

To transform in the international criminal trial: merging restorative and retributive justice

by Mark Findlay

In their recent book, *Transforming International Criminal Justice: Retributive and restorative justice in the trial process*, Professors Findlay and Henham argue the need to merge these two paradigms within the international criminal trial if global victim communities are to be better served by justice. In order that rights are protected and legitimacy assured, this should occur within a framework and process common to the international tribunals. This article establishes the case for trial transformation looking at a model of justice that is more inclusive and cognisant of competing aspirations for justice resolutions internationally. *Collaboration* will enable otherwise alternative locations for international criminal justice to effectively integrate victim interests and rights protection. The paper speculates on the crucial features of the trial that will enable collaborative justice to predominate. Prosecutorial and judicial discretion in particular are explored as mechanisms for trial transformation within a new normative framework for international criminal justice.

INTRODUCTION

As argued in detail within *Transforming International Criminal Justice*, the interests of global victim communities should be behind any movement for a new and more inclusive international trial process. Improved access to justice governed by a strong “rights-protective” framework is the reason for collaborating restorative and retributive justice in the trial. For enabling victim interests, greater inclusivity alone is not enough, however. The international trial must better recognise and satisfy often competing community concerns, and in so doing balance the inevitable need for recourse only to alternative, often ungoverned justice environments.

Recently the principal prosecutor for the International Criminal Court has flagged the need for the ICC to better engage with alternative international justice paradigms. We believe that it is through the engagement of restorative and retributive justice determinations within the formal protections of the trial process that international victim communities will be given greater opportunity to have their legitimate interests recognised and dealt with by state sponsored justice initiatives.

The key to this new approach to international criminal trial process is collaboration between lay and professional interests internal to and beyond the trial. This may be achieved within a new normative framework where collaboration between currently incompatible and competing justice paradigms (restorative/retributive) will be advanced no matter how heretic this might presently be seen from the perspective of justice professionals, as well as those who reject the narrow scope and legitimacy of trial justice. The challenge is to create a new “morality” for international trials in which prosecutorial and judicial discretion can range more freely and effectively to establish truth as well as liability, and to produce reconciliation as well as penalty.

WHY THE TRIAL?

We have often been asked about our focus on the trial, where in civil law procedural traditions in particular, pre-trial process weighs heavily on justice outcomes and crucially formulates the relationships which decide trial deliberations (see the work of the International & Comparative Trial Project (ICTP), Centre for Legal

Research, Nottingham Law School). Part of the reason is analytical. We view justice as a consequence of structured decisions and the trial is essentially about relationships and pathways of decision-making where justice is “on show”. More than for its symbolic significance that crucially legitimates present claims for international criminal justice, the trial also exhibits fairness and rights protections over these “pathways of influence” at crucial decision sites, such as between judges and victims when it comes to sentencing (for a more detailed discussion of “pathways of influence” within the trial, see Findlay & Henham 2005, chapter 3). In this way both the deficiencies and the potentials of the trial for international criminal justice are revealed against important and under-recognised interests in justice claims and resolutions.

Why is it, for instance, that retributive fact-and-guilt-finding may seem to satisfy removed international “political communities” but only partially meets the needs of “communities” directly victimised by crimes against humanity? The responsibility rests with state and international institutions to rehabilitate the trial process in order to better recognise and satisfy the legitimate and otherwise viable interests of victim communities currently widely resorting to alternative justice structures.

TRIAL PROCESS AS A TRANSFORMATIVE MECHANISM

As we develop this trial analysis focus it becomes obvious for the trial to merit its place within international criminal justice symbolism ongoing, the international tribunals should stand and be measured against the rapid development of alternative resolution process. When so compared the trial is actually diminishing as a crucial component of international criminal justice even in the anticipation of the international criminal court. Yet what the ICC can offer to disenfranchised victim communities should be enhanced through greater avenues of access, and a more attractive menu of possible processes and resolutions to integrate a greater global population of victim communities.

In order to achieve this, it became apparent through our comparative analysis of trial traditions that the trial would have to transform, and the justice it marketed collaborate with more expansive and as yet formally unprotected alternative interests. As we envisage it, trial transformation process involves linking morality, law and behaviour along essential sites and relationships of decision-making within the trial. To achieve this it is necessary to look at the nature and parties to these relationships and to interrogate the pathways of influences which they develop and utilise.

A transformed trial will enjoy new decision outcomes and a repositioning of its focus from contests over fact to the establishment of truth.

THE CASE FOR TRIAL TRANSFORMATION

At the heart of our case for trial transformation is the acceptance of the need for, and utility of, new notions of justice. Trial professionals may find this hard initially to accept or to participate in, having up until now debated more about the synthesis of procedural traditions in order to produce institutions and practices where justice is the result of compromise (see Findlay M. (2001) “Synthesis in trial procedures? The experience of international criminal tribunals”, in *International and Comparative Law Quarterly* 50/1:26–53).

Accepting that fair trial at least in part relies on access to justice we propose that a more essential synthesis necessary for international trials should approach alternative mechanisms for decision-making and new resolutions of determination for the trial process itself. Not the sole, but an important reason to introduce restorative justice dimensions into the trial should be to cover a greater range of legitimate victim community interests. On this rests the foundation for international trial transformation.

It may seem somewhat glib to refer to the interests of victim communities as if easily identifiable and homogeneous. We accept that work will need to be done to encourage currently disenfranchised victim communities to enunciate their justice concerns and to agree to reposition them within the trial context. In addition, inherent within the activation of community interests is a constant struggle between competing concerns through legitimate processes of adjudication. In this respect the trial will no doubt need to move beyond its adversarial or inquisitorial framework in order to embrace mediation for the purposes of victim community compromise.

As mentioned earlier the transformed trial will rely upon and promote new notions of justice. At the heart of these is the recognition of the significance of community, and more particularly legitimate expectations of victim communities whether they be restorative and/or retributive. Restorative justice has long identified the essential importance of communitarianism, and the concept of collaborative justice. Integrating lay and professional interests in the trial must of necessity also rely on more communitarian decision-making and counters.

Through reconciling alternative justice paradigms within the trial process there is the wider potential for international criminal justice to achieve positive consequences for international governance and peace making. As far as this can be achieved, the new notions of justice essential for trial transformation will produce both more diverse and expansive justice resolution.

This new normative framework, or perhaps “revised morality” for the international trial and hence international criminal justice is in some respects not so

new. It is a matter of emphasis. Restorative and retributive justice already have their recognised place in international criminal justice, even if in separate institutional and process environments. That said, it is the failure of collaboration in these themes for the wider benefit of lay and professional interests which requires rethinking. Collaborative justice entails accessible and well-governed opportunities for lay and professional players to practice and benefit from new decision making possibilities within more flexible and inclusive justice processes. The trial should be central to these. If this can be achieved then the legitimacy of international criminal justice will be enhanced well beyond its current limited alternative incarnations, and from this the capacity of international justice as a mechanism for global governance will be expanded. To achieve these outcomes will require a long and detailed progress from a new trial morality.

THE CASE FOR JUSTICE SYNTHESIS

Not only trial professionals but alternative justice practitioners and community leaders may initially reject the need to challenge the autonomy of the parallel justice system. Restorative justice advocates in particular argue that it is the failings of formal justice that require a restorative alternative operating alongside the negative influences of guilt and punishment. The reality is that restorative justice has in many jurisdictional settings found its way into pre-trial and trial practice already. One reason for this is the stable and accountable structure of trial decision-making. There is ample evidence that certain victim communities are currently both inadequately addressed by either justice paradigm in their alternative contexts, and for restorative justice in particular may be existing without fundamental rights protections.

Essential for this synthesis is the potential in the trial to move from a *fact* to a *truth* model in its evidence-management tasks. Through this there will be the capacity to broaden processes for establishing responsibility away from more narrow questions of criminal liability. This will also enable multiple and phased trial outcomes directed essentially by prosecutorial and judicial discretion.

For restorative justice to better migrate into the international trial decision making process this will not require the trial to compromise its essence, or to engage in such a radical change that its integrity is lost. Diversion as a discretionary option in trial decision making means that the judge can, and already does in some systems, redirect certain decisions away from adversarial and towards restorative outcomes. Where the trial will be required to change, in our view, is in the tools it employs for decision-making, the discretion it directs to facilitating these, and the possible outcomes available as a result.

In summary, the trial can become a place for restorative justice at various crucial decision sites either through diversion, or by offering additional modes of

determination resolution (such as mediation and conciliation) within its own processes. The trial can add value to restorative justice through its rights framework, its merging of responsibility and liability (and the consequences which flow from this), and where necessary an enforceability potential. Additional benefits such as professional expertise, and the availability of retributive considerations where compatible, should not be underrated from the victim point of view.

RECONFIGURING COMMUNITY INTERESTS

The driver for merging restorative and retributive concerns within the trial is the legitimate interest of victim communities. In collaboration with these communities, trial professionals in particular may develop wider *communities of justice* which in turn will tend to legitimate the trial, its players and determinations. To better recognise victim community interests within the trial will necessitate a reconsideration of essential themes such as access to justice, due process, and the presumptions of innocence.

In addition, the rights which are in focus as part of a fair trial, will need to become collectively as well as individually envisaged. In this respect responsibility may also need to be collectivised and the emphasis on individualised justice in certain circumstances downplayed.

FOUNDATIONS FOR CHANGE

We are not as yet at a stage to identify all the aspects of trial process which will be affected through transformation. Broadly speaking, it will include:

1. tests for competing versions of the truth;
2. an expanded forum in which to negotiate power and influence;
3. different ways to reinforce acceptable community standards;
4. a better capacity to serve the needs of constituent communities;
5. the potential to vindicate ideology through symbolism;
6. different approaches to stigmatisation, shame and labelling; and
7. new and enhanced opportunities to provide for closure and compensation.

Having put the case for trial transformation there is a need to settle the foundations on which any change process will progress. From this list presented the common concerns are:

- victim interest
- community direction
- adversarial shift; and a

- repositioning of the existing status structures within the trial towards a more collaborative and discretionary mode.

THEMES IN TRIAL TRANSITION

The principal themes in trial transition as argued by us include:

1. the mobilisation of judicial discretion
2. the reconceptualising of evidence
3. the repositioning of the adversarial context
4. removing structural obstacles in trial decision making; and
5. engaging better with victim community.

How is this transformation to be achieved in practice? This is where our thoughts move into uncharted waters and we leave the empirical certainties of the recently published book. Chapter 8 sets out an agenda for change and some speculation about practical outcomes. However, these require considerable formulation and detailed development. What can be done at this stage is to highlight several crucial features of the trial and restorative justice which may prove to be both impediments to and stimulants for this transformation. Discretion we see as paramount amongst these.

MOBILISING PROFESSIONAL DISCRETION

Along with a remodelled over-arching normative framework, the transformation of the trial should be managed internally through the responsible and creative exercise of professional discretion, prosecutorial and judicial primarily. There will be a need for the invigoration and integration of lay interests to legitimate new trial justice and enhance the discretion to be exercised by the professionals. The intention for such an enhancement is to enable a sympathetic and sensitive incorporation of retributive and restorative paradigms within the trial. This will require new trial decision options directed primarily through judicial discretion. Along with the expansion of professional discretion will necessarily follow the revitalisation of accountability particularly from the point of view of communities of victims and their interests, consistent with the legitimisation of trial authority and capacity.

In current climates of concern, to regulate discretion in all aspects of criminal justice it is radical to advance an expansion of professional discretion. We do this mindful that the parameters of judicial discretion in particular in international criminal justice are far from yet settled. However, provided the expansion of professional discretion coincides with an increase in accountability, then fears about uncontrolled instinctive judicial synthesis can be met. The prosecutor and the judge we see as essential to the operation of the international trial in its merged

traditions. The judge will become a more crucial focus in transforming trials as the adjudicator over the two justice paradigms, and the interests in contests at any important decision site.

New roles for judges and prosecutors, and new pathways and options for discretionary power in decision-making will depend on the following themes:

1. the development of a normative framework fostering transformation, and empowering discretion;
2. a reconfiguration of trial decision sites;
3. the development of prosecutorial and judicial discretion in a collaborative justice and “rights” protective context;
4. better integration between judges and victims in the resolution process; and
5. the enhancement of discretion producing new justice resolutions and outcomes in the trial.

As previously referred to, the new trial morality (being more victim focussed) will qualify such developments and be confirmed by them. At an essential structural level, the main decision sites in the trial will experience reconfiguration as a consequence of more significant victim inclusion and the opening up of determination possibilities. For instance, sentencing may move into the realm of mediation and reconciliation against retribution in order to achieve a more comprehensive and resilient outcome for the victim communities that provides for truth telling, responsibility allocation and restitution. Prosecutors may need to rely more on tolerance in order to achieve truth at the cost of actionable evidence.

RECONCEPTUALISING EVIDENCE & REPOSITIONING THE ADVERSARIAL CONTEXT

Pausing on evidence for a moment, one issue that distinguishes the trial from Truth and Reconciliation Commission is the purpose of evidence. In the trial the concern is to establish facts against which liability is contested. For truth and reconciliation the pre-existing acceptance of responsibility may redirect the purpose of evidence towards truth rather than fact.

This is more than a semantic distinction, and from the view of trial professionals in particular, may profoundly subvert the current liability-allocating purposes of the trial. It may lead to a change in the rules for establishing facts and bringing them to trial. It certainly will change the utility of evidence and thereby the purpose of fact-finding. Truth may become the essence of the quest for evidence and from this the determination of the trial may move away from strict associations with tests of the liability.

The new approach to evidence both causes and is a consequence of reconsidering the contest of the trial. The expansion and development of what is on trial now

becomes essential to the transformation project. With restorative justice in the mix there may be points in the trial where contestants concede responsibility for the benefits of establishing truth and avoiding retributive penalties. This may mean that the trial then takes a new track and other dispositions open up while some close down. In the end, truth may be the constant and evidence of the truth employed for distinctly different tasks than traditional verdict delivery and sentence.

REMOVING STRUCTURAL OBSTACLES TO TRANSFORMATION

Readers may feel by now that we are asking too much of the trial and that those with vested interests in its present authority structures would be wise to resist the push to transform. This no doubt will happen and it is where the widest involvement particularly amongst trial professionals in the formulation of a new normative framework for governing international criminal trials is essential if they are ever to gain acceptance and subscription from that sector. The way to win over trial participants is through demonstrating that by adding significant justice dimensions to the trial this will enhance legitimacy and utility. Not every one is persuaded that increased and diversified access is a good thing but this too will have measurable impacts on the relevance of the trial for international criminal justice, and its influence over global governance.

Others may consider the institutional and process instruments which currently empower international trial agencies such as the ICC, may not allow the room for trial transformation. The significant recognition within the Rome Statute (for the foundation of the ICC) of victim interests and the acceptance of judicial discretion at many levels does not contradict the trajectory for change. Indeed it will allow for much of the transformation we envisage without the need for further legislation, provided the support mechanisms are in place.

In conclusion we return to the impetus of victim community interest. If there is one theme in trial transformation for international criminal justice enhancement as we see it, it is engagement. Collaboration will be required between states and communities (particularly in post-conflict settings); lay and professional partnerships in the trial; and a more comfortable progress from indigenous to global justice.

With the trial remaining as the centrepiece of international criminal justice (and we accept this) its transformation will bring new potentials to justice at a global level. This is an inevitable consequence of international trials with greater legitimacy, coverage and utility.

As with truth and reconciliation trends, transformed trial process will complement governance and post-conflict restoration. An example would be that as it retains its symbolic presence in victor's justice for post-conflict restoration, a trial with genuine restorative potential will assist in the incorporation of alienated victim communities within the emerging state, as an important sponsor of state justice. The challenge is for the trial, once advertising new and inclusive community expectations, to live up to them. 

- The arguments presented in this brief summary were the substance of a talk given to the Institute of Advanced Legal Studies in June 2005, and are extensively elaborated in the recent publication, Findlay M and Henham R (2005), *Transforming International Criminal Justice: Retributive and Restorative in the Trial Process*, Willan Publishing, Uffculme, Devon.

Mark Findlay

Professor of Criminal Justice, Law Faculty, University of Sydney; Associate Senior Research Fellow, Institute of Advanced Legal Studies, University of London.