Promotion of Human Rights and Information, 1997, 42). Trials are an effective mechanism for deterring crime as they hold genocidaires accountable and thus discourage others. Furthermore, these trials deter the denial of genocides.

Holocaust denial is another reason why deterrence is critical, because such denial threatens to delegitimise the experiences of victims, increases anti-Semitism and may ultimately pave the way for future atrocities. There has been a growing number of people who deny the Holocaust, claiming it was fabricated and no crime had been committed (Ranki, 1997). The ongoing prosecution of Nazis can be justified as it helps

¹ International Criminal Court.

² International Criminal Tribunal for the Former Yugoslavia.

³ International Criminal Tribunal for Rwanda.

⁴ Special Court for Sierra Leone.

combat this threat. Ranki stresses that in a context of growing denialism, reaffirming the identity of the perpetrators and victims has important civic value (1997, 31). Trials are crucial in terms of gathering evidence and placing statements on an official historical record. One of Nuremberg's central successes was to prevent and counter denial of the Holocaust because of its meticulous collection of evidence (Goldstone, quoted in Gearty 2007). Ongoing cases are important for a similar reason, in providing concrete evidence of the Holocaust and ensuring it remains at the centre of attention. Irwin Cotler believes that every time a Nazi war criminal is convicted we repudiate the denial movement. However the inverse is also true, every time society opts not to prosecute, inferences are drawn that no crime has been committed (Cotler, 1988, 70). These trials must continue, as the prosecution of Nazis now is important to rebuff modern denial attempts and ensure victims' experiences are not erased. Therefore, these trials have utility as they prevent denial of genocide and potentially prevent future genocides.

Empowering victims

Finally, genocidaires should be subject to trial and punishment for the benefit of survivors and their families in terms of closure and empowerment. Bandes looks at how the theory of closure has been embraced as a goal for victims and survivors that the legal system ought strive towards (Bandes, 2009, 2). According to restorative justice philosophy, 'closure and emotional healing' is vital for restorative outcomes (Barton, 2000). The lack of resolution or convictions for victims of genocide can have a debilitating effect on their wellbeing or ability to process the trauma and move on (Maogoto, 2004, 211). Perpetrators never being caught or brought to justice can prevent catharsis. Punitive justice can help individuals move on, can assuage anger and help victims reach closure.

The restorative impact these trials has on survivors and their families can be demonstrated in the trial of Auschwitz guard Reinhold Hanning in 2016. This case saw the conviction of a 94-year-old, former death camp guard as accessory to the murder of 170,000 people (Connolly, 2016). A survivor of the Holocaust, Hedy Bohm, flew from Canada to testify at the trial and told reporters she was 'grateful and pleased by this justice finally after 70 years' (cited in Connolly, 2016). The trial allowed people whose families had been killed to reach some form of peace, knowing perpetrators were being punished. Equally as important, the trial also gave survivors the opportunity to speak out by testifying and talking to the media (Connolly, 2016). These trials are an official acknowledgement and recognition of wrongdoing, 'which for many victims is the beginning of their healing process' Goldstone, quoted in Gearty 2007, 3). It is a powerful acknowledgement that the state and the community are on the victims' side, by recognition of the events that transpired and the resultant harms.

Empowering victims works to undermine the voices of deniers and provides a sense of support within the community, rather than isolation. According to special prosecutor Schrimm, ‘one owes it to the survivors and the victims not to simply say “a certain time has passed, it should be swept under the carpet”’ (cited in Nagorski, 2016, 316). For victims who have had to deal with the repercussion of these atrocities for decades, the time delay does not mitigate the guilt or need for justice. If anything it exacerbates it, as they are confronted with their culprits’ freedom and lack of consequences.

Although trials are criticised as being ineffective mechanisms for catharsis, this is undermined by the central role victims play in pushing for these cases to be heard. According to Murphy, is that trials are a ‘poor vehicle for authentic expression of emotion’ (2012, 157). Murphy believes that victims place too much importance on trials to help them reach closure, as this can leave them feeling empty and aimless (2012). It is fair to say that for many people a trial is insufficient, as it cannot reverse the losses suffered. However, if trials can provide victims with any form of closure or assuage any suffering, they are justified regardless of whether they fall short of remedying the entire situation. As Goldstone writes, ‘the main customers of war crimes trials, like any trials, are the victims’ (Goldstone, quoted in Gearty 2007, 3). Given victims are often at the forefront of campaigns for punishments and trials, it seems evident that they do provide some benefit (Menzel, 2007).

A further criticism is the traumatic effects trials can have on survivors who are forced to relive terrible experiences; however, the opt-in nature of these court cases provides relief to this criticism. It is said that these trials can re-traumatise victims, especially through the distressing effect of testifying (Brehm, Uggem & Gasanabo, 2014). However, these systems have optional participation, which means victims are not forced to relive horrors unless they chose to participate. Many victims say they feel empowered when confronting perpetrators (Catani, 2012). In the trial of Groning, Kathleen Zahavi was able to directly address the man who was responsible for her parents’ death:

I hope the images of what went on there will stay with you for the rest of your days. You were allowed in your freedom to grow old. My parents weren’t allowed that. (cited in Withnall, 2015)

To have the opportunity to express your thoughts and to personally hold perpetrators to account can be invaluable to victims and is an opportunity only granted through trials.

The ECCC is a pertinent example of a court being used to empower victims. The ECCC was distinct from most other genocide courts as it focused on victims and included a victim participation scheme (Boyle, 2006). The ECCC enacted victim participation provisions, permitting survivors to file complaints, apply to

become witnesses or become a civil party.⁵ In one case, over 4,000 victims sought civil party status (ECC, Press Release, 24 June 2011). Allowing victims to participate as civil parties is unprecedented in criminal justice and provided a unique opportunity for victims to have their voice heard (Nguyen & Sperfeldt, 2014). Karstedt called this new scheme ‘a road from absence to presence, and from invisibility to the visibility of victims’ (2010, 17). The ECCC allowed victims to express and process traumatic experiences and facilitated some survivors achieving closure (Nguyen & Sperfeldt, 2014). Furthermore, they had the opportunity to present their personal experiences and memories in a public forum, thus being able to express and validate their trauma (Nguyen & Sperfeldt, 2014). Allowing different minorities to present the distinct nature of the harm they suffered under the Khmers was important as it meant their personal experiences were acknowledged rather than homogenised (Mohan, 2008). Given the trial was decades after the event, the trial was an opportunity to revisit past events and reflect and meant that victims were able to move on and feel that a sense of justice had been achieved (Cataoni, 2012). These trials are a unique occasion for victims to reach closure, allowing them to voice their experiences and see their perpetrators punished.

Conclusion

Genocidaire trials should continue to occur due to the important role they play in general deterrence of war crimes, punitive theories of retribution and the restorative benefit they have for survivors and their families. These elements are not impacted by the passage of time. Although punishing elderly genocidaires is controversial as they no longer pose a threat to society, these trials still provide significant benefits to victims and the community. Retribution is morally just as trials allow mass murderers to receive punishment.

The sentencing of genocidaires help to prevent future crimes, as the accountability of perpetrators deters actions and the public nature of these trials combats denialism. These trials help victims achieve a sense of justice through having their experiences acknowledged and seeing their perpetrators held to account. Moreover, the principals of deterrence, retribution and restoration are equally applicable in relation to other trials that involve time delays or elderly offenders. In the prosecution of war crimes, historical sexual assaults, murder cases that remain unsolved and other indicatable offences, it is important that cases are

⁵ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Ver 4) (adopted 11 September 2009).

still brought regardless of delays. Time should not prove a barrier to bringing legal action when victims and their families continue to suffer for the acts of violence perpetrated against them.

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