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Internationalised Criminal Trial and Access to Justice

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Introduction[1]

The influence of a human rights paradigm over the recent development of local and regional criminal justice concerns throughout Europe is indisputable. Essential to this is the commitment that crucial lay parties within the justice process (such as the accused and the victims) should have adequate access to common procedural protections of criminal justice. This paper takes this trend and measures its influence on the development of international criminal justice, the trial in particular. At the very least we argue that parallel concerns about fair trial in the international procedural context will endorse the importance of a fair trial paradigm down to domestic trial levels. As part of this analysis, the essential connection between access to justice and fairness, in the context of international criminal trials,[2] is critiqued.

The recent internationalisation of criminal procedure[3] is a revealing context within which to view the relationship between access to justice and

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[1] In conceptualising access to justice in this paper I do not intend to be restricted to the consideration of the accused's participation in the trial. Access is more creatively viewed as opportunities for participation in the trial which usually tend to favour professional players. Justice in an adversarial context then needs to be ensured by opening up corresponding access opportunities to lay participants in general, and the accused and the victim in particular. If justice is seen to precede and post-date the trial then access concerns should prevail in these situations as well.

[2] When talking of international criminal trials the distinction should be remembered between domestic trials which are internationalised (perhaps through the appeal process, or through the contention of issues which cut across international law and relations), and those trials which commence before the international tribunals. This distinction is implicit throughout the paper if not always consciously drawn.

[3] See *L. Sunga*, The Emerging System of International Criminal Law: Developments in codification and implementation, 1997; also, *P. Reichel*, Comparative Criminal Justice Systems: A topical approach, 1999.

aspirations for fair trial.[4] In this respect the comparative procedural dimension of the paper suggests that fair trial means different things in different trial traditions. Where these traditions are at least accommodated in regional and international tribunals, then the process of moving local to global may be expected to require a harmonisation of fair trial and its influences. The paper highlights, with the consideration of access to justice in particular, how this may be problematic.

Many of the essential identifiers of access to justice are present in the instruments establishing international criminal tribunals,[5] and are claimed as their protections for fair trial. In this paper the potentially problematic nature of access to justice within regional and internationalised criminal trials is used to speculate on future developments in fair trial practice.[6] Fair trial in turn is anticipated as becoming more relevant in the evaluation of common law criminal justice, and the place of access issues within it.

An assumption underlying the arguments to follow is that international trial procedures have the potential to influence the development of fair trial practice within local jurisdictions. The recent impact of international law (and its institutional conventions) on areas of the criminal law and practice such as extradition and anti-terrorism might support this suggestion.[7] Any potential for such influence is particularly compelling in the British courts where, after the Human Rights Act 1998, the requirements for fair trial will provide a crucial, holistic measure of acceptable trial practice.[8] Therefore it will become increasingly significant for UK judges to draw on European jurisprudence when constructing a fair trial paradigm. The next question is, will international criminal jurisprudence on fair trial, particularly where access to justice is concerned, grow to provide another important level of authority?

[4] This paper is not concerned with the wider debate about procedural synthesis and difference within internationalised criminal justice. For this see *M. Findlay*, Synthesis in Trial Procedures? The experience of the international criminal tribunals, 50/I International and Comparative Law Quarterly 2001, pp. 26–53.

[5] See the Rome Statute of the International Criminal Court; Statute of the International Criminal Tribunal for the former Yugoslavia.

[6] In light of the essential connection between access to justice and fair trial (recognised in Article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms, and now jurisdictionally through the Human Rights Act (Eng) 1988), the place of access to justice within fair trial paradigms will become progressively more significant for common law courts.

[7] For a discussion of this, see *P. Arnell*, The Proper Law of the Crime in International Law Revisited, 9/I Nottingham Law Journal, 2000, pp. 39–52.

[8] For an expansion of these themes, see *M. Findlay*, The Cost of Globalised Crime: New levels of control, International Journal of Comparative Criminology, 2002 (forthcoming). Also, see *A. Ashworth*, Article 6 and the Fairness of Trials, Crim. L.R., 1999, pp. 261–272.

In civil law criminal procedure traditions such as France, European human rights jurisprudence (clearly comparable with that prevailing in over international criminal trial practice) is critically impacting on criminal justice process and its reform.[9] In Belgium and in Italy human rights concerns, and the challenge of practice in other procedural traditions, have brought about radical changes in domestic criminal justice practice.[10] More recently in Italy, there has arisen a backlash against rights-based procedural reform evidenced by legislative attempts to restrict the impact of regional and international conventions.

Even in common law jurisdictions, not governed by a domestic rights charter or regional rights conventions, the recognition by the courts of the influence of international human rights instruments and obligations[11] has generated the potential to see a greater adherence to "fair trial" paradigms (as in international criminal trial procedure). Whether developments in access to justice before the international criminal tribunals is an additional stimulus for change, is worthy of contemplation.[12]

We conclude with a brief comment on evaluating access to justice in trial practice. The critical understanding of the lay/professional relationship (particularly in terms of legal representation) is crucial the before reality of access and its confirmation of fair trial. The international tribunals present a telling context wherein professional legal representation alone may not be enough to demonstrate access to justice, or to ensure equality of arms and hence fair trial. It will require to test these outcomes through a consideration of the quality and compatibility of that representation.

[9] For instance, at the pre-trial phase in inquisitorial processes it might be the secrecy surrounding the crucial involvement in the dossier by the police, and the absence of accountable, procedural controls over the police investigator which ham-strings defence counsel at trial, and precludes fairness. Prosecutorial or judicial responsibility over the creation of the dossier, the courts have held, may not cure this. For a discussion of recent developments in this system, see *J. Bell*, "The French Pre-Trial System" in *C. Walker & K. Starmer* (eds.) Miscarriages of Justice: A review of justice in error, 1999, chap 17.

[10] *S. Freccero*, 'An Introduction to the New Criminal Procedure', 21 American Journal of Criminal Law, 1994, pp. 345–383.

[11] See, for instance, the High Court's comments in respect of indigenous land title, in Mabo v State of Queensland (1992) 66 ALJR 408.

[12] Some might say unfortunately, as a result of September 11 and the 'war on terror', the more rapid distancing of the United States from the potential of an International Criminal Court will make more problematic any comprehensive influence of international criminal justice over global fair trial discourse.

Internationalised criminal trial

After outset and clarity it is necessary to touch on the internationalisation of criminal trial practice. More than simply considerations of procedure and practice, the social and political context within which internationalisation is occurring should be recalled, particularly when considering the significance of access issues for internationalised trials.

Beyond the creation of international tribunals[13] to investigate and try crimes of world significance, there is emerging an international jurisprudence on criminal law, and procedural hybrids to support and develop international criminal law. The principles on which this trend is based, are informed by international human rights conventions[14] and multinational political priorities.

It is not only trials (and trial procedure) before the international tribunals which represents internationalisation in the present context. It could be argued that the internationalisation of domestic trials, through a variety of processes is as significant and may have preceded the rejuvenation of the international tribunals.[15] For the purposes of this paper, and the argument about authority and influence, we are more interested in the institutional development of international trial practice rather than the transition of domestic trials into international concerns.

The pace and form of recent developments in institutionalised international criminal trials seems to be largely the product of global political imperatives.[16] The nature of these imperatives[17] has necessitated the oper-

[13] Exemplified by the International Criminal Tribunal for the former Yugoslavia (in The Hague), and moves towards an international criminal court see, "A Permanent International Criminal Court" at www.undp.org/missions/netherlands/ICC.htm. Also *W. Schabas*, An Introduction to the International Criminal Court, 2001.

[14] See *I. Dennis*, Human Rights and Evidence in Adversarial Criminal Procedure: the advancement of international standards, in *J. Nijboer & Reijntjes* (eds.), Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence, 1997, pp. 523–532.

[15] For a discussion of the domestic source of certain international criminal trials beyond the international tribunal structure see *G.K. McDonald & O. Swaak Goldman* (eds.), Substantive and Procedural Aspects of International Criminal Law: the experience of international and national courts, 2000, and *D. Woodhouse* (ed.), The Pinochet Case: a legal and constitutional analysis, 2000.

[16] Such as the need to try war criminals identified as a consequence of more regular global military interventions such as Bosnia and Serbia. See *D. Cotić*, A Critical Study of the International Tribunal for the former Yugoslavia, 5/2-3 Criminal Law Forum, 1994, pp. 223–236. Also note the recent US opposition to the establishment of an International Criminal Court is founded on the American view of an inextricable connection between any such court and the mandate and interests of the UN Security Council.

[17] Driven as they are by the foreign policy concerns of the United States and Western Europe, even more than those of world agencies such as the United Nations. See *R. Goldstone*,

ation of trials and resultant penal sanctions within two broad and divergent criminal justice traditions, and their derivations.[18] The speed with which these developments have occurred, has meant that the evolution of international criminal institutions and procedures appears expedient rather than experimental, rationalised rather than rational.[19]

When analysing these trends, the context of the criminal trial reveals the contemporary parallels between internationalised justice and international political mission. Because of its essential connection with the negotiation and imposition of penal sanctions, the trial of war crimes in particular demonstrates a primary political imperative for the internationalisation process.[20] For instance, the global political push to an international criminal law, and its institutions,[21] recently has relied on the connection between the image of a "just" international military intervention,[22] and the necessity to punish "crimes" which either justified that intervention or were perpetrated by those opposed to it. At the conclusion of the military context, the resolution of

Justice as a Tool for Peace-making: truth commissions and international criminal tribunals, 28/3 New York University Journal of International Law and Politics, 1996, pp. 485–503.

[18] For a discussion of the place of civil and common law procedures within recent war crimes trials, see *T. McCormack & J. Simpson*, The Law of War Crimes: National and international approaches, 1997.

[19] It is also important to recognise that the structure of these international institutions and the derivation of the procedures under which they will operate have been the subject of intense political lobbying. See *M. Schaif*, The Politics Behind the U.S. Opposition to the International Criminal Court, New England International and Comparative Law Annual, <www.nesl.edu/annual/volS/sclrarf.htin> 1998. Also the resistance to this trend takes on an expedient and politicised format particularly after September 11.

[20] See *T. Meron*, War Crimes Law Comes of Age, 1999.

[21] Opposition to such developments rests on the preference by countries like the US and China to use their UN Security Council veto to negotiate and control prosecutions, rather than as a general resistance to the concept. While the Americans endorse the court concept they seem unwilling to relinquish their dominance of international institutions through an independent prosecution process, and have put the view that the proposal for an international criminal court will fail without their support. In the US view the connection between political priorities and the rule of law is clear at an international level. Now as the masters of the international coalition against terror the US have taken over the institutional role of police and courts in a military context following the fall of the Taliban. See *D. Schaffer*, Address Before the Southern Californian Working Group on the International Criminal Court, http://www.pbs.org/wgbh/pages/frontline/shows/karadzig/genocide/iccus.html 1998.

[22] This concept of a "just" war not only regularly appeared in the rhetoric of NATO over Kosovo, but has since been implicit in delineating the "crimes" of the Serbians from the necessities of NATO forces – see also, *G. Ulmen*, Just Wars or Just Enemies, in 109 Telos, 1996, pp. 99–112.

these "crimes" is transferred into the courtroom and the trial.[23] Further, the trial seems to be a less contentious domain where the two principal Western procedural styles of justice confront one another.[24] The same could not be said, for instance, of the pre-trial phase.[25]

A sometimes overstated characteristic of internationalised criminal trials is the prevalence of procedural features from both civil and common-law procedural styles. A harmony of convenience is emerging through international trial practice, rather than as yet any recognised institutional procedural synthesis.[26] A brief recognition of the contest between these traditions, and their foundation principles, may help to explain the concept of fair trial currently prevailing internationally.[27]

Underlying procedural traditions and the foundations of fair trial

As stated earlier, for the purposes of this paper it is not essential to the discussion of access and internationalised criminal procedure that the relationship between pre-existing procedural traditions be exhaustively discussed. In fact useful comparative examinations of this relationship are scarce.[28] It is more important that the positioning of these traditions is understood, in terms of the foundations they provide for fair trial discourse and the manner in which these are pragmatically dealt with by international Trial Chambers.

The internationalisation of criminal justice has necessitated debates about synthesising two traditions of criminal procedure (civil law and common law in origin).[29] This, however, has not been a straightforward or bifurcated consideration of different criminal justice traditions, particularly where American

[23] See *D. Robinson*, Trials, Tribulations and Triumphs: Major developments in 1997 at the International Criminal Tribunal for the former Yugoslavia, XXXV Canadian Yearbook of International Criminal Law, 1997, pp. 179–213.

[24] See *V. Tochilovsky*, Trial in International Criminal Jurisdictions: Battle or scrutiny, 6/1 European Journal of Crime, Criminal Law and Criminal Justice, 1998, pp. 55–59.

[25] This is not to downplay the significant differences between civil law and common law evidentiary rules and trial practice, the comparative analysis of which will form the basis of much of the research to follow. See, for instance. *D. Nsereko*, Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia, 5/2-3 Criminal Law Forum, 1994, pp. 507–555.

[26] See *Findlay*, supra note 4.

[27] See *M. Findlay*, Fair Trial and the Rights Dimension of International Trial Procedure (unpublished paper).

[28] One such is *J. Hatchard, B. Huber & R. Vogler*, Comparative Criminal Procedure, 1996.

[29] See *F. King & A. La Rosa*, International Criminal Tribunal for the former Yugoslavia: current Survey – the jurisprudence of the Yugoslavia Tribunal: 1994–1996, 8/1 European Journal of International Law, 1997, pp. 123–179.

commentators have been involved. Significant derivations within each main procedural style[30] (and the political systems they support) make the comparative evaluation and exploration of actual and potential synthesis intricate.[31] Such analysis involves more than merely the unpacking of broad legal styles, rather requiring comparative research within the realms of politics and policy, at domestic and global levels.[32] In addition, the derivation of the international tribunals may reveal as much about their procedural entity as any historical analysis of legal traditions.[33]

Fortunately, the consideration of civil law criminal procedure within the common law criminal trial has now moved beyond policy concerns for improved "service delivery" at any jurisdictional level alone.[34] The developing importance of extradition, mutual assistance, and the internationalisation of criminal procedure in war crimes tribunals, means a recognition that modern criminal justice must operate above jurisdictional peculiarities.[35] Proposals for an International Criminal Court (ICC) enunciate the expectation that contracting states will assist in the investigation and prosecution of crimes against humanity, well beyond the narrow requirements of constitutional legality or international law.[36]

The trend towards a more common and transferable criminal procedure is clearly needs driven in a globalised climate where crime and its control are matters for international agencies.[37] Parallel with this has been genuine endeavours in the main procedural traditions to unify and simplify their crim-

[30] Such as between English and American common law, Italian and French civil law.

[31] For a sophisticated examination of the relationship between these broad procedural styles, see *K. Zweigert & H. Kötz*, Introduction to Comparative Law, 1998.

[32] For an analysis of the inextricable association between methods of legal regulation, and domestic and global political interests, see *M. Findlay*, The Globalisation of Crime, 1999, chap. 1.

[33] For instance, it might be argued that the Yugoslav and Rwanda tribunals are more the creatures of American military justice models, than of common law or civil law courts – see *J. Cockayne*, Procedural and Processual Synthesis in International Tribunals (unpublished paper), 2001.

[34] This has been an efficiency measure which in part motivated the recent civil procedure reforms in the UK and Australian jurisdictions. It well demonstrates the problems inherent in using concepts essentially relevant to the participant whose expectations may construct a notion of "service" and its efficient delivery.

[35] The identification of globalised crime and control agendas for issues such as the drug trade, and internet fraud emphasises the need for the construction of laws and procedures as free as possible from jurisdictional restriction or the impediments of convention. When faced by crime without sites, the legal/procedural response should move beyond jurisdictional identity. The difficulties in achieving this in a credible fashion are considerable.

[36] Rome Statute of the International Criminal Court; Part 9: International Cooperation and Judicial Assistance.

[37] For a discussion of crime and globalisation, see *Findlay* supra note 32.

inal processes. This is manifest, with varying degrees of success, through efforts at uniform criminal codes within many common law jurisdictions, and the transfer of common code traditions across civil law jurisdictions, particularly in transitional eastern European states. The logical extension of such developments is the transferability of justice models via the harmonisation and rationalisation of criminal procedure within a rights paradigm, to satisfy emerging international obligations and interests.[38] An immediate recognition of (and perhaps stimulus for) greater procedural harmonisation in the British context will arise as the courts explore continental and European jurisprudence on fair trial, as a natural consequence of the Human Rights Act governing the development of trial practice on a case-by-case basis. The courts may need to look further and seek the assistance of "fair trial" jurisprudence even as it is developing within international procedural contexts. For example, the status of the victim in the trial is generating an impetus for this.

Access to justice is a universal indicator of trial fairness and rights recognition within the context of the European Convention. *Lord Woolf* (the current English Chief Justice) in his influential report on access to justice in the English civil jurisdictions[39] identified the failings of that system as including delay, expense, lack of proportionality, and differential accessibility. The same could be alleged against many common law criminal justice jurisdictions. The Woolf Report advocated, amongst other things, a comparative inquiry into civil styles of justice in order to address the deficiencies in the delivery of justice in common law traditions. Typical, however, of the debate in a policy climate, the course of such synthesis was not detailed.

Even so, the recommendations of *Woolf* (touched upon in more detail later) may provide a very general template for addressing the reality of access to justice provisions in the international criminal trial institutions. For instance, in relation to the International Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) it is important to interrogate the processes of appointing legal counsel, the resourcing of the accused's defence, and in general the equality of arms between the parties. There is little potency in assertions of access to justice which, as Woolf identifies, are not backed up by such essential practice guarantees.

In civil law traditions, the concern over access as an indicator of trial fairness is also apparent. For instance, the Codice di procedura (CCP) in Italy which was in 1989 a fundamental revision of the preceding codes, emphas-

[38] For a comprehensive analysis of the influence of rights paradigms over emerging international criminal procedure and its accommodations, see *D. Amann*, Harmonic Convergence? Constitutional criminal procedure in an international context, 75/3 Indiana Law Journal 2000, pp. 810–873.

[39] *H. Woolf*, Access to Justice: the final report to the Lord Chancellor on the civil justice system in England and Wales, 1996.

ised the predominance of oral evidence in the trial. The intention was as much as anything to ensure the position of the accused and his rights to test the case against him to the fullest. The CCP also repositioned the status of professional players in the trial while continuing to recognise the importance of access to justice for civil claimants, such as victims. Access as an issue of balance between rights and responsibilities in the trial was the tone here.

In the operations of the international tribunals there has been qualified success in transplanting key aspects of civil law criminal procedure into trial practice. Reasons of jurisdictional loyalty and familiarity are continually exposed through the preferred practice of judges and prosecutors in the international criminal tribunals. Others have suggested that the manner in which judicial authority is used in the tribunals tends to favour one procedural tradition over the other.[40]

It would appear that in terms of ideology and principle rather than procedural detail, the synthesis of traditions at the international level has gathered momentum. A concern is that common claims concerning access to justice as a feature of this harmony may also remain aspirational or symbolic.

Fair trial ideologies – compromise and accommodation in international tribunals?

One might assume that if the main western criminal procedural styles to some extent co-exist to allow for international criminal trials and thereby facilitate the process of internationalising criminal justice, the ideology underpinning these styles eventually will become more essentially harmonious. Instead, in practice, ideological dissonance between trial styles (at international procedural levels) is either understated or simply not fully thought through. It is masked by regular restatements of universal principle (such as the similar and uniform ascription to a presumption of innocence in each style), and commonality of key terms and language.

The degree of divergence is apparent in the debates regarding the appropriateness of trials in absentia, in the international criminal tribunals.[41] Yet even these have been veiled in compromise. This may be a factor of the political atmosphere in which the existence of international criminal justice institutions have been negotiated, from jurisdictions wherein these western styles predominate.

[40] *M. Bohlander & M. Findlay*, "The Use of Domestic Sources as a Basis for International Criminal Law Principles - An exchange of civilities in the search for a common denominator" (forthcoming).

[41] *V. Morris & M. Scharf*, An Insiders Guide to the International Criminal Tribunal for the former Yugoslavia, 1995, pp. 222 and following.

Significant divergence between ideologies also suggests, as for both originating procedural styles behind the present wave of internationalisation that essential elements of their concepts of justice are unclear, incompatible or are realised differentially.[42] The notion of fair trial is a case in point. In certain jurisdictions it is guaranteed through justiciable rights while in others it is little more than a tone to be set through wide ranging judicial discretion. Even what constitutes 'fairness' is not consistent across jurisdictions and traditions, beyond what might be imposed from regional and international conventions.

Along with difficulties regarding consistency in principles underpinning fair trial, there appear to be problems with the manner in which these are translated and developed. Fair trial determinants are reliant on institutional authority to ensure their application. Such authority is very often judicial, interpretative and recognised through precedent.

Precedent is the principle on which common law judicial reasoning is said to rest. This doctrine is both the foundation for common law legal authority, as well as the process through which judicial reasoning is said to be constructed, and transferred. It is in common law, dependant on the notion of stare decisis where the decisions of a superior court are directly binding on the lower courts within a common jurisdiction. Precedent-based case law is not essentially a feature of the civil law judicial authority. However, even where codes declare the law and judges more strictly interpret their application, the process of interpretation recognises past decisions to some degree.

It is proposed for the International Criminal Court (ICC), "the court may apply principles and rules of law as interpreted in its previous decisions".[43] This would suggest at least an invitation to precedent-based case law authority, rather than statutes alone as providing legal authority. Complicating this, the Trial and Appeal Chambers of the ICC need to recognise those rules of process within their own legislative basis, applicable treaties and principles of international law, and "general principles of law derived ... from national laws of legal systems of the world ... provided that these are not inconsistent with (the court's statutes and international law)".[44] Add to this the requirement to interpret law consistent with internationally recognised and codified human rights, and any hierarchy of precedent for the ICC will not operate in any simple path of authority. If notions of fair trial differ at any or each of these levels of potential authority then it will take more than pathways of precedent to ensure resolution.

[42] For example, the Italian 'presumption of innocence is literally a presumption that the accused is not guilty as opposed to an affirmative statement of innocence. This is attributable to the Italian view of the incompatibility of a presumption of innocence with pre-trial restraints on personal liberty and prevails throughout the appeal process. See CPP Arts 60, 648.

[43] Rome Statute of the International Criminal Court (ICC Stat.) Art. 21 (2).

[44] ICC Stat. Art. 21 (1).

Were the doctrine of precedent to govern international judicial decision-making in the criminal jurisdiction it would be essentially influenced by the contesting notions of the law coming before the Trial Chambers, from their origins in different traditions, with different ideological justifications and concepts of justice prevailing.

Consistency then would not be imposed (in any common law sense) through a single hierarchical application of precedent within a common context of judicial reasoning. Precedent would, as seems to be the case in tribunal practice, become the process of procedural compromise. Precedent as it is more narrowly used in common law would not, for the ICC, be easily reconciled with the other provisions on "Applicable Law" (the title of Article 21).

Criminal trials in both procedural traditions declare the special position of the accused, and his pre-eminence in determining access to justice as a feature of fair trial. The presumption of innocence is said to provide the context within which the accused should have claim to access, and is why fairness should apply to the manner in which he is tried.[45] The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Stat.) declares that the accused shall be innocent until proven guilty.[46] As well, the accused is accorded the right to remain silent[47] and he/she is not compelled to testify against himself or confess his guilt.[48] While these protections appear to comply with international instruments such as the International Covenant on Civil and Political Rights,[49] they are contradicted in the practice of both procedural styles, and may be qualified or waived even in the workings of the international tribunal. For instance, in England the right to silence has recently been curtailed.[50] In most civil law traditions, while the presumption of innocence may be accepted, it is expected that the accused will be an

[45] In conventional civil law traditions, where the presumption of innocence may not prevail, fairness for the accused may be limited to his right to refute the charges, and access through active legal representation may not carry the same connection with justice as it might in a common law tradition.

[46] ICTY Stat. Art. 21 (3).

[47] ICTY Rules of Evidence and Procedure (RPE) Rule 42 (A) (iii). No reference in the Statute or the Rules is made to any inferences which the judge or prosecutor may draw if silence is claimed. See also the ICC Stat. Art. 67 (1)(g).

[48] ICTY Stat. Art. 21 (3)(g).

[49] Article 14(3)(g) sets out the right "not to be compelled to testify against himself or confess guilt". This has no express equivalent in the European convention and as an implied right enjoys less firm protection.

[50] The right to the unsworn "dock statement" has been removed (which is contrary to the proposed protection in the ICC – ICC Stat. Art. 67 (1)(h)). Judges are also given some restricted opportunity to make adverse comment on an accused's refusal to answer questions in certain circumstances. See for instance, the Criminal Justice and Public Order Act 1994 ss.

initial witness in his/her defence and that their testimony will answer the inquisition. With charges relating to crimes where the special knowledge of the accused is recognised, in either tradition the presumption against self-incrimination may be waived.[51] Even for the International Criminal Tribunal for the former Yugoslavia (ICTY), its Rules provide opportunity to require answers which may be self incriminatory, with the provision that on objection the witness will be protected from criminal prosecution supported by this evidence (except for perjury).[52] If there is harmony here it is in the ascription to a universal belief assuming quite different procedural manifestations, which then is qualified in pre-trial and trial practice.

Under article 66 (2) of the Statute of the International Criminal Court the onus is placed on the prosecutor to prove the guilt of the accused "beyond reasonable doubt".[53] While this is procedurally consistent with the presumption of innocence it would require a significant shift in the inquisitorial role of procurators in civil law traditions.[54] As a universal rule it also stands in contrast with developments in common law jurisdictions to impose the onus of denying guilt on an accused for specific offences, through devices such as presumptions regarding knowledge and possession, or through strict liability offence constructions.[55]

Independence for trial professionals is a common aspiration within both original procedural styles. The independent judge is the front line of defence for fair trial and is the arbiter when issues of access are in question. The construction of international tribunals is also said to rest on the independent judiciary.[56] The International Criminal Tribunal for the former Yugoslavia (ICTY) is constituted by a bench selected through a complex election process designed to ensure the widest representation from UN states.[57] Its statute specifically requires "adequate representation of the principal legal systems of the world".[58] Yet with the judiciary of the tribunal elected through a politically initiated ballot such as this, the independent presence and operational

34, 36, 37. For a wider discussion of these issues see, Murray v DPP (1992) 97 Cr. App. Rep. 151; *R v Martinez-Tobon* (1994) 2 All E.R. 90.

[51] For a discussion of this in the context of Article 6 of the European Convention, see *Saunders v UK* (1977) 23 E.H.R.R. 313.

[52] ICTY (RPE) Rule 90 (E) (as amended).

[53] This formula now is no longer strictly required in English jury directions.

[54] This is taken even further from the civil law tradition when the ICC statute protects against the imposition on the accused of "any reversal of the burden of proof, or any onus of rebuttal" – ICC Stat. Art. 67 (1)(i).

[55] See, for instance, the Magistrates Courts Act 1980, (Eng) s.101; Misuse of Drugs Act 1971, (Eng) s.27 (2); Public Order Act 1986, (Eng) s.6 (5).

[56] ICTY Stat. Art. 12.

[57] ICTY Stat. Art. 13.

[58] Ibid.

status of the international judiciary might be impugned. For instance, both with the ICTY and the proposed International Criminal Court (ICC) issues of delegated authority and the role of the UN Security Council in facilitating prosecutions and enforcing judgments make the separation from international political instrumentality somewhat illusory.[59] Even if this goes no further than whether justice is seen to be done,[60] the injection of state interests into the selection process for the international judicial chambers does not sit well with an ideology of independence.

Another important ideological premise grounding fairness for the criminal trial is that of individual criminal responsibility. While the accused is said to have acted voluntarily and has a proven capacity for committing the offence may be individually liable, he must have access to the case against him and the opportunity to individually address it in a fair trial setting. The Statute of the ICTY[61] and the and the Statute of the ICC[62] each express the principle of individual liability. Once said, both statutes proceed to allow for vicarious liability, complicity, and to deny the excuse of superior orders or office. A practical reason for the recognition of individual over collective or generic liability here is to avoid prosecutions directed against the state or any official capacity.[63] But notions of generic liability tend to further remove the accused from the assurance of access to justice as an individual.

The Yugoslav tribunal in its decisions has demonstrated a difficulty in coming to terms with the core adversarial features of its procedures – in particular the right of the parties to determine who is called to testify. This has lead to changes in the rules of procedure as they operate in the tribunal to permit the court a greater level of control over the process. This may be seen as a direct consequence of the influence of civil law judges, inexperienced in, and clearly unhappy with, the adversarial model.[64]

Continuing at a procedural level one of the major ideological challenges for the international tribunals appears to be the production a common concep-

[59] The role of the Security Council and the General Assembly in filling casual judicial vacancies, appointing other trial professionals, disciplining professional misconduct, and ensuring the primacy of the tribunal or court against those of national jurisdictions makes the bond a more operational one. Similar criticisms could be raised in relation to the independence of the prosecutor.

[60] For research examining whether the decisions of the International Court of Justice are influenced by the selection process used for that court, see *F. Brown Weiss*, "Judicial Independence and Impartiality", in L. Damrosch (ed.) The International Court of Justice at a Crossroads, 1987.

[61] Art. 7 (1).

[62] Art. 25 (2).

[63] For instance, ICTY Stat. Art. 7. Another indicator of this is the limitation on the jurisdiction of these tribunals only over "natural persons".

[64] For this theme I am indebted to an anonymous reviewer.

tualisation of fair trial and to see its uniform acceptance in the form of rights protections now commonplace at a regional level throughout Europe. This may not always translate down to individual jurisdictions. Within common law procedural styles, for example, where recognition of the rights of the accused has either proceeded from broad statements of often-contradictory principle,[65] or is constructed against challenges to justice on a case by case basis, a coherent representation of the essential elements in fair trial is illusive.

In reality, a constant policy concern across procedural traditions is access to justice. This is the case where these traditions intersect in the international tribunals, as it is where individual jurisdictions endeavour to translate and inscribe the injunctions of regional and international conventions. Article 6 of the European Convention declares a range of specific access rights as being essential to a holistic notion of trial fairness. As is discussed later, the international tribunals follow a similar course[66] but their jurisdiction and purpose suggest particular problems for the achievement of access as an indicator of fair trial.

Essential connections between procedure and access to justice

Lord Woolf observed the following features as ensuring access in the context of civil justice:

- The process should be just in the results it delivers;
- It should be fair and seen to be so by:
  - Ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - Providing every litigant with an adequate opportunity to state his own case and answer his opponents;
  - Treating like cases alike.
- Procedures and costs should be proportional to the nature of the issues involved;
- It should deal with cases with reasonable speed;
- It should be understandable to those who use it;
- It should be responsive to the needs of those who use it;
- It should provide as much certainty as the nature of the particular cases allows;

[65] See *A. Norrie*, Crime, History and Reason, 2001.

[66] For instance, under its Statute (Article 67) the International Criminal Court will recognise the same rights as those set out in Article 6 of the Convention along with a specific reference to the right to silence and the protection against self incrimination.

- It should be effective: adequately resourced and organised so as to give effect to the previous principles.[67]

Perhaps as a consequence of the civil justice context, the flavor of these principles is processual, and recognises important relationships and interests contesting for justice. Even so, the broad themes provide a useful framework for evaluating access to criminal justice in a variety of procedural contexts. Access to justice is a universal aspiration for fair trial and as such should not be dependent on the nature and procedural tradition of any particular process or jurisdiction. Unfortunately, procedural peculiarities, and institutional priorities, compounded by the liberal application of prosecutorial and judicial discretion tend to maintain the jurisdictional relativity of fair trial and access features in practice.

Connecting access to criminal justice with fair trial requirements[68] has until recently in most jurisdictions resulted in statements of principles almost entirely centred on the accused person. Perhaps this might more recently be explained by the predominance of adversarial trial models where the contest is between the state and the accused on behalf of the victim and the community. This has developed an attitude to access amongst the judiciary and legislators of both original procedural traditions that is largely defence-focused, rather than formally recognising competing claims to justice from victims and the community.[69] Further, it has produced a debate both about procedural reform and access which tends to diminish the essential connection between the two by arguing for or against the rights protections, seeking a better balance between adversarial parties, and as a result concentrating against the abuse of power.

Access to justice requires smooth procedures to ensure fair trial outcomes. Strong structures of rights and protections for lay participants in criminal trials are not sufficient on their own.

Particularly with serious criminal offences, access to fair trial is a key indicator of fairness in any system of criminal justice. It is in the upper tier of trial justice that the courts are more particular about the manner in which procedure ensures access. However, the trial at all its levels is notoriously constructed to exclude the active involvement of all but legal professionals.[70] This is more so now in common law courts as the rights of the accused are

[67] *Woolf, op cit*, chap. 1.

[68] Such as is done in Article 6 of the European Convention, and ICC Stat. Art. 67.

[69] This is not so much the case in civil law jurisdictions where the victim, for instance, may have a right to question witnesses and present evidence.

[70] See *R. Cotterrell*, The Sociology of Law, an introduction, 1992.

continually qualified,[71] and lay participation is limited or as with the case of recent jury reforms, gradually falls away.

Despite the growth in international human rights jurisprudence, in both civil law and common law trial procedures, less regard seems to be paid to the equation of trial fairness with access issues. This is despite the growing influence of rights discourse over trial practice and outcomes.[72] The same cannot be said for civil justice.[73] If the trial were declining as an important centre for the achievement of justice then this may not be a cause for concern. In some local jurisdictions with increased pressure on the accused to plead, this is so. However, as the central symbol of international criminal justice, the trial remains the context against which most other access issues are directed, irrespective of the ratio of trials to pleas in a more general trial context.

Managerialist criminal justice policy agendas are reducing access to the trial (or preferred forms of trial) through:

1. the overvaluation of plea (and sentence discounting)
2. the recognition and institutionalising of the bargain at charge and plea stage, and
3. the variation of modes of trial.[74]

This means that for whatever reasons access to the trial (and the justice protections which judicial oversight affords) are less viable and available. This trend is well researched both in terms of the miscarriages of justice which it may foster, and the efficiencies in case management it allows. There is little work, however, on the impact this has over actual opportunities for access and lay participation in the trial.

Against the trend in many individual civil law and common law jurisdictions the trial is an essential motivator for the internationalisation of criminal procedure. However, as is discussed later, issues of access and lay participation remain problematic in these developments. This is not due to any necessary dislocation between trial procedures and access to justice. Rather, it indicates an inability to translate expectations for access and fair trial into consistent procedural frameworks within the context of international criminal justice.

[71] Current legislative and administrative intervention into trial practice in several common law jurisdictions promotes the "level playing field" notion of rights and obligations, and advances victims rights against protections for the accused.

[72] As discussed in *A. Ashworth*, Article 6 and the Fairness of Trials, Crim. L.R., 1999, pp. 261-272.

[73] See *Woolf op cit.*

[74] In England, for instance, see Criminal Justice (Mode of Trial) Bill 1999.

Access to justice and international trials

It merits speculation that if international criminal justice has some resonance for regional and local criminal procedure then the influence on criminal justice policy generated by the essential position of the trial within new international procedural conditions should have an impact on the conceptualisation of access to justice. The supportive contexts of Article 6 of the European Convention, and for Britain the Human Rights Act would place any such influence within the context of fair trial discourse. The international trial process is the arena in which access at that level is discussed, and international criminal justice tends to equate access with avenues for trial participation, first for the accused and then for victims. It will be difficult for regional and local jurisdictional concerns about access to move well beyond the trial, as international criminal justice focuses more and more on this context.

At the international level of criminal justice, the trial is rejuvenated. For often clearly political reasons the theatre of the public trial is a significant driving force behind the development of international criminal justice policy.[75] Even so, it would appear from the foundation instruments of the tribunals, the relationship between the paramount position of the trial in international criminal procedure, and requirements for fair trial, have not been entirely worked through. At least not insofar as they allow for and protect access to justice. The consideration of access to justice as exemplified through trial participation has not much ventured outside the "rights foundations" of international criminal procedure. This in turn is primarily conceived as applying to the accused. For instance, little is said at the international level, about the access by trial context, beyond peripheral concerns such as protection for victim witnesses[76] and victim compensation.[77] This appears as contrary to current concerns for victim impact, and victim compensation in various common law and civil law jurisdictions where the victim is given direct access to the sentencing process.

In the area of judicial oversight as a guarantee of access to justice, international tribunal practice is also rather general and formative. In the case of the ICTY, for example, the tribunal is responsible for the protection of

[75] N.B. ICC Stat. Art. 64; ICTY Stat. Art. 20 (for a discussion of in camera conditions see, Rules of Procedure and Evidence of the ICC, Rules 74, 87).

[76] It is envisaged that in the ICC there will be a Victims and Witnesses unit charged with their protection. See, Article 68 (2), (3) & (4); Article 43 (6). Despite being established in the court registrar the unit will operate in consultation with the prosecutor to ensure security and protection rather than access. Also, see *J Cockayne*, Procedural and Processual Synthesis in International Tribunals: Part III; Victims and witnesses, (unpublished paper), 2001.

[77] See ICC Stat. Arts. 75 & 79 and the establishment of a trust fund for the benefit of victims.

witnesses and victims.[78] Judgments when delivered must be accompanied by written reasons.[79] Where errors of law or fact occasioning a miscarriage of justice are alleged appeal is available, and a review of judgment can follow the discovery of new relevant facts.[80]

The existence of a Pre-trial Chamber[81] is supposed to protect the accused and his expectations for justice during the investigation stage. The chamber may "take such measures as may be necessary to ensure the efficacy and integrity of the proceedings and, in particular, to protect the rights of the defence".[82]

Disclosure of evidence to the accused prior to trial is crucial for the formulation of claims for access. The obligations for disclosure of evidence may have a bearing on access to justice and are an interesting procedural feature of the international tribunals. In the ICTY the prosecutor shall make available to the accused as soon as practicable after his initial appearance "copies of the supportive material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the prosecutor from the accused or from prosecution witnesses".[83] This would seem to encompass statements, which were not to be used by the prosecution in their case (provided these had been recorded as statements), and if so it would go well beyond general common law conventions for the disclosure of the prosecution "brief". Regarding the ICTY, the requirement for the prosecution to disclose extends to the inspection of all documentation and material evidence on which the prosecution will rely or which is material to the preparation of the defence. The prosecutor may resist disclosure if in his/her opinion it would be against the public interest to do so, or it would prejudice an ongoing investigation or the security interests of any State. This is determined on application to the Trial Chamber.[84]

It is in the area of reciprocal disclosure where procedures might be viewed as having gone beyond the conventional expectations in common law jurisdictions.[85] The prosecutor is required to notify the defence of the witnesses that

[78] ICTY Stat. Art. 22.

[79] ICTY Stat. Art. 23.

[80] ICTY Stat. Arts. 25 & 26.

[81] For instance, in the ICC Stat. Arts 56–69.

[82] ICC Stat. Art. 56 (1)b).

[83] ICTY (RPE) Rule 66 (A).

[84] ICTY (RPE) Rule 66 (C).

[85] While it is not a convention in common law to require the defence to disclose there have been recent statutory developments creating these limited obligations. See Criminal Procedure and Investigation Act (Eng) 1996. Also note the requirement in jurisdictions such as Scotland for the notification of special defences. Even so these are the exception rather than the rule and in no way equate with the prosecutions' responsibilities in this regard.

will be called to establish their case and to rebut any defences. The defence on the other hand shall notify the prosecution of an alibi and "any special defence (such as diminished responsibility) and the notification shall specify the names and addresses of witnesses upon which the accused intends to rely to establish the special defence".[86] Except in particular circumstances this level and detail of disclosure challenges the common law protections of the accused referred to earlier, ideologically at least at the heart of the presumption of innocence.[87] Even more unusual in this context is the rule that if the defence applies for access to the material evidence on which the prosecution intends to rely then the prosecutor "shall be entitled to" any and all similar evidence in the defence case.[88] Also there is an ongoing duty on both parties to disclose any evidence which later comes to their attention which should have been disclosed under the rules.[89]

There is an overriding duty on the prosecutor to disclose any exculpatory evidence; such that suggests the innocence of the accused "or mitigate the guilt of the accused or *may effect the credibility of the prosecution evidence*" (emphasis added).[90] Such an obligation based on the subjective assessment of a party to the proceedings no doubt will generate pre-trial argument. In addition, it is entirely reliant on the integrity of the prosecutor and points to the difficulty of the enforceability of such rules of disclosure.

The issue of disclosure required by the ICTY is further complicated through a detailed set of exclusions.[91] These include internal memoranda about the investigation, and certain information delivered in confidence.[92] Witnesses may be compelled to answer even self-incriminating questions but if so they have immunity from further prosecution on this evidence.[93]

[86] ICTY (RPE) Rule 67 (A)(ii) indicates that the consequence of a failure to disclose limits the right of the accused to utilise the special defence insofar as he cannot call evidence in support beyond his personal testimony.

[87] In this respect it is not only the ideology of original procedural styles which is challenged, but so too consistency with the ideology of the international tribunals.

[88] ICTY (RPE) Rule 67 (C).

[89] This, of course highlights a common failing with expectations for disclosure: the party on whom the obligation is placed is also the party likely to have special knowledge of what should be disclosed. Therefore, the enforcement of disclosure obligations as of right from the benefiting party may prove impossible.

[90] ICTY (RPE) Rule 68.

[91] ICTY (RPE) Rule 70 – Matters not Subject to Disclosure.

[92] If such information is required for disclosure, the person providing confidential information cannot be compelled as a witness to answer questions which he declines on the basis of confidentiality – ICTY (RPE) Rule 70 (D).

[93] ICTY (RPE) Rule 90 (E). Interestingly, this stands in opposition to rights charters such as the International Covenant on Civil and Political Rights. See how this stands against the protections espoused in ICTY (RPE) Rule 95.

Another unique interest claiming and receiving access in the international context is that of contracting (or referring) states. In this respect access to justice may be viewed as a question of jurisdiction or standing and may relate to effective prosecution rather than defence. Particularly in the case of the ICC, the context of its creation will require that a state with a direct interest in the proceedings will have access. States may refer crimes to the prosecutor for investigation and trial.[94] The prosecutor, through the Pre-trial Chamber may claim jurisdiction over a reluctant or unable state, to investigate and prosecute crimes within the mandate of the court. The independence of the tribunal restricts the potential for access by contracting states to the process or outcomes of the trial, beyond the initiating stage.

In its broadest sense, the accused alone is offered the right to appear in person before independent tribunals, as the international courts claim to be constituted. The hearing, it is claimed, will be fair and impartial and operate under a process with the characteristics of fairness comparable with those generally espoused in Article 6 of the European Convention. However, the independence and impartiality of any international tribunal, and the fairness it can guarantee are obviously dependent on the nature of its constitution and the history of its recent operation.

Challenges to access the actuality of legal representation

Access to trial justice is best explained by viewing both lay and professional involvement within the trial. From either perspective it needs to be analysed on at least three levels:

access to trial (and those mechanisms which divert participants from the trial; accused, witnesses and victims),

access by those within the trial (the accused through actual representation; child witnesses in particular through specialised procedural provisions, victims through recognition and compensation),

access to the community by the trial (usually identified by involvement in verdict delivery).

At each level it is not difficult to identify impediments and opportunities for access.

A useful way to critically expose the reality of access in trials in any context is to identify points of connection between the professional and lay participants in the trial, at crucial situations of access. This becomes even more important as recent research identifies that it is the relationship between lay and professional participants in the trial, rather than the form of trial or the

[94] ICC Stat. Art. 14.

situations in which parties relate which is crucial to trial outcomes.[95] Legal representation and the interaction between the advocate and the accused are examples of this crucial relationship.

At the international level the issue may be communication rather than availability of representation. In a variety of trials before the ICTY, appointed defence counsel have come from language, cultural and legal traditions very different from the experience of the accused. This has led to difficulties with instruction, communication and representation, let alone the most effective preparation and presentation of a defence. In some cases this has produced a defection of counsel or requests for a new legal team.[96]

While the right access by the accused to legal representation was stated and complied with at the international level, in these cases, real access for the accused may have been denied through communication failure. The languages of the court, and the limitations over choice of counsel for the defence have clearly alienated some defendants. The reality of effective lawyer/client communication will become more keenly appreciated in the international context (and will be eventually recognised as an essential qualifier of fair trial through the right of representation). This then may inform comparable access debates in the European courts, and filter down to local jurisdictions which tend to focus on service availability rather than the nature of representation and delivery. If such were to be the case then the relationship between representation, its actuality and fair trial would transform debates about legal aid and access to justice into considerations of quality and actuality and not just availability. For this to happen would mean that the equality of arms condition of fair trial would take on a more quantifiable meaning.

The nature, quality and availability of legal representation are crucial to the fair trial from the perspective of the accused. But representation, or the lack of it may not merely be evaluated in terms of legal aid mechanisms, or principles of equality of alms.[97] Before the international tribunals, legal representation may be guaranteed but the divisions of language, culture and experience between the accused and his counsel may qualify the actuality of representation and hence access. In this regard, the crucial nature of the lay/professional relationship, so significant in trial outcomes is at the heart of "access" to justice, and not just the provision of any professional representation.

[95] For a detailed exploration of this in the context of comparative trial research, see *M. Findlay & R. Henham*, "Methodology and the Comparative Contextual Analysis of Trial Process: A preliminary study" at <www.clr.ntu.ac.uk/ictp/index.htm>, 2002.

[96] See the case of *Prosecutor v. Tadić* (Case No. IT-94-1-AR72).

[97] This is a principle essential for the European courts' interpretation of Article 6 rights. In brief, it refers to a person being afforded reasonable opportunity of presenting his case to a court under conditions which do not place him at a substantial disadvantage to his opponent.

The context of international criminal justice, and more particularly the dynamics of the international tribunals, where professional representation alone may not ensure access to justice, throws into stark relief the nature of the lay/professional relationship and its essence in fair trial. Access to justice guarantees before the international tribunals centre around professional representation for the accused but are silent on the issues of quality and compatibility, and say nothing about the manner in which equality of arms is actually ensured.

The location of tribunal investigations and hearings may exacerbate the cultural divide between the accused and his legal representative, and therefore endanger equality of arms. In addition, the nature of the charges indicted from international jurisdictions, the limited available defences, and the acceptance of factual generality in establishing either[98] could create conditions where access to the real "defence" of a fair trial may be reduced.

Evaluating trial access

Access to justice is more than a matter of procedures and structures.[99] Fundamentally access is a question of trial practice, and procedure may only signpost what is expected for a trial to be considered fair. In practice access relies on prosecutorial discretion, mode of trial, remand issues, and sentencing process. But to understand the actual access offered these need to be subdivided for analysis in both local and international trial settings. For instance, within considerations of the prosecution, sufficiency of evidence, public interest and accountability, disclosure protocols, delay, principles of diversion, governance of evidence delivery etc. require consideration as they impact on the identified perspectives of access. Perhaps more significantly, there needs to be a deconstruction of the relationship between the accused and his legal representatives so as to test the reality of such representation in the context of access to justice, and to weigh equality of arms.

Linked to the evaluation of institutional features of the trial access should follow a critical review of the principal sites of decision-making which influence the trial and construct its progress. These may most simply focus on important justice professionals such as the prosecutor, the defence advocate and the judicial officer who are crucial in facilitating and overseeing access. Regarding the sentencer, for instance, it is necessary to examine the influence

[98] Note the Tribunal's difficulty in the *Tadić* case (supra, at note 96) in accepting or impugning the alibi defences when the indictment ranged over broad and uncertain temporal and spatial qualifiers.

[99] See *B. Zupančić*, Access to Courts as a Human Right According to the European Convention on Human Rights, 9/2 Nottingham Law Journal, 2000, pp. 1–16.

of the prosecutor, decisions to divert, victim impact, complaint adjudication, minimum standards, plea discounting, the provision of reasons, race and gender issues, and the operation of judicial discretion in general.

Once decision-making is identified as crucial for access, then the relationships producing these decisions, as well as the relationships which the decisions cement, should be open for evaluation in access terms. The lay/professional relationship, and more specifically that of the accused and his legal representative, must be evaluated in terms of quality and compatibility for equality of arms to have any meaning.