Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law

Yong Pung How School of Law

3-2007

Emerging International Criminal Justice

Mark FINDLAY
Singapore Management University, markfindlay@smu.edu.sg

Clare MCLEAN

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

Part of the Criminal Law Commons, and the International Law Commons

Citation
FINDLAY, Mark and MCLEAN, Clare. Emerging International Criminal Justice. (2007). *Current Issues in Criminal Justice*. 18, (3), 457-480.
Available at: https://ink.library.smu.edu.sg/sol_research/2041

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

Published in Current Issues in Criminal Justice, March 2007, Volume 18, Issue 3, Pages 457-480.

Emerging International Criminal Justice

Mark Findlay and Clare McLean*

Introduction

International criminal justice is sufficiently well established to merit an overview of its origins and institutional development. This paper starts out by identifying the institutional indicia of international criminal justice and their close connection to the development of international human rights protections. Underlying these structural and process signposts is some controversy regarding their motivations. Has formal international criminal justice emerged in response to novel and genuine concerns for the safety of humanity, or is it a manifestation of global governance priorities in post conflict scenarios, regional and international?

Aligned with questions about wherefrom, and why, is the distinction of an international jurisdiction for criminal justice. Without this the integrity of international criminal justice as a unique justice paradigm is rightly suspect. We argue that it is much more than spatial location or political entity which designates and determines international criminal justice. The 'humanity' which is to be protected, and the nature of inhumanity that is prosecuted, suggest new notions of constitutional legality and standing which can develop beyond the symbolism of the global community.

Finally, the paper contrasts the pervasive but arguably less politically potent 'alternative'[1] incarnations of international criminal justice. Truth and reconciliation commissions, for instance, could be said to have insured the relevance of international criminal justice to a host of victim communities otherwise excluded from the formal institutions. The international criminal trial, on the other-hand, will require transformation[2] if its conflict resolution potential is to be realised, and if legitimate victim interests are to be incorporated in its legitimacy. We conclude by briefly speculating on 'where to international criminal justice?'

Origins of Trial-Based International Criminal Justice — The Human Rights Connection

Whichever specific point in time one posits as its origin, the connection between formalised international criminal justice and individual human rights is inextricable. The majority of

* Institute of Criminology, Law Faculty, University of Sydney.

1 The description 'alternative' for these paradigms of justice is misleading in that their coverage of victim communities and situations of post conflict resolution makes them arguably more significant than formal justice institutions such as the international criminal tribunals.

2 Findlay & Henham 2005 show how this might be achieved

commentators assert that the creation of the International Military Tribunal at Nuremberg marked the birth of formalised international criminal justice.[3] These proceedings clearly enunciated that individuals had actionable criminal liability under international law (Clapham 2003:31), and, according to Teitel (1999:285), this international response to the atrocities perpetuated by the Nazis signified the beginning of the modern human rights movement.

The Nuremberg Trials were closely followed, and to a large extent overlapped, the Tokyo War Crimes Trials, where Japanese Class A war criminals were brought before the International Military Tribunal for the Far East (IMTFE).[4] The legislative consequences of these tribunals were:

- the incorporation of the Genocide Convention (1948) into international law,[5]
- the formal recognition of international human rights law through the UN adoption of the Universal Declaration of Human Rights (1948),[6] and
- the formulation of the Geneva Conventions (1949).[7]

Despite this initial energetic conflation of international human rights instruments and criminal justice institutions, the intervention of the Cold War saw both the concept and practice of international criminal justice removed from the forefront of global politics and relations.[8] Indeed, it became clear during this period that a more permanent grounding for international criminal justice would rely as much on favourable international political hegemonies, as on strong legislative mechanisms endorsing human rights and international criminal law.[9]

The 'revival of the international criminal justice project' (Megret 2002:7) came in the 1990s, with the creation of international criminal tribunals for the former Yugoslavia (ICTY, 1993) and for Rwanda (ICTR, 1994). While Beigbeder asserts that the 'essential historical, legal and judiciary basis'[10] of these derived from the Nuremberg proceedings, Clapham (2003:43) argues they have gone beyond the immediate post-war response in clearly establishing 'that crimes against humanity exist as self-standing crimes'. That is, contrary to their formulation at IMT and IMTFE, 'these international crimes can [now] be prosecuted even in the absence of an armed conflict' (Clapham 2003:43).

The ICTY trial and appeal chambers in particular have actively prosecuted an international criminal jurisprudence. Most recently, with the elaboration of joint criminal enterprise theory[11] to enable the indictment of those collectively liable, the judges of the ICTY have identified unique foundations for international criminal law which will benefit its consolidation through the work of the International Criminal Court (ICC).

---

3 See for example: Clapham 2003; Booth 2003; Rehman 2002; Teitel 1999.

4 <www.arts.cuhk.edu.hk/NanjingMassacre/NMTT.html> accessed 6 October 2003.

5 Convention on the Prevention and Punishment of the Crime of Genocide (1948).

6 Adopted by the General Assembly of the United Nations on 10 December 1948. For further discussion see Rehman 2002:515–517. Although the Declaration is not binding on states, Rehman argues that it 'stands out as the most authoritative commentary on international human rights and criminal justice processes' (2002:516).

7 For the full text of the 1949 Conventions and the 1977 Protocols see <www.icrc.org/ihl.nsf/WebCONVFULL?OpenView> accessed 6 October 2003.

8 Perez (2000:183) argues that the need to maintain Cold War alliances was responsible for the toleration of human rights and humanitarian law violations in this period.

9 This is explored in the context of the war against terror, in Findlay 2007a, and global governance, in Findlay 2007b.

10 Beigbeder 1999:49; reviewed by Megret 2002:8.

11 For a critical discussion of these developments and their limitations see Danner & Martinez 2005.

The Special Court for Sierra Leone (SCSL, 2002)[12] is another product of this revived international criminal justice movement, while Indonesia's Ad Hoc Human Rights Tribunal on East Timor and the Cambodian Extraordinary Chambers,[13] although similarly constructed in response to mass human rights violations, differ in that they remain part of national criminal justice systems.[14] The SCSL is also notable in that it runs in parallel with a truth and reconciliation commission. This has led to some interesting cross-over between the jurisdictions of the restorative and retributive justice institutions.[15]

Beyond considerations of institutional justice manifestations, significant 'process' events in the recent progression along this international criminal justice continuum,[16] are the *Pinochet* precedent[17] and the entry into force of the Rome Statute creating the International Criminal Court.[18] The *Pinochet* proceedings saw Spain, albeit because of the 'vagaries of British extradition law and practice' (Perez 2000:189), assert universal jurisdiction in 'a claim to vindicate the rights of humanity as a whole' (Perez 2000:189).[19] Furthermore, in terms of precedent, the House of Lords reached an 'arguably revolutionary legal conclusion stripping Pinochet of former Head of State immunity' (Perez 2000:189-190). For Robertson (1999, quoted in Megret 2002:9) this suggests 'the age of impunity may be drawing to a close'. Indeed. Article 27 of the Rome Statute also asserts the '[i]rrelevance of official capacity'. Furthermore, in line with the developments of the ICTY and ICTR, the ICC has incorporated within its jurisdiction both violations perpetrated in the course of an internal armed conflict (Article 8 of the Rome Statute), as well as crimes against humanity committed in the absence of, or unrelated to, any conflict (Article 7 of the Rome Statute). This has enabled the first indictment issued from the ICC to focus on allegations of crime emerging from armed conflict in the Republic of Congo. For many the creation of the ICC is the institutional culmination of the belief that 'because individuals

---

12 Established by the *Special Court Agreement (Ratification) Act 2002*. For the full text of this Agreement follow the links from <www.sc-sl.org/> accessed 6 October 2003.

13 For details see the Agreement between the UN and Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (6 June 2003). For an outline see <www.asil.org/ilib/ilib0611.htm#a1> accessed 6 October 2003.

14 It should be noted that widespread dissatisfaction with Indonesia's Ad Hoc Human Rights Tribunal on East Timor has repeatedly led to calls for the creation of an independent international tribunal. For example see <www.globalpolicy.org/intljustice/tribunals/timor/2003/0818renew.htm> accessed 6 October 2003.

15 For a discussion of the case in question and its consequences for the court see Cockayne 2005; Cockayne & Huckerby 2004. In Findlay & Henham 2005 we argue that both justice paradigms should reside in the transformed international criminal trial for the protection of the rights and legitimate interests of victim communities.

16 Booth (2003:191) views international criminal justice as 'a continuum, a process that was catalysed in Nuremberg'.

17 *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* 37 ILM 1302 (HL 1998) (hereinafter *Ex Parte Pinochet*); *R v Bow St Metro Stipendiary Magistrate and Others, Ex Parte Pinochet* (No 2) 1 All E R 577 (HL 15/01/1999) (hereinafter *Ex Parte Pinochet II*); *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* 38 ILM 581 (HL 1999) (hereinafter *Ex Parte Pinochet III*).

18 The Rome Statute of the International Criminal Court (hereinafter Rome Statute) entered into force on 1 July 2002. For the full text see <www.un.org/law/icc/statute/romefra.htm> accessed 6 October 2003.

19 This assertion was made in Spain's second request for the extradition of Pinochet from the UK, since their first request, being grounded in passive personality jurisdiction, was denied on the basis that such grounds would not have afforded British authorities the right to prosecute in equivalent circumstances under British law (Perez 2000:190). Other examples of countries asserting universal jurisdiction include the 1987 prosecution in France of Klaus Barbie for wartime deportations of civilians (Teitel 1999:292) and Israel's 1961 prosecution of Adolf Eichmann for war crimes and crimes against humanity including genocide (Rehman 2002:517).

live under the international legal system, they must necessarily have rights and obligations flowing from it' (Booth 2003:186).

Motivational Origins

While international criminal justice clearly originated as a response to human rights atrocities, the motives underlying its emergence are the subject of much debate. The argument divides around the essential protection of humanity from new crimes and harms which only a global justice response can satisfy, or a wider mandate employing international criminal justice to advance the dominant political hegemony. It could be said that these motivations are not mutually exclusive, and in fact are crucially interdependent if the protection of humanity is to devolve from persistent military intervention. The critics of this alliance suspect that the more independent aspirations for justice will be captured by a dominant political ideology designating the legitimate global community, and the citizens worthy of protection (Findlay 2007a).

i. A genuine humanitarian response?

Proponents of this view hold that the phenomenon of international criminal justice and its practical manifestations are genuinely rooted in a universal desire to protect human rights and to redress those who have been violated.[20] Several of the distinct justifications articulated by the Permanent Members of the Security Council for the creation of the ICTY, when translated into general terms, can be seen to constitute the normative motivations behind international criminal justice viewed as a genuine humanitarian response.[21] Even so, these general pronouncements are pregnant with complex and competing considerations:

(a) *To provide justice for the victims*

Justice in itself is a moral imperative at the heart of the law and of human rights. Yet there are also practical gains to be made in providing justice for victims, most notably to 'discourage acts of retaliation' (Scharf 2000:929). In the words of Cassese, the ICTY's first President, the 'only civilized alternative to this desire for revenge is to render justice'.[22] Cassese points to the assassination of Simon Petlyura (former headman of the Ukrainian armies during the Russian civil war) and Talaat Bey ('the great killer in the Armenian pogroms of 1915' (Arendt 1994:265, quoted in Cassese 1998:1)) by civilians to support this assertion, and quotes Arendt with approval when she says:

> [N]either of these assassins was satisfied with killing 'his' criminal, but ... used his trial to show the world through court procedure what crimes against his people had been committed and gone unpunished (Arendt 1994:265, quoted in Cassese 1998:1).

Colson (2000:54) voices this concern on a larger scale, seeing the potential future outbreak of war as a consequence of rights violations not redressed. Quoting the ICTY's Deputy Prosecutor, Graham Blewitt, in support of this argument, McGeary observes, '[p]eople explain this war as a revenge for atrocities done in the past that were never punished.'[23] In this view, then, international criminal justice derives from a wish to prevent future abuses perpetrated in the name of revenge.

---

20 See, for example: Arbour 1997; Cassese 1998; Wippman 1999; Colson 2000; Scharf 2000; Rehman 2002; Clapham 2003.

21 These justifications are set out and discussed in Scharf 2000:928–933.

22 International Tribunal for the Former Yugoslavia, First Annual Report, at para 15, UN Doc IT/68 (1994). Cited in Scharf 2000:929.

23 Cited by Colson 2000:54, and referenced to McGeary 1996:22–27.

The tension between retribution and revenge is just one dilemma faced in reconciling legitimate victim interests. Once the victims of crimes against humanity, or victims of genocide are established and located (no easy task on some occasions), the challenge for international criminal justice is to provide the maximum access for those interests in an atmosphere of rights protection which enables victim integration to the extent that the legitimacy of the justice response is better ensured.

(b) *To establish accountability for individual perpetrators*

Again, aside from the moral need to address the particular individuals to whom responsibility for human rights abuses can be traced (Colson 2000:54), there is a practical component to this objective. It stems from the fact that 'the perception of collective guilt only fosters new cycles of retribution' (Mendez 1997, cited in Perez 2000:175, n2). Support for this view is provided by Scharf, who argues that the assignment of collective guilt which characterised the post-WWII years 'in part laid the foundation for the commission of atrocities during the Balkan conflict' (Scharf 2000:930). The logic is that reconciliation is impossible in an atmosphere of blame, one faction by another.

On the other-hand, an over-reliance on individual liability in instances where crimes and harms were the consequence of contribution may promote show trials, rather than any real attempt to punish proportionally collective responsibility.

(c) *To facilitate restoration of peace*

This is inextricably linked to the aforementioned justifications, that is, avoidance of acts of revenge and the facilitation of reconciliation are integral to the restoration of peace. In concluding that 'leaving indictees at large [would] preclude the establishment of the rule of law and democracy in the former Yugoslavia' (Cassese 1998:9), Cassese turns to Hegel: '*fiat justitia ne pereat mundus*' (justice should be done, so that the world will not perish) (Hegel 1821, quoted in Cassese 1998:9).

Again, this is a normative quest. Peace here is the natural consequence of victor's justice. Unfortunately, in the context of courts and trials it is not the peace that truth and reconciliation can bring. Rather it is a desire for peace which is enforced through conquest and confirmed through liability. From the view of many victim communities it may not be a long-lasting peace.

(d) *To develop an accurate historical record*

Cassese (1998:5-6) identifies this as one of the 'notable merits' of 'bringing culprits to justice', since it means that '*future generations* can remember and be made fully cognisant of what happened'. Why is this important? Again the objective is practical -- a definitive account 'can pierce the distortions generated by official propaganda, endure the test of time, and resist the forces of revisionism' (Scharf 2000:932), 'no tradition of martyrdom ... can arise among informed people'.[24] The presumed logical conclusion is that, consequently, the perpetrators of human rights abuses will not one day be emulated, nor will ethnic violence emerge in response to a distorted truth.[25]

---

24 Report to the President from Justice Robert H Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, 7 June 1945. Quoted in Scharf 2000:931.

25 In deciding to establish the ICTY, the US Representative of the UN Security Council remarked that the Tribunal would develop an historic record for a conflict in which distortion of the truth has been an essential ingredient of the ethnic violence. Reported in Scharf 2000:931.

However, through the determination of trial justice presently constructed, truth is not always, or even, the path to proving the case. What is sufficient as evidence, and what stands as fact upon which a successful prosecution can rest, is the story that survives the adversarial contest. This is not negotiated truth. Without truth determined, reconciliation may not accompany retribution as the essential outcomes of international criminal justice.

(e) *To deter perpetration of atrocities elsewhere*

This aim is also viewed as one of the main reasons 'the international human rights community enthusiastically embraced' the *Pinochet* proceedings (Wippman 1999:473). The reasoning in this respect is that the UK decision to divest Pinochet of his Head of State immunity, along with the Chilean Supreme Court's reiteration of this decision and their initiation of prosecution proceedings against him, will serve to deter 'other dictators in the making' (Wippman 1999:474) from perpetrating similar human rights abuses lest they too be subject to such treatment.[26] As Perez (2000:189) has stated, 'the calculations of officials responsible for human rights violations can never be the same'. In a similar vein, it is often proposed that the frequent recurrence of human rights abuses in the twentieth century is partially attributable to the consistent failure to punish those responsible. For example, Cassese (1998:2) argues that the unforeseen consequence of allowing the perpetrators of the Armenian genocide to proceed with impunity was that 'it gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later'. Similarly, Goldstone (the first Prosecutor of the ICTY) has concluded that the failure to prosecute Pol Pot (Cambodia), Idi Amin (Uganda), and (at that time) Saddam Hussein (Iraq) encouraged the Serb policy of ethnic cleansing in the former Yugoslavia and the commission of genocide by the Hutus in Rwanda with the expectation that they too would not be held accountable.[27] Thus, Arbour (1997:535) asserts, with respect to the ICTY,

> for the first time since Nuremberg and Tokyo, a serious attempt is being made at punishing, and therefore possibly preventing, the perpetration of the most horrendously violent, large scale criminal attacks on human life.

That for many 'deterrence is the most important justification and the most important goal' (Wippman 1999:474) of international criminal justice is commonly acknowledged. However, this is another justification which cannot, without much deeper empirical foundation, stray far from normative ascription.

ii. A politically motivated response

The contrary position, however, is that the commonly purported justifications above disguise less altruistic motivations. 'Surely, international criminal justice also tells another story, one that is at least more ambiguous, more fraught with power' (Megret 2002:9). At the heart of this view is the disbelief that these reasons provide an adequate answer to the question: 'why would states ever bother to create institutions that might end up turning against them?' (Megret 2002:10) Instead, Megret (2002:15) posits the view that it is interest shaped by political culture which dictates whether or not states support the international criminal tribunals (ICTY and ICTR).

In the context of the Bosnian crisis, several commentators have identified the 1992 media reports of concentration-type camps as the key turning point in the international

---

26 This view persists despite the fact that proceedings against Pinochet were subsequently suspended and eventually terminated on the grounds that he was too ill to undergo such a trial. Coincidentally, these proceedings were terminated on 1 July 2002, the same day the Rome Statute entered into force.

27 Reported in Scharf 2000:926 927.

response.[28] In reactivating the 'religious imagery of the victim' (Hazan 2000:76, quoted in Megret 2002:17), these reports 'touch[ed] at the very heart of European memory' (Megret 2002:17) and resulted in a public demand for action (Megret 2002:17). This outcry was amplified by what Robertson calls the 'CNN factor' (Robertson 1999, quoted in Megret 2002:17), whereby CNN became a 'recruiting officer for the human rights movement' (Robertson 1999:xix, quoted in Megret 2002:17). Yet, it is the way in which this permeated 'political issues and outcomes' which is, in Megret's opinion, the key to understanding how international criminal justice came to be manifest in the shape of international criminal tribunals (Megret 2002:18). Ultimately, 'the outcry ... [made] it necessary to give the impression that something was being done about the crisis' (Megret 2002:18). That is,

> the transformation of the Yugoslav crisis from a principally political problem to an ethical one in the eyes of public opinion set off a bizarre and frantic race for historical legitimacy between France and the United States. Each of these states seemed to calculate that, if an international criminal tribunal were to be created at all, it would be in their interest to be associated with the aura of reviving the idea, while not pushing it so far ahead that it would get out of hand (Megret 2002:18).

While Megret (2002:19) concedes that there were 'elements of domestic liberalism' at play, his commentary is imbued with the notion that the institutional embodiment of international criminal justice was an unintended consequence of the rhetoric of morality activated to appease public opinion. Hazan also views the tribunals as an 'anxiolytique' for public opinion rather than as long-term commitments to international criminal justice (Hazan 2000, quoted in Megret 2002:19), while, according to Scharf, 'America's chief Balkans negotiator at the time, Richard Holbrooke, has acknowledged that the tribunal was widely perceived within the government as little more than a public relations device and as a potentially useful policy tool'.[29]

In support of their sceptical stance, Megret and Scharf point to the fact that the ICTY was 'remarkably under-funded' (Scharf 2000:934) during its first years in operation, 'a toy in the hands of the great powers ... reined in whenever it showed signs of threatening the status quo' (Megret 2002:21). Yet, despite these 'dismal beginnings' (Megret 2002:21), the outlook is positive. The judges of the ICTY have 'transform[ed] themselves into crusading diplomats' (Megret 2002:25), as such 'a thorough mix of liberal legalism and realist interest is what characterize[d] the emergence and consolidation of international criminal justice towards the end of the twentieth century' (Megret 2002:29-30). It remains to be seen 'how far international criminal justice's "own momentum" will take it' (Megret 2002:32).

How 'International' is International Criminal Justice — The Relationship between International Criminal Justice and National Criminal Justice

Having reflected upon the institutional origins of formal criminal justice and the arguments concerning motivation, the question naturally follows, how is the distinction 'international' to be established and maintained? Are we merely masquerading some hybrid procedural tradition, or has a new jurisdiction and standing in justice emerged?[30]

---

28 For example: Ball 1999, Bass 2000; Beigbeder 1999, Hazan 2000, Robertson 1999, Scharf 1997. Reviewed by Megret 2002:17. Notably, however, these reports were later to be unfounded – see for example: <www.terravista.pt/guincho/2104/199810/deichmann_9701.html> and <www.balkan-archive.org.yu/politics/conc_camps/html/Kenney.html> accessed 7 October 2003

29 *Washington Post*, 3 Oct 1999; quoted at <www.fair.org/reports/post--war-crimes.html> accessed 7 Oct 2003.

30 This is critiqued in Cockayne 2005

a) Why is international criminal justice required in lieu of national criminal justice?[31]

From the outset it should be noted that the principle of complementarity, central to the Rome Statute (Article 1), asserts ICC jurisdiction only where national criminal justice systems are either unable or unwilling to try international crimes in accordance with the requirements of due process. Even so, for the USA in particular, the suspicion that the ICC jurisdiction would compromise domestic autonomy has proved a barrier to some states signing up to the ICC mission.

Thus the most pertinent arguments for international, rather than national, criminal justice are those pertaining to the usual instability of national criminal justice systems in countries ravaged by mass human rights atrocities. Aside from the reality that the societies in question will often be 'too fragile to survive the destabilising effects of politically charged [domestic] trials' (Cassese 1998:4), the central concern is that these national criminal justice systems may be incapable of conducting impartial proceedings.[32] For example, with regard to the former Yugoslavia and Rwanda, Arbour (1997:534) has stated, 'for different reasons, the national criminal justice system was too incapacitated to satisfy the forms of justice in the context of the enormity of the injury inflicted on the social fabric of these countries by the crimes committed'.

Indeed, one of the reasons the Rwandese Government itself supported an international Tribunal was 'its desire to avoid any suspicion of its wanting to organize speedy, vengeful justice' (Arbour 1997:535). Thus, as Lord Hope stated in the *Pinochet* proceedings, 'justice must not only be done; it must be seen to be done' (quoted in Delmas-Marty 2002:290). It is on these grounds that Delmas-Marty (2002:293) called for an international judicial response to the September 11 2001 attacks, her concern being that the US national criminal justice system would conduct 'procedures that resemble vengeance more than justice' and ones which would violate the legality principle of criminal law — that is that 'crimes must be defined precisely and that laws imposing harsher penalties may not be imposed retroactively'(2002:289).[33]

Yet while international proceedings would likely be tainted with less bias than national trials, a belief in complete impartiality is overly optimistic. For example, with respect, Cassese's (1998:7) assertion that 'international judges have no national, ethnic or political axe to grind' demonstrates a surprising naiveté of the complexity of global relations. It also contradicts his previous statement that 'international judges *may* be in a better position to be impartial and unbiased than judges who have been caught up in the milieu which is the subject of the trials' (Cassese 1998:7). This is a more realistic view.

A convincing argument for international criminal justice in place of national criminal justice is the fact that trans-national investigation is easier for an international court to accomplish (Cassese 1998:8), as is the extradition of those 'who have found refuge in foreign countries' (Arbour 1997:535). Furthermore, as Kelson noted in 1944,

---

31 Cassese (1998:6) poses this question.

32 A failure to do so would run counter to the principle of procedure, set out in both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which asserts the right of an individual to be judged by an impartial and independent tribunal. For full texts see <www.unhchr.ch/html/menu3/b/a_ccpr.htm> and <www.echr.coe.int/Eng/BasicTexts.htm> accessed 7 October 2003.

33 This principle, from which international human rights instruments do not permit a state to derogate (even in 'exceptional circumstances') is set out in both ICCPR and the ECHR.

'[i]nternationalisation of the legal procedure against war criminals would have the great advantage of making the punishment, to a certain extent, *uniform*', where national courts will likely 'result in conflicting decisions and varying penalties' (Kelsen 1944:112, quoted in Cassese 1998:8). Finally, is the logic that just as domestic crimes are tried in national courts, crimes against international law should be tried in international courts – in the words of Roling, 'an international judge should try the international offences. He [or she] is the best qualified' (Roling 1961:354, quoted in Cassese 1998:7). This argument, however, has not been wholeheartedly embraced — indeed the inclusion of the complementarity principle within the Rome Statute will likely mean national prosecutions are far more frequent than international proceedings. It might also betray the reality that we are a way off from a truly international judicial profession (see Wessell 2006).

b) How have international criminal justice and national criminal justice impacted on each other?

The concepts of 'hybridisation' and 'harmonisation' set out by Delmas-Marty (2003:13) have been influential (if perhaps overstated) in understanding this relationship. Asserting that the intended operations of the ICC are the modern epitome of international criminal justice, the exercise of these concepts in normative form has been realised in the ICC empowering legislation. So saying, it is too simplistic to offer an analysis of international criminal procedure as the comfortable marriage of dominant traditions.[34] The jurisprudence of the ICTY in particular has shown that any convergence of national traditions is a random and peculiar exercise, heavily dependent on the context of the deliberations.[35]

The Rome Statute is the product of extensive deliberation and compromise amongst numerous states. Consequently, it not only embodies an amalgamation of a wide range of national criminal justice principles, but it incorporates elements of both the adversarial and inquisitorial processes: it is a hybrid being. Tochilovsky (2002:268) provides a detailed discussion of these procedural issues, and questions how such 'conflicting visions' will be resolved in practice. He points out, for example, the fact that while the Rome Statute and the Rules of Procedure and Evidence[36] 'impose a duty on the Prosecution to equally investigate both incriminating and exonerating circumstances', they simultaneously assume that each party will 'prepare and present its own case' (Tochilovsky 2002:268). Furthermore, while the common-law tradition of plea-bargaining is not precluded by the Rules, judges are obligated 'to seek the truth regardless of any agreements reached by the parties' (Tochilovsky 2002:268). It is the fact that judicial discretion will determine how these discordant approaches play out in practice, that is the source of Tochilovsky's apparent dissatisfaction with this state of affairs,[37] rather than an opposition to Delmas-Marty's vision of a 'pluralist, universal conception of international criminal law' (Delmas-Marty 2003:13). Indeed, this vision is one he seems to share — 'jurists from various parts of the world, representing different systems and cultures, will play a crucial role in further development of a unique international criminal law system in the ICC' (Tochilovsky 2002:275). If the experience of the ICTY is anything to go by, this dream of a judicial

---

34 The synthesis of procedural traditions in the face of pragmatic compromise, and the alienation of other important traditions beyond civil and common law is presented in Findlay 2001.

35 Even down to the influence of research sources is speculated upon by Bohlander & Findlay (2003).

36 Hereinafter 'the Rules'. For full text see <www1.umn.edu/humanrts/instree/iccrulesofprocedure.html> accessed 7 October 2003.

37 Henham (2004) takes issue with this and in turn proposes an enhancement of judicial discretion it the international court context

'internationale' can be derailed by the persuasive preferences of an aggressive prosecutor or a resilient judicial chamber.

The interaction of international and national criminal justice systems does not end here. A harmonisation process is evolving for the ICC, whereby the composite set of principles embodied in the Rome Statute have been legislatively incorporated into the national criminal law of many states. A prime example is the entry into force, on 30 June 2002, of the German Code of Crimes Against International Law (CCIL).[38] In providing for 'the universal prosecution of crimes against international law through the German criminal justice system', the CCIL 'transfers the substantive criminal law prescriptions of the ICC Statute into German law' (Werle & Jessberger 2002:192). The significance of this lies in the fact that the CCIL establishes 'the punishability of war crimes and crimes against humanity *for the first time* in legislation of the Federal Republic of Germany' (Werle & Jessberger 2002:192, emphasis added). That similar legislation has been enacted in no fewer than eleven countries throughout the world is testament to the strength of the influence of international criminal justice on national criminal justice systems.[39]

With one exception, the Rome Statute does not obligate states to transpose the substantive criminal law of the Statute into its domestic legislation.[40] The driving force behind such reform is complementarity. The expected consequence of this principle is that the 'enforcement of international criminal law through national courts will remain the backbone of the international criminal justice system' (Werle & Jessberger 2002:194). States, then, have the opportunity to retain their autonomy with regard to prosecution of violations of international criminal law committed within their territory or by one of their nationals. As Werle and Jessberger argue, this is 'a strong incentive to consider domestic law in light of the *Statute*' (2002:195, emphasis in original). In this subtle way, as Clapham (2003:65) suggests, '[t]he complementarity principle at the heart of the Statute has generated a complementary transnational legal order for the prosecution of international crimes'.

Yet, although it has had arguably the greatest impact in this respect, it is not just in response to the Rome Statute that principles of international criminal justice have been transposed into national systems. As Arbour (1997:536) points out, the Statute that created the ICTY[41] bound Member States of the Security Council to cooperate with the Tribunal (Article 29). Consequently, many countries 'enacted specific legislation permitting them to discharge these obligations' (Arbour 1997:536). The influence was limited, however, since several states neither undertook such reform nor 'formally notified the Tribunal of their ability to comply under their existing national law' (Arbour 1997:537). Rehman (2002:510) also argues that there exists 'a strong and influential relationship between national criminal justice systems and international human rights law'. Given the incontrovertible evidence of the relationship of international criminal justice with international human rights, it is appropriate to draw on this argument here. The principles of customary international law and the immutable rules of *jus cogens* form the basis for Rehman's claim. Whilst states are

---

38 An English translation of the CCIL is annexed to Werle & Jessberger 2002.

39 For the full text of the Draft Legislation, Enacted Legislation and Debates relating to the implementation of the Rome Statute into national law see: <www.iccnow.org/resourcestools/ratimptoolkit/nationalregional tools/legislationdebates.html> accessed 7 October 2003.

40 The exception is Article 70(4)(a) which provides that 'Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals'.

41 Statute of the International Tribunal (adopted 25 May 1993). For full text see: <www.un.org/icty/basic/statut/ statute.htm> accessed 7 October 2003.

required to comply with the latter, there is no obligation to incorporate specifically any relevant provisions into domestic legislation. However, as Rehman (2002:518) points out, '[i]n practice almost all states have adopted constitutional practices to conform to the norms of *jus cogens*'. In offering additional support for his overall argument, Rehman proposes that treaty bodies, for example the Human Rights Committee[42] and the Committee against Torture,[43] have influenced the practices of many states, including 'pariah states such as Iraq, Libya and Sudan', having led them to reconsider their own domestic criminal justice system in terms of its human rights policies (Rehman 2002:522).

How is *International* Criminal Justice Manifest?

It is a commonly shared view that justice is revealed in the application as much as it may be in the normative aspirations for its outcomes.

Formal institutions

As Scharf (2000:927) argues, '[i]t is one thing to create an international institution devoted to enforcing international justice; it is quite another to make international justice work'. For some, that the ICC has no constabulary, no *subpoena* power and cannot sanction states directly in the event of non-compliance, may make this latter objective impossible to achieve (eg Scharf 2000; Roznovschi 2003). However, the most frequently made arguments for the impotence of international criminal justice are the low rates of indictments, trials and convictions effected by the ICTY and the ICTR. In its first six years of operation the ICTY issued ninety-one public indictments, but tried and sentenced only six individuals (Wippman 1999:476). Wippman (1999:476) points out, 'these numbers are miniscule relative to the numbers of persons actually responsible for criminal violations of international humanitarian law'. Furthermore, '[i]t will rarely be possible to prosecute more than a representative sampling of those responsible for genocide, crimes against humanity, and war crimes' (1999:480). That this is the case does not bode well for the proposed deterrent effect of the international tribunals and the ICC,[44] casting serious doubt on optimistic proclamations such as '[t]he real story of the new Court may actually be the crimes which never take place' (Clapham 2003:67). This is particularly concerning when one considers that deterrence was a primary justification for the creation of these international institutions. It also leaves unanswered the question 'how is international criminal justice manifest?'

For Colson (2000:58), '[t]he starting point [in responding to this question] is to conceive of international justice as a process which in itself has significance, no matter what the expected outcomes of the process are'. He argues that the investigation and denunciation of war crimes by the ICTY, prior to any actual trials, had two important effects:

(1) 'victims and their relatives experienced a form of relief — at last their status as victims was being taken seriously by the international community through one of its institutions' (58) and

42 See <www.unhchr.ch/html/menu2/6/hrc.htm>, accessed 7 October 2003, for details.

43 See <www.unhchr.ch/html/menu2/6/cat.htm>, accessed 7 October 2003, for details.

44 Goddard (2000:464) argues otherwise: 'And even if only a few of the perpetrators of genocide, crimes against humanity, or war crimes are held to account, then examples may serve to deter others similarly minded, and that in itself will be a resounding victory for all humanity'. This view should be compared with the in-depth evaluation put forward by Wippman (1999) which concludes the uncertainty of the deterrent effect.

(2) 'to a limited but significant extent, accusations made against Bosnian-Serb leaders Radovan Karadžiae and Ratko Mladiae weakened their popular support' (58–59).

Furthermore, Colson argues, as does Booth, that, in general, international tribunals ensure that collective assignation of guilt is avoided (Colson 2000:60; Booth 2003:185). The overall effect then is one of catharsis (Colson 2000:59). That is, the activity of the international tribunals supports 'the hypothesis of international justice as a cathartic process' (Colson 2000:60).

It is appropriate to note at this point that not all commentators are of the view that the avoidance of collective assignation of guilt is necessarily a beneficial outcome of international tribunals. Rather, Teitel (1999:298) proposes, in spite of the proposed advantages articulated above, that 'such emphasis on ascribing individual accountability ... is of questionable value because individual proceedings ultimately obscure the profound role of systemic policy in repression'. Locating his criticism directly within the trial process, he argues that 'the insistence on proof of individual motive can be misleading, as it obscures the extent to which persecutory policy is a social and above all political construct' (299). Consequently, there is a need for international tribunals, if they are to continue to assign individual responsibility, to ensure that the 'significance of systemic persecution ... [and] the extent to which the architecture of genocide [and other human rights abuses] [are] political' (298–299) is clear to the world audience.

Returning to the manifestation of international criminal justice, while Akhavan does not share Colson's specific conceptualisation, he provides further support for the view of international criminal justice as manifest beyond the trials conducted in its name. He argues that the mere 'stigmatization of criminal conduct may have far-reaching consequences, promoting post-conflict reconciliation and changing the broader rules of international relations and legitimacy' (2001:1). Specifically,

> international criminal tribunals can play a significant role in discrediting and containing destabilizing political forces. Stigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence (2001:1).[45]

That international criminal justice is manifest in this way is demonstrated by the fact that

> the international policy of discrediting wartime leaders, and the criminalization of the former leadership of Republika Srpska by the ICTY, have allowed new leaders such as Dodik to emerge and to make statements that would have constituted political suicide in another context (2001:5).

Akhavan also agrees with Colson that the international tribunals play a valuable role for victims in ensuring that the crimes against them 'do not fall into oblivion' (2001:1). In these ways, international criminal justice manifests itself in a 'significant contribut[ion] to peace building in post-war societies' and through the introduction of 'criminal accountability into the culture of international relations' (2001:2). Notably, these achievements correspond with several of the justifications put forth for the creation of the international tribunals.

At the same time it has been the frustration and dissatisfaction of victim communities with limited and exclusive tribunal-based justice which has stimulated recourse to local community justice resolutions. This has created its own challenges to international criminal justice in that the alternative exercises, while being concerned with elements of crimes against humanity or genocide, have been coloured by domestic tensions and compromises.

---

45 Notably, the tone of Akhavan's argument indicates his belief that indictment in itself is important in undermining influence, regardless of apprehension and prosecution.

International criminal justice is also declared in national criminal law. As outlined above, anticipation of the eventual entry into force of the Rome Statute resulted in significant and widespread legislative changes to domestic laws. Furthermore, it has been shown that the requirements of the international tribunals and the rules of *jus cogens* had a similar re-formulating effect on national justice. Yet discussions of international criminal justice continually either overlook or underestimate the importance of these changes. Booth (2003:178) proposes that the function of an ICC trial will be 'first and foremost a proclamation that certain conduct is unacceptable to the world community'. Compatible with this intention, domestic legislation is being enacted world-wide to bring the national criminal law of more and more countries into line with the Rome Statute. Each such enactment represents a step closer to Clapham's 'transnational legal order' (Clapham 2003:65), at least in a legislative and institutional sense.

Alternative paradigms?

Certainly international criminal justice is not purely the domain of international trial institutions and the processes which flow, or are purported to flow, from them. Expansive efforts to create an international criminal justice outside the framework of criminal prosecution are evidenced particularly in post conflict and transitional states, the South African Truth and Reconciliation Commission (TRC) being a celebrated example. In the South African case, amnesty was offered in return for 'full disclosure of all the relevant facts relating to acts associated with a political objective'[46] — as Dyzenhaus (2003:366) points out, this led some to believe that justice, seemingly being unlikely to be achieved given the continuing strength of the old regime, had been traded for the truth. The opposing view, in Dyzenhaus' analysis, is that justice was not negotiated, or sacrificed, but rather 'the way the TRC went about finding out the truth achieved a kind of justice different from — even superior to — criminal or retributive justice' (2003:366), namely restorative justice.

While this latter view is arguably the more convincing of the two, its most critical ingredient is the implied dichotomy of retributive/guilt-based justice and restorative/truth-based justice. In this analysis, the two seem to be posited as mutually exclusive, incapable of happy coexistence. We have established, in the context of international criminal justice, that this dichotomy is false (Findlay & Henham 2005:chs7,8). A comparative exploration of the objectives underlying both the 'formal' institutional attempts at international criminal justice and the 'informal' *community* approaches shows, not only that the two can, with institutional transformation, co-exist in a transitional context, but that there is also significant scope for restorative themes to be incorporated into the procedural framework of international trials.[47] This has been recognised recently by the Chief Prosecutor for the ICC when commenting on the role of the court in conflict resolution.

The motives for international criminal justice through institutions and institutional processes have been articulated, and form a starting point for the comparative project.[48] As noted, one of the justifications for the creation of international tribunals and the ICC was that it would develop an accurate historical record. This goal also underlies the establishment of truth and reconciliation commissions. However, where the proposed merits of such a record are viewed in instrumental terms by proponents of due process, centred on deterrence of future violence, the objectives of supporters of truth and reconciliation commissions are much more expressive in nature and tied to understanding

---

46 *Promotion of National Unity and Reconciliation Act* 1995. Cited in Cassese 1998:4.

47 An argument for this is posed in the context of the influence which China might have over the development of international criminal justice. See Findlay 2007c.

48 Henham has explored this in relation to international sentencing. See Henham 2003, 2004.

at the interests of victim communities. For example, Coakley (2001:233) expands on the purpose of memory and truth-telling in the following manner:

> In order to alleviate the suffering associated with memory, the process of truth telling is seen as an essential component of any attempt at healing and reconciliation ... the truth of individual suffering is a vehicle to achieve both individual and collective healing. The stories of the victims are supposed to move people collectively thus diminishing the legacies of violence by sharing its effects ... This process can help heal society's wounds and restore dignity to the victims of the previous regime.

The contrast between these instrumental and expressive objectives raises several issues. First, the disjunction makes it possible that different 'truths' will be created within the adjudication process, a situation which has inevitably led to debate over what the 'best' truth might be, and for what purpose. While Scharf (1999:513) argues vociferously that 'the most authoritative rendering of the truth is only possible through a trial that accords full due process', he is countered by those who argue, that, a truth commission operating in conjunction with amnesty provisions 'promotes a process of truth-finding in which a fuller picture of the truth emerges than would in a series of trials, since amnesty seekers have an interest in making full disclosure' (Dyzenhaus 2003:366). The proposed incompatibility of retributive and restorative justice in this view hinges then on the perceived necessity of amnesty for truth. Again, we do not see this as inevitable and by deconstructing this proposed conjunction two questions can be addressed:

(1) *Which of the two approaches produces the more accurate and more complete record of events, that is the 'better truth'?*

Implicit in the question are the assumptions that (a) the complete truth can never be fully recovered, if for no other reason than the fallibility of human memory, and (b) that accuracy is imperative to the production of truth. In raising this second concern we are careful not to equate accuracy with factuality in any legal sense. As a consequence of adversarial argument in particular, what is accepted as fact to satisfy the requirement of criminal evidence may be more a prevailing argument, than truth.

Sarkin (1997:529–530) adds a realist political dimension to valuing the 'better' truth. In the context of South Africa 'a new nation cannot be built on denial of the past'. That civil and political distrust can be overcome through what would effectively be the withholding of truth, it is argued is illogical.

Scharf (1999:513) cites as support for his view comments by Justice Robert Jackson, the Chief Prosecutor at Nuremberg — most significantly: 'According to Jackson, the establishment of an authoritative record of abuses that would endure the test of time and withstand the challenge of revisionism required proof "of incredible events by credible evidenc"'.[49] Thus, although he does not state it so explicitly, it seems that Scharf's opinion of the superiority of the criminal trial as a truth-producing mechanism stems from a faith in the rules governing such trials, in particular the rules of evidence and the required standard of proof. A problem with this conclusion rests in the problematic but assumed correlation between truth and what will stand as evidence towards criminal liability. The argument goes that the more probative the 'fact' the more it is truth. The contest between the narratives of the criminal tribunals, and the stories of the truth commissions, is more particularly

---

49 Quoting a Report to the President from Justice Robert H Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, 7 June 1945, reprinted in 39 *American Journal of International Law* 178 (Supp 1945).

determined, we would argue by the completeness of the recount (and its legitimacy for victim communities), beyond its evidentiary status for tribunal chambers.

Viewing the trial as a series of process-generated decision-making sites, Scharf's standpoint is at the core a belief that each of these sites, or turning-points, tests the evidence such that only accurate information is allowed to be woven into the picture of truth — it is a faith in procedure to filter out erroneous claims and dubious evidence, and thus produce 'the truth'. This, we submit, is misguided.

First, it presupposes the infallibility of the trial structure, without acknowledging the inherent weaknesses of both adversarial and inquisitorial systems when it comes to eliciting the whole story, particularly from a victim perspective. Many rules of evidence, in fact, are designed to circumscribe the fullest recount against the rights of the accused or prevailing probative considerations. From this imperative there is a genuine potential of the criminal trial to distort the truth. Let us begin with the rules governing admissibility of evidence. There are no grounds for assuming that evidence deemed inadmissible is inaccurate or vice versa; it may have been illegally obtained, it may be more prejudicial than probative and lack corroboration, but the possibility that it is accurate (or inaccurate) remains. Judicial discretion to admit illegally or improperly obtained evidence, or that extracted under duress — because its probative value outweighs its potential benefit — may do little more than suggest a relative likelihood of truth emerging from a flawed process. Thus the rules of evidence can operate to produce a partial truth.

Furthermore, the fact that opposing counsel can paint vastly differing stories from examination of the same witnesses renders questionable the truth-finding potential of the adversarial trial. This process of story construction has important repercussions in relation to the 'cathartic' function of testifying earlier proposed by Colson. It highlights the inherent distorting potential of the criminal trial, in its search for prevailing fact rather than negotiated truth.

Nina argues that selectivity of a different nature was at work in the South African TRC. In his analysis, 'the state is privileging the writing of a particular history ... it is the construction of a very limited and controlled history' (Nina 1997:66–70), perhaps most condemning: 'One gets the impression as if there was never apartheid or reasons to revolt against it' (69). The core of his argument is that in a 'desperate bid to avoid confrontation with the [whites]' (65), the TRC re-created an accommodative, edited history — a history of the very nature held above to be unsatisfactory. Even so, the stories emerging from out of the Commission produced admission which may never have emerged through a formal adversarial process.

Qualifying any such assertions, further criticism of the South African TRC's truth-finding ability in contrast with trial process, comes from Dyzenhaus (2003:367).

> [A]necdotal evidence suggests that perpetrators often stuck to a script, probably co-ordinated by the few lawyers who appeared time and again with this group, which disclosed as little as possible and attempted to confine implicating others to implicating security force actors who had died.

Without commenting on matters of accuracy,[50] this critique draws attention to the potential for distortion within the framework of a truth commission, as well as through trial decision-making, because of the necessity to negotiate participant interests, or navigate rule limitations. Arguably as the truth commissions have found in particular, this distortion, no

50 To make such a judgment would require thorough investigation outside the scope of this paper.

matter what the process of extraction and deliberation, may be heightened and the resultant 'truth' further weakened, where the process operates without flexible amnesty provisions.

(2) *Are amnesty provisions necessary for a truth commission to operate?*

The incentive beyond rare and genuine contrition (which should not be dismissed as an ingredient of truth commission hearings) for perpetrators to provide 'full disclosure' if they are faced with prosecution, is indemnity if not amnesty. The challenge is to enable amnesty provisions which are open and responsible and do not essentially sacrifice retributive outcomes for restorative 'truth' seeking. We argue this is both appropriate and achievable within the contexts of transformed deliberative domains.

It is through compromise with retributive justice (recognising the complexity of legitimate victim interests) that restorative justice and truth seeking will best be achieved. Indeed a combined model would overcome many of the weaknesses of the two separate approaches in terms of truth-finding, arguably representing a more robust international criminal justice than is currently being achieved. In saying this, we do not advance as a hypothetical model on these lines the creation of an international truth commission to operate in conjunction with the ICC. This has not proved successful in Sierra Leone.[51] The transformed trial mechanism[52] wherein the judge could move from adversarial trial procedures to truth-finding and mediation has the benefit of encouraging disclosure as truth rather than actionable fact, while the evidence given in any adversarial context could be tested by the judge for the purposes of liability if appropriate. Furthermore, the amalgamation of these approaches would better accommodate the administration of juvenile justice, wherein welfare and restorative agendas are more apparent. Linton (2001:237) highlights this in the context of Sierra Leone — while adults will be prosecuted for atrocities in the Special Court, '[t]he Security Council has stressed that other institutions, such as the Truth and Reconciliation Commission, are better suited to deal with juveniles'.

Thus far, the discussion has focused on perpetrators' contribution to the truth, and the potential production of conflicting 'perpetrator truths' as a consequence of the contrast between the instrumental and expressive objectives of criminal trials and truth commissions respectively. Yet this contrast also translates into two different experiences for victims. As noted, Colson argues that international criminal justice, as manifest through the international tribunals, is a cathartic process. Central to his theory is the idea of 'psychoanalytic catharsis included in the act of testifying' (2000:60), and the argument that the purpose, the medium, and the setting of the ICTY are all conducive to the cathartic process. That is, the purpose is to clarify 'thought by removing ignorance, the medium of testimony allows victims to express their trauma and therefore relieve the stress attached to it, and the setting provides a safe and controlled locus … a properly distanced context'. The analysis, however, neglects the aforementioned potential for distortion inherent to the trial process. This has significant repercussions for victims' cathartic experiences.

At a basic level, what of those victims who are not allowed to testify? In a purely evidentiary context, their testimony can be deemed more prejudicial than probative, and would violate the accused's right to a fair trial. While it is imperative that this right be upheld if the court or tribunal is to achieve legitimacy as tribunals of liability, the refusal to admit a wider range of victim testimony denies the potential of the trial as a chamber of truth. As with many formalist commentators, Colson does not explore the emotional

51 For a critique of this binary approach see Cockayne 2004.

52 See Findlay & Henham 2005.

consequences for the victim and victim communities. Victims in the context of genocide in particular want the perpetrators punished but equally need their story to be told. Excluded from trials currently constituted because their testimony may not qualify as evidence, victims conclude that their story was less important, a feeling which, when widespread, may adversely affect healing and reconciliation. From a victim perspective, the legitimacy of the trial process from which their story has been removed will also be impugned.

For those victims who do testify, what is the impact of having their stories selectively constructed, destroyed, and reconstructed in examination and cross-examination? Not only are their experiences distorted, but they are taken out of their hands completely and retold through the voice of professionals. This loss of ownership, along with the procedurally enforced restraints preventing the accurate telling of their stories, will more likely lead to increased frustration and dissatisfaction for victims than it will to catharsis. They will not feel, as Colson (2000:58) argues they would, that their status as victims is 'being taken seriously by the international community through one if its institutions'. Indeed, the validity of Colson's analysis depends on victims being able to take the stand, tell their story, and step down; however the trial operates in a very different way. His analysis is constrained within the confines of the international criminal trial currently constructed and as such relegates the victims and the power of their stories to truth commissions, where the purported objectives are expressive rather than instrumental. With the incorporation of this new level of 'truth' within a transformed criminal trial process, the divergence of justice paradigms would be breached and legitimate victim interests merged within an institution which is to some degree accountable in terms of formal rights and responsibilities.

As Dyzenhaus (2003:366) points out, one claim of supporters of truth commissions is that 'in that process the victim has a role that goes well beyond serving as an instrument to achieve conviction' The argument continues that, in taking this expanded role in telling their stories, "victims might find not only that they can come to terms with the abuses, but also that they are "restored" to a relationship of equality with the perpetrators, so that they can develop a sense of agency appropriate for participation in a democratic society' (366). Coakley (2001:234) draws attention to this function of a truth commission to 'provide a forum for people who have not been able to tell their story before'. She notes the writing of one commissioner at the United Nations Truth Commission for El Salvador:

> One could not listen to them without recognising that the mere act of telling what had happened was a healing emotional release, and that they were more interested in recounting their story and being heard than in retribution. It is as if they felt some shame that they had not dared to speak out before, and, now that they had done so, they could go home and focus on the future less encumbered by the past (Burgenthal 1994, quoted in Coakley 2001:234).

The parallels with Colson's proposed cathartic process are clear — it is simply the setting which differs. Furthermore, Coakley (2001:234) argues that this experience goes beyond the individual, having 'a "cathartic" affect [sic] in society, making it possible for a society to "cleanse" itself through this process of breaking the silence and acknowledging a shameful period in its history'.

However, this view is not unchallenged. Dyzenhaus (2003:366) warns that the reality of the South African TRC 'should provide a highly cautionary note'. He points to evidence presented by Wilson that many victims did not get to testify at the TRC, and that those who did 'often found themselves in a micro-managed process in which their testimony was reduced to the empirical data the TRC required' (Dyzenhaus 2003:366, drawing on Wilson 2001). Wilson argues that the TRC instrumentalises victims' testimonies in the same manner as does the criminal prosecution, the only difference being the TRC does so 'to assist the project of nation-building' (Wilson 2001, cited in Dyzenhaus 2003:367), whereas

the criminal prosecution does so 'to achieve the end of conviction' (Wilson 2001, cited in Dyzenhaus 2003:366). This is contestable against the governance aspirations of alternative criminal justice paradigms recognised recently by the ICC prosecutor.

Conclusion

Not accidentally this paper has drawn its discussion of emerging international criminal justice to the convergence of restorative and retributive themes. It is the next great challenge in the development of justice globally to synthesise (and assimilate within the rights framework of the trial process) the formal and informal paradigms for the sake of legitimate victim interests, without sacrificing the rights provided through the trial or the inclusive flexibility of the less formal resolution processes.

The existence of informal manifestations of justice to resolve crimes against humanity, being attempts by communities to realise international criminal justice at a local level, highlights that a variety of legitimate victim needs must be satisfied if international criminal justice is to be realised. They show that the ICTY, the ICTR, and the ICC cannot in themselves represent international criminal justice. Rather non-formal resolutions are taking on a resonance which cannot be ignored. The satisfaction of the needs they highlight must be more strongly recognised within the fabric of international criminal justice. While the development of these restorative processes should not be hindered by institutions designed for more retributive purposes, there is a need to open up the trial as a restorative tool so that it is more inclusive of victim interests and more responsive to community expectations. This will necessitate a reshaping of the formal institutions and community responses if international criminal justice is to be fully realised. A new normative framework which values 'humanity' as its focus and 'truth' as its outcome will be the driver for change.

An important consequence of international criminal justice better meeting the legitimate needs of victim communities will be the resolution of conflict and the advancement of peace-making. Braithwaite (2002) similarly claims this for restorative justice when applied to state reconstruction. The limitations of trial-based retributive justice mean that in its formal incarnation, international criminal justice is not as influential as it might be in long lasting global governance challenges (Findlay 2007b).

The governance potentials of international criminal justice should not be limited to bi-products of a re-emphasised restorative dimension. As the ICC in particular will require productive integration across national, regional and international criminal justice systems in order to achieve its prosecutorial mandate, this will provide an opportunity for justice alliances (or at least understandings) which are the foundations for global governance. International criminal justice, as a force for global governance, therefore, depends on its capacity to resolve conflict and to enhance the national and regional mechanisms for sustaining good governance within a legal rights framework. In achieving this, the recognised interests of victim communities will legitimise the exercise of international criminal justice in all its forms, and will commend the capacity of global governance to resolve and avoid conflict. The transformation of international criminal justice suggested above will allow international political alliances to progress the objective of world peace above military dominance. A crucial factor in reaching such accommodations will be an ability to reconcile, in justice decision-making, the competing claims to truth/responsibility and fact/liability. This is the challenge for those who manage the process that leads to international criminal justice coming of age.

Cases

R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet 37 ILM 1302 (HL 1998) (*Ex Parte Pinochet*).

R v Bow St Metro Stipendiary Magistrate and Others, Ex Parte Pinochet (No 2) 1 All E R 577 (HL 15/01/1999) (*Ex Parte Pinochet II*).

R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet 38 ILM 581 (HL 1999) (*Ex Parte Pinochet III*).

References

Akhavan, P (2001) 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *The American Journal of International Law*, vol 95, p 7.

Arbour. L (1997) 'Progress and Challenges in International Criminal Justice', *Fordham International Law Journal*, vol 21, p 531.

Arendt, H (1994) *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin, Harmondsworth.

Ball, H (1999) *Prosecuting War Crimes and Genocide. The Twentieth Century Experience*, University Press of Kansasm, Lawrence.

Bass, GJ (2000) *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton.

Beigbeder, Y (1999) *Judging War Criminals: The Politics of International Justice*, St Martin's Press, New York.

Bierne, P (1983) 'Cultural Relativism and Comparative Criminology', *Contemporary Crises*, vol 7, p 371.

Booth, C (2003) 'Prospects and issues for the International Criminal Court: lessons from Yugoslavia and Rwanda' in Sands, P (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge.

Braithwaite, J (2002) *Restorative Justice and Responsive Regulation*, Oxford University Press, Oxford.

Burgenthal, T (1994) 'The United Nations Truth Commission for El Salvador', *Vanderbilt Journal of Transnational Law*, vol 27, pp 498 & 510.

Cassese, A (1998) 'Reflections on International Criminal Justice', *Modern Law Review*, vol 61, p 1.

Clapham, A (2003) 'Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the new International Criminal Court' in Sands, P (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge.

Coakley, V (2001) 'Towards Justice and Reconciliation in East Timor', *Alternative Law Journal*, vol 26, p 229.

Cockayne, J (2004–5) 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals', *Fordham International Law Journal*, vol 28, p 616.

Cockayne, J & Huckerby, J (2004) 'Special Court for Sierra Leone: Truth and Reconciliation Commission applications for hearings with Samuel Hinga Norman and Augustine Gbao' (unpublished briefing paper)

Colson, AJ (2000) 'The Logic of Peace and the Logic of Justice', *International Relations*, vol 15, p 51.

Crawford, J (2003) 'The Drafting of the Rome Statute' in Sands, P (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge.

Danner, A & Martinez, S (2005) 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', *California Law Review*, vol 93, pp 75–169.

Delmas-Marty, M (2002) 'Global Crime Calls for Global Justice', *European Journal of Crime, Criminal Law and Criminal Justice*, vol 10, p 286.

Delmas-Marty, M (2003) 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', *Journal of International Criminal Justice*, vol 1, p 13.

Dyzenhaus, D (2003) 'Judicial Independence, Transitional Justice and the Rule of Law', *Otago Law Review*, vol 10, p 345.

Erez, E & Rogers, L (1999) 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals', *British Journal of Criminology*, vol 39, p 216.

Findlay, M (1997) 'Crime, Community Penalty and Integration with Legal Formalism in the South Pacific', *Journal of Pacific Studies*, vol 21, p 145.

Findlay, M (1998) 'Crime as a Force in Globalisation', *Journal of Financial Crime*, vol 6, no 2, p 100.

Findlay, M (1999a) 'Relating Crime and Globalisation', *Australian Quarterly*, vol 71, no 4, p 23.

Findlay, M (1999b) *The Globalisation of Crime: Understanding Transitional Relationships in Context*, Cambridge University Press, Cambridge.

Findlay, M (2001a) 'Synthesis in Trial Procedures? The experience of the international criminal tribunals', *International and Comparative Law Quarterly*, vol 50, no 1, p 26.

Findlay, M (2001b) 'The Cost of Globalised Crime: New levels of Control', *International Journal of Comparative Criminology*, vol 1, no 2, p 109.

Findlay, M (2002a) 'Decolonising Restoration and Justice: Restoration in transitional cultures', in Strang, H & Braithwaite, J (eds) *Restorative Justice: Philosophy to practice*, Ashgate, Aldershot.

Findlay, M (2002b) 'Internationalised Criminal Trial and Access to Justice', *International Criminal Law Review*, vol 2, no 3, p 237.

Findlay, M (2002c) 'The International and Comparative Criminal Trial Project', *International Criminal Law Review*, vol 2, p 47.

Findlay, M & Henham, R (2002d) 'Criminal Justice Modelling and the Comparative Contextual Analysis of Trial Process', *International Journal of Comparative Criminology*, vol 2, no 2, p 162.

Findlay, M (2003a) 'Crime, Terror and Transitional Cultures in a Contracting Globe' in Dauvergne (ed) *Jurisprudence for an Interconnected Globe*, Ashgate, Burlington.

Findlay, M & Bohlander, M (2003b) 'The Use of Domestic Sources as a Basis as a Basis for International Criminal law Principle' in Capaldo (ed) *Yearbook of International Law and Jurisprudence 2002*, Oceana, New York.

Findlay, M & Henham, R (2005) *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process*, Willan Publishing, Cullompton.

Findlay, M (2007a) 'Terrorism and Relative Justice', *Crime, Law and Social Change*, <http://dx.doi.org/10.1007/s10611-007-9054-8>.

Findlay, M (2007b) 'Governing through Globalised Crime' (in press).

Findlay, M (2007c) 'China's Place in International Criminal Justice?' (unpublished conference paper).

Findlay, M & Henham, R (forthcoming) 'Integrating Theory and Method in Comparative Contextual Analysis' in McConville, M et al (eds) *Research Methods for the Arts and Humanities*, University of Edinburgh Press, Edinburgh.

Hague Academy of International Law (1961) *Collected Courses*, 1960-II, Sijthoff AW, Leyden.

Hazan, P (2000) *La Justice Face a la Guerre: de Nuremberg a la Haye*, Stock, Paris.

Hegel (1821) *Grundlinien der Philosophie des Rechts* (Elements of the Philosophy of Right)

Henham, R (2003) 'Some Issues for Sentencing in the International Criminal Court', *International and Comparative Law Quarterly*, vol 52, p 81.

Henham, R & Mannozzi, G (2003) 'Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis', *European Journal of Crime, Criminal Law and Criminal Justice*, vol 11, no 3, p 278.

Henham, R (2004) 'Theorising the Penalty of Sentencing in International Criminal Trials', *Theoretical Criminology*, vol 8, no 4, p 429.

Goddard, L (2000) 'The Globalisation of Criminal Justice: Will the International Crininal Court become a Reality?' *Canterbury Law Review*, vol 7, p 452.

Hodgson, J (2000) 'Comparing Legal Cultures: The Comparativist as Participant Observer' in Nelken, D (ed) *Contrasting Criminal Justice: Getting from here to there*, Aslgate, Aldershot.

Kelsen, H (1944) *Peace Through Law*, University of North Carolina Press, Chapel Hill.

Linton, S (2001) 'Cambodia, East Timor and Sierra Leone: Experiments in Internaional Justice', *Criminal Law Forum*, vol 12, p 185.

McGeary (1996) 'Face to Face With Evil', *Time*, 13 May 1996, pp 22–27.

McGregor, P (1998) '"Telling My Lais" War Crimes and Reconciliation', *Human lights Defender*, vol 7, no 3, p 4.

Megret, F (2002) 'The Politics of International Criminal Justice', *Emory Journal of International Law*, vol 13, p 1261.

Mendez, JE (1997) 'In Defense of Transitional Justice' in McAdams, AJ (ed) *Transiional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Inciana.

Nelkin, D (ed) (1995) 'Legal Culture, Diversity and Globalisation', *Social and Legal Studies* (Special Issue), vol 4, no 4.

Nelken, D (1998) 'The Globalisation of Criminal Justice' in Freeman, M (ed) *Law at the Turn of the Century*, Oxford University Press, Oxford.

Nina, D (1997) 'Panel Beating for the Smashed Nation? The Truth and Reconcilation Commission, Nation Building and the Construction of a Privileged History in South Africa', *Australian Journal of Law and Society*, vol 13, p 55.

Perez, AF (2000) 'The Perils of Pinochet: Problems for Transitional Justice and a Supranational Governance Solution', *Denver Journal of International Law & Policy*, vol 28, p 175.

Piotrowicz, R (1998) 'International Focus', *Australian Law Journal*, vol 72, p 844.

Popovski, V (2000) 'The International Criminal Court: A Synthesis of Retributive and Restorative Justice', *International Relations*, vol 15, p 1.

Rehman, J (2002) 'The Influence of International Human Rights Law upon Criminal Justice Systems', *Journal of Criminal Law*, vol 66, p 510.

Roberts, P (2002) 'On Method: The Ascent of Comparative Criminal Justice', *Oxford Journal of Legal Studies*, vol 22, p 539.

Roling, BVA (1961) 'The Law of War and the National Jurisdiction since 1945' in Hague Academy of International Law, *Collected Courses*, 1960-II, Sijthoff AW, Leyden.

Roznovschi, M (2003) 'Book Review: Sadat L N, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium (International and

Comparative Criminal Law Series)', *International Journal of Legal Information*, vol 31, p 120.

Sands, P (ed) (2003) *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge.

Sarkin, J (1997) 'The Truth and Reconciliation Commission in South Africa', *Commonwealth Law Bulletin*, vol 23, nos 1 & 2, p 528.

Scharf, MP (1997) *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*, Carolina Academic Press, Durham.

Scharf, MP (1999) 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', *Cornell International Law Journal*, vol 32, p 507.

Scharf, MP (2000) 'The Tools for Enforcing International Criminal Justice in the New Millenium: Lessons from the Yugoslavia Tribunal', *International Criminal Justice*, vol 49, p 925.

Teitel, R (1999) 'The Universal and the Particular in International Criminal Justice', *Columbia Human Rights Law Review*, vol 30, p 285.

Tochilovsky, V (2002) 'Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience', *European Journal of Crime, Criminal Law and Criminal Justice*, vol 10, p 268.

Van der Vyver, JD (2001) 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness', *Emory Law Journal*, vol 50, p 775.

Vogler, R (2006) *A World View of Criminal Justice*, Ashgate, Aldershot.

Werle, G & Jessberger, F (2002) 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law', *Criminal Law Forum*, vol 13, p 191.

Wessel, J (2006) 'Judicial Policy Making in the International Criminal Court: A Policy Guide to Analysing Judicial Administration', *Columbia Journal of Transnational Law*, vol 44, p 377.

Wilson, R (2001) *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, Cambridge University Press, Cambridge.

Wippman, D (1999) 'Atrocities, Deterrence, and the Limits of International Justice', *Fordham International Law Journal*, vol 23, p 473.

Electronic References

Discussion of the International Military Tribunal for the Far East <www.arts.cuhk.edu.hk/NanjingMassacre/NMTT.html> accessed 6 October 2003.

Full text of the Geneva Conventions (1949) and the 1977 Protocols <www.icrc.org/ihl.nsf/WebCONVFULL?OpenView> accessed 6 October 2003.

For the full text of the Special Court Agreement (Ratification) Act (2002) follow the links from: <www.sc-sl.org/> accessed 6 October 2003.

Agreement between the U.N. and Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (6 June 2003). Outline: <www.asil.org/ilib/ilib0611.htm#a1> accessed 6 October 2003.

Widespread dissatisfaction with Indonesia's Ad Hoc Human Rights Tribunal on East Timor has repeatedly led to calls for the creation of an independent international tribunal. For example: <www.globalpolicy.org/intljustice/tribunals/timor/2003/0818renew.htm> accessed 6 October 2003.

Full text of the Rome Statute of the International Criminal Court <www.un.org/law/icc/statute/romefra.htm> accessed 6 October 2003.

The 1992 media reports of Bosnian concentration-camps were unfounded <www.terravista.pt/guincho/2104/199810/deichmann_9701.html> and <www.balkan-archive.org.yu/politics/conc_camps/html/Kenney.html> accessed 6 October 2003.

Scharf's comments in the Washington Post (03/10/99) <www.fair.org/reports/post-war-crimes.html> accessed 6 October 2003.

Full text of the International Covenant on Civil and Political Rights (ICCPR) <www.unhchr.ch/html/menu3/b/a_ccpr.htm> accessed 6 October 2003.

Full text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) <www.echr.coe.int/Eng/BasicTexts.htm> accessed 6 October 2003.

Full text of the Rules of Procedure and Evidence of the International Criminal Court <www1.umn.edu/humanrts/instree/iccrulesofprocedure.html> accessed 6 October 2003.

Full text of the Draft Legislation, Enacted Legislation and Debates relating to the implementation of the Rome Statute into national law <www.iccnow.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates.html> accessed 6 October 2003.

Full text of the Statute of the International Tribunal (Adopted 25 May 1993) <www.un.org/icty/basic/statut/statute.htm> accessed 6 October 2003.

Human Rights Committee <www.unhchr.ch/html/menu2/6/hrc.htm> accessed 6 October 2003.

Committee against Torture <www.unhchr.ch/html/menu2/6/cat.htm> accessed 6 October 2003.