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Collective Responsibility for Global Crime: Limitations with the Liability Paradigm

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Collective Responsibility for Global Crime – limitations with the liability paradigm[1]

Introduction

It is not just the communitarian constituency which is unique and therefore demanding in the development of international criminal justice (ICJ).[2] As the collective reality of global crime victimisation suggests, the jurisprudence of international criminal law needs to better confront and confer new notions and determinations of collective liability and responsibility.[3] Identifying generic crimes for prosecution is not enough. Liability itself needs to be creatively collectivised. And as this paper suggests, if criminal liability is an insufficient determination in resolving the legitimate interests of victim communities, should international criminal justice look to responsibility and 'truth' as more effective measures for victim community satisfaction where collective perpetration is involved?

The treatment of joint criminal enterprise, command responsibility and superior orders by the war crimes tribunals and by the legal scholarship which supports their deliberations[4] has been distinctly unimaginative in addressing this tall order. The paper argues that an inability to escape the confines of individual liability, when exercising even the retributive arm of international criminal justice, stands in the way of a more victim-centred and thereby restorative international criminal justice.

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[2] For a discussion of victim constituency see Findlay, M. (forthcoming) 'Activating Victim Constituency in International Criminal Justice', *International Journal of Transformative Justice* June 2009.

[3] In this paper the distinction is drawn between criminal liability determined as it is through investigation, prosecution and trial, and responsibility for harm established in a wider sense of truth-telling. As can be seen from the *Inquiries Act* (UK) section 2, even formal justice mechanisms can be charged with exposing responsibility for matters of public concern, while being expressly removed from findings of liability, civil or criminal.

[4] For a critique of the judicial and academic analysis see Ambos, K. (2007) 'Joint criminal Enterprise and Command Responsibility' *Journal of International Criminal Justice* 5: 159-174.

The same will be said for restrictive interpretations of individualised rights as a responsibility for international criminal law.[5] The Rome Statute[6] when determining *individual responsibility* states that the court shall have jurisdiction 'over *natural persons*[7] pursuant to this Statute'.[8] In the Rome Conference debates extending that liability to corporations was specifically considered and denied. The counter-argument was based on the recognition that many domestic law systems do not recognise the criminal liability of corporate entities. As such, the complementarity regime of the court could be compromised. Alternatively, where corporate liability is a feature of domestic criminal law, there should be no reason to exclude the applicability of general notions to international crimes.

However, during an address to the fifth assembly of State Parties,[9] the first Chief Prosecutor of the ICC, Louis Moreno-Ocampo declared the intention to locate responsibility for crimes of genocide, war crimes and crimes against humanity in Ituri (Democratic Republic of Congo) in a wider arc.

> Different armed groups have taken advantage of the situation of generalised violence and have engaged in the illegal exploitation of key mineral resources…according to information received crimes reportedly committed in Ituri appear to be directly linked to the control of resource extraction sites. Those who direct mining operations, sell diamonds or gold extracted in these conditions, launder the dirty money, or provide

[5] Damgaard, C. (ed.) (2008) *Individual Criminal Responsibility for Core International Crimes,* Heidelberg: Springer Berlin.

[6] Article 25:1, Rome Statute for the International Criminal Court (The Rome Statute). This is the empowering legislation for the International Criminal Court (ICC) settled by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998).

[7] If it is possible to consider the corporation as a 'legal personality' then this might be a step towards aligning it with the concept of 'natural person. Certainly if the prosecution for international crimes is carried out at a state jurisdictional level then the individuals with responsibility within the corporation would face possible prosecution.

[8] In commenting on this Article, Albin Eser observes that '…there can be no doubt that by limiting criminal responsibility to individual natural persons, the Rome Statute implicitly negates – at least for its own jurisdiction – the punishability of corporations and other legal entities (Eser, A. (2002) 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jones (eds.) *The Rome Statute of the International Criminal Court: A commentary,* Oxford: OUP: 778). The same is the case for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) – (Article 6, ICTY Statute; Articles 1 and 5, ICTR Statute

[9] Ocampo, L. M. (2006) 'Opening Remarks' *Fifth Session of the Assembly of State Parties,* Hague: ICC.

weapons could be authors of the crime, even if they are based in other countries.[10]

No indictments have yet been laid by the ICC against corporations. Indeed, it has been argued[11] that both due to the significant evidentiary difficulties involved and on the principle of complementarity (if corporate criminal liability is not recognised in many national legal orders), it would be then inappropriate for the ICC to claim this jurisdiction.[12] Even as a mechanism for state reconstruction, the propensity to blame many for the crimes that are now sheeted back to the few, may not simply or incrementally produce wider reconciliation and satisfaction among the affected populace. The causal bi-products of individual and collective liability are as problematic at an international level as they are for state-based criminal justice.

The conflict resolution and peacemaking aims of the ICC, criticised by some as adventurous and inappropriate,[13] pressure for a transformed consideration of liability and responsibility within international criminal justice (ICJ). The ICC Prosecutor has signalled an interest to investigate beyond the immediate territory of local and regional armed conflict, and to extend narrower notions of criminal responsibility which have been accepted by the ad hoc tribunals. These courts have preferred to debate the nature of joint criminal enterprise,[14] common purpose and accessorial liability in international criminal law rather than embracing more collective concepts of responsibility which are at the heart of vicarious and corporate liability.[15]

The UN Special Court for Sierra Leone (SCSL) has also identified the unlawful international trade in diamonds as central to the funding and

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[10] It should also be noted that the liability here could still be individualised, directed to human actors within the corporation in a manner not dissimilar to the treatment of individuals within military agencies by the Nuremberg military tribunal.

[11] Eser, 2002: 77

[12] The success rate for prosecutions at the Nuremberg Tribunal (and cases following) of persons playing an economic role in crime, was poor (Eser, 2002: 307-10).

[13] See the detailed critique of expansive aims advanced in Damaska, M. (2008) 'What is the Point of International Criminal Justice?' *Chicago Kent Law Review* 83/1:329.

[14] For instance before the ICTY see, *Prosecutor v Tadic* Case No. IT-94-1-T, TC Judgement 7.5.97; *Prosecutor v Tadic* Case No. IT-94-1-A, Appeal Court Judgement 17 July 1999.

[15] Exploring the problems with this approach see Danner, A. & Martinez, J. (2005), 'Guilty Associations: Joint criminal enterprise, command responsibility, and the development of international criminal law', California Law Review 93/75: 77-169

motivation for conflict. In response, the UN Security Council[16] expressed 'its concern at the role played by the illicit trade in diamonds in fuelling the conflict in Sierra Leone', and directed that steps be taken by certain states towards controlling the trade. Even so, the SCSL has not indicted any individual or organisation for trading in diamonds which then exacerbated military conflict.[17]

The nature of liability is just one challenge for international criminal trial transformation in practice. The recognition of collective liability for communitarian victimisation is central in redirecting the constituency of international criminal justice which underpins the need and reality of trial transformation. In this regard, the necessity is, rather than adapting and straining pre-existing concepts of liability and sanction, to develop a new jurisprudence for international criminal justice which recognises responsibility for shared perpetration.[18] Shadowing this is the need to allow for a notion of shared victimisation which recognises the problematic and deeply contextual possibilities of overlap between criminal perpetration and victimisation. A new normative framework for ICJ, leading to a reconceptualisation of victimisation as the appropriate international justice constituency and a consequential engagement with truth and responsibility, are at the heart of the applied exploration of justice transformation referred to later in this paper.

Against the limitations of individual and collective liability the transformed international criminal trial is designed to approach dynamics for change from two directions. Initially it is concerned with victim-centred restoration accepting the problem of demarcating victim communities which also may engage in criminal perpetration as retaliation or armed struggle. Second is the consideration of collective perpetration, either in the organisational sense with corporate criminality, or where crimes are exacerbated by the involvement of the many against the many. Terrorism is a case in point. From the internal dynamics of the international trial

[16] U N Security Council Resolution 1306, 2000

[17] The Special Court is analysed in Cockayne, J. (2004) 'Special Court for Sierra Leone', *Journal of International Criminal Justice* 2: 1154-1162

[18] The normative framework which will underpin this new jurisprudence is explained in Findlay & Henham (forthcoming)

transformation is a mix of substantive and procedural re-ordering.[19] In a practical sense these changes will locate on concerns for standing, and for the sources of decision-making source narrative.

The confines of the analysis to follow do not allow for a full exploration of the needs for, and outcomes of international criminal trial transformation. Rather, the paper narrows down consideration of collective responsibility as a vehicle for advancing the cause of communitarian international criminal justice, suggesting a more effective way to engage the legitimate interests of victim communities. On the way to this we need to consider:

- imagining new notions of liability for international criminal prosecutions, in the context of truth and responsibility
- identifying victim communities as a proper focus for international trial justice, with all the problems this may pose
- constructing new roles for the juridical professional[20] in international criminal trials, to manage and monitor trial transformation and justice synthesis
- suggesting how enhanced discretion and accountability in trial decision-making will achieve transformation, despite the trend in domestic justice environments to limit and diminish judicial discretion in particular
- ensuring that the victim's voice is a significant influence over the selection and activation of trial resolution options
- reconstructing the adversarial trial environment and wresting truth from fact and responsibility from liability in certain process formats; thereby
- ensuring the place of international criminal justice in a regime of global governance which works for the restoration of victim communities as much as the reconstruction of state and political hegemony.

As the location for international criminal trial justice the ICC (actually or symbolically) provides the institutional context for critically analysing the

[19] It is suggested that for the ICC at least this can be achieved within the flexible intentions and applications of the Rome Statute while the secondary rules of procedure may need significant adjustment to incorporate restorative dimensions.

[20] The juridical professional; judges, prosecutors and defence lawyers; in transformed justice have the responsibility to inject fidelity into the accountability framework of ICJ. For a detailed examination of the importance of fidelity; see Ashworth, A. (2000) 'Testing Fidelity to Legal Values: Official involvement and criminal justice', *Modern Law Review* 63/5:633

future intersection between collective liability and communitarian responsibility.[21]

Institutional Ordering and Trial Transformation

The International Criminal Court (ICC) has advanced its role as incorporating the prosecution and punishment of select and significant offenders who endanger humanity, and thereby promoting the peace and security of mankind. It is also important to consider the court's institutional role in characterising selected victim communities, discriminating victims from collaborators and providing some degree of victim 'agency through the victim support unit.

The court's mandate emerges from the UN Security Council and its standing from the laws and authority of member states. The ICC Statute claims for the court a 'distinct nature'[22] determined by its expansive aims and its differentiation from national courts.

Aligned with this distinction, the constituencies of international criminal law, as symbolically ensured through the ICC, are victim communities in the most vulnerable states of genocide, war crimes, crimes against humanity and aggression. Despite the retributive focus and traditions of international trial justice, the ICC is being challenged through victim interests to:

- impugn the relevance of retribution as the sole or even primary focus for international criminal justice;
- realistically interpret the capacity to achieve general deterrence through trial outcomes;
- transform the trial process in a way which would recognise and ensure restorative justice paradigms with at least equal commitment[23];

[21] For a discussion of the ICC as the institutional foundation of ICJ in the context of individual criminal liability, when compared to the ad hoc tribunals, and to domestic justice paradigms see Megret, F. (2009) 'In Search of the Vertical: An exploration of what makes international criminal tribunals different and why' http://SSRN.com/abstract=1281546

[22] Rome Statute of the International Criminal Court, 37 ILM 1002 (1998) (herein after *the Rome Statute)*

[23] For a detailed argument justifying this direction of trial transformation see Findlay, M. & Henham, R. (2005) *Transforming International Criminal Justice: Retributive and restorative justice in the trial process,* Collumpton: Willan Publishing, esp. chaps 7 & 8. For an elaboration of the mechanics of trial transformation see Findlay, M. & Henham, R. (forthcoming) *Beyond Punishment: Achieving International Criminal Justice?* London: Palgrave Macmillan.

- require international criminal justice to focus its attention on legitimate victim interests by enhancing access, inclusivity and integration of these interests within the protective framework of the trial process;
- seek the reconciliation of victim community interests which are restorative and retributive as a responsibility of the juridical professionals who run international criminal trials; and thereby
- reposition the role of international criminal justice away from sectarian political dominion, towards accountable and pluralist order maintenance and justice delivery.[24]

While being forced to consider the liability of the 'legal individual' and at the same time aspiring to secure communitarian safety, the court from its first trial has faced pressures for procedural transformation fuelled through conflicts of interests and problematic indemnity.

Deriving the moral justifications for interfering in the lives of others from the notion that that conflict is essentially destructive of humanity, ICJ comprises processes seeking to resolve conflict by peaceful means which are intrinsically good. The ICC declares these essential purposes. Peace-making through trial justice suggests an engagement with competing 'truths' in ways similar to conventional trial fact-finding through adversarial argument.

The search for truth within the trial need not be some unattainable aspiration or distracted normative commitment. Nor should it be consigned to non-trial restorative resolutions.[25] It can take on, through trial transformation, as much of the operational reality and procedural appropriateness as verdict delivery within the trial process. Truth, thereby, will give a more legitimate and viable foundation for state reconstruction, than retribution and deterrence as didactic and unproven consequences of penality. Truth-telling becomes a purpose as well as an outcome of the transformed trial process.

In particular, the conflict resolution and victim restoration roles for the court rely on the fullest understanding of contextual historiography. However, trials are trials and the considerations for the court may seem bound by the indictment before it, and the construction of the prosecution case. How then

[24] For a discussion of the problematic nexus between crime and global governance see Findlay, M. (2008) *Governing through Globalised Crime: Futures for international criminal justice,* Collumpton: Willan publishing; especially chaps. 7 & 9.

[25] As discussed later, Damaska (2008) opposes this view.

will truth-telling insinuate itself where fact and evidence are the restricted trial discourse? Trial transformation intends that when, through prosecutorial initiative, defence application, victim representation or judicial intervention, the incapacity of the adversarial mode to satisfy key legitimate interests are identified, then diversion to 'truth-telling' and restorative resolutions will be an option. Whether this comes about through suspension of prosecution and conciliatory diversion, or transfer to a formal truth telling mode within the trial is a matter to be determined by the judge. The Rome Statute would not require amendment to achieve these procedural alternatives.[26]

As with the developing jurisprudence of the international criminal tribunals, trial transformation will be evolutionary and not instantaneous. Legal professionals within the court would need to approach transformation with good will for it to operationalise. The member states will have to accept that transformation better enhances the expressed purposes of the court, and thereby increase its legitimacy in the eyes of essential stake-holders, so that the original authority of the court is not withdrawn or challenged by disgruntled signatories.

Some say that to attach conflict resolution to the central aims[27] of the international criminal trial is asking too much, and doomed to frustration.[28] These criticisms have merit if the trial model under review is some narrow and constrained reflection of adversarial decision-making.[29] Even without the trial transformation we envisage, the ICC pre-trial and trial models have already moved away from an unreconstructed adversarial frame. For better or worse, the juridical professionals in the ICC re-iterate the court's exemplary function motivated by wide peace-making aspirations. These are beyond individual deterrence and concerns about impunity. They represent a fundamental belief that through strategic prosecution the ICC may have a much more extensive conflict resolution function than the consequences of prosecuting individual liability in domestic courts might anticipate.

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[26] The rules of evidence and procedure prevailing in pre-trial and trial proceedings would have to be adjusted to enable this discretion.

[27] Remembering that the ICC has clearly claimed this purpose for the court and not left it as a prosecutorial aspiration – See LRA indictment.

[28] For instance, Damaska (2008).

[29] This could not be said of the procedural hybrid form of the ICC.

However, exemplary prosecutions and penalties cannot of themselves claim restorative potential. To maximize the restorative dimension of formal ICJ the normative foundations of the trial transformation process[30] must reflect a number of humanitarian principles. The most fundamental of these involves equal treatment and tolerance of human difference and frailty. The justice system and the trial in particular, must not be used as a form of oppression where the law and its execution evoke a theory of social control by force and violence. Further, the humanitarian normative foundation advances the legitimate interests of victim communities over the sectarian priorities of a limited cultural and political hegemony.[31]

It could be argued that the diversionary pathway to trial litigation and the deductive process of evidence accumulation and presentation favours justice through institutional and social exclusion. Added on to a trial context where access is much constrained and inclusivity formalized, the conventional criminal trial is a discriminatory regime (N.B. the processes of fact finding, confidentiality arrangements and awarding punishment). That explains why the normative repositioning of ICJ which respects restorative as well as retributive paradigms requires humanitarian foundations confirmed through improved procedural access, inclusivity and integration. [32]

Retributive international criminal justice now administered through a largely adversarial process is rationalised by substantive norms of law and procedure that conventionally ignore essential qualities of humanity at large, even though presumptions of equality before the law overlay trial fairness. This rationalization is itself justified by a notion of due process where the accused person is protected against the vengeance of victim communities, and the domination of the state.[33] In this 'rights' paradigm we have argued[34] a strong justification for locating even limited restorative determinations within the international criminal trial is to benefit from measures of procedural fairness.

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[30] As discussed in Findlay & Henham (2005).
[31] For a discussion of the connection between humanity and hegemony see Findlay (2008); Chap 3.
[32] This is discussed in greater detail in Findlay & Henham (forthcoming) chap 1.
[33] See for example Article 6 of the European Convention on Human Rights
[34] Findlay & Henham (2005) chaps 7 & 8.

The selective 'rights focus' of the trial should also be an important expectation for victim interests seeking restoration, whether these rights take second place to accused's protections or not. It is the recognition of procedural fairness (in a more *balanced* setting than conventional adversarial trial fairness) and juridical accountability over humanity's interests which can be didactically asserted and valued through the transformed international criminal trial. The balance is provided through the wider recognition of victim community interests through the exercise of juridical discretion over retributive or restorative procedures and outcomes. Once so enunciated in trial transformation, procedural fairness and the rights it recognises may act as a comparative normative framework for the processes of alternative institutions which will continue to have a much wider restorative remit in ICJ .

The retort to this wider declaratory mission to inject rights from the trial to alternative modes might be, "why not simply require these rights of international criminal justice generally"? The nexus between the increased satisfaction of victim interests and enhanced rights protection within the formal trial setting is ripe for empirical testing during the progression to trial transformation. Once set then this understanding should be offered by example rather than compulsion to other justice modes concerned to maximise legitimacy and governance influence (Findlay, 2008; chap 7).

The 'rights protection' paradigm characterising the transformed trial is:

- Committed to communitarian rather than individual rights recognition.
- Respecting the preferred rights of accused persons in the adversarial trial mode, while victim voice will be given significance in pre-trial and trial fact determinations as well as in sentence.
- Where the restorative/mediatory role victim voice will be given equal standing as any other key truth-teller (and contesting victim voices will be free to dispute the stories told)
- Where the sanctity of the trial and the pre-trial context as it protects witnesses and values evidence, will prevail in both the retributive and restorative modes, and will value and protect the process of truth telling in the same way it validates and protects witness evidence; this in turn
- Injecting into restorative 'truth-telling' within and beyond the transformed trial expectation for the recognition and delivery of communitarian rights in which the juridical professional ensures agency.

Transformed trial process will also produce a new justice ordering where real institutional involvement will be accorded the victim voice. Integrating victim interests in a more sophisticated, even if only practically didactic fashion within the transformed international criminal trial will open up the prospects for 'fairness' as a measure of the humanity of justice processes. Communitarian integrity and, more importantly, an awareness of the contexts that give rise to cultural differences based as these may be in:

- alternative world views of fairness,
- competing conceptualisations of primary knowledge,
- valuable normative traditions, and
- community virtues,

are picked up by the 'truth-telling' opportunities in a transformed trial framework. In this regard, trial fairness will not simply be secured through the concern for the accused in the adversarial context, but more widely balanced in restorative opportunities for the victim and the offender.

The new institutional manifestation of transformative *trial* justice offers the possibility for reconciling differences of approach exemplified in the dialect of retributive and restorative justice. This dialectic is resolved through trial transformation, where in a common due process procedural context the juridical professionals are able to activate either or both justice options to satisfy legitimate victim expectations through conciliation rather than contest. The transformed trial, as a centre-piece within this transition transcends the debate about punishment before restoration by recognizing much more than adversarial differences, thereby resolving conflict by using rules of law and procedure to facilitate flexible and conciliatory outcomes.

Having said this, as with the international criminal trial at present limited to retributive considerations, prosecutions are very selective and as such the interests covered are as symbolic as they are significant. To open up the trial to restorative possibilities will not invite a flood of victims to enjoy this new atmosphere of procedural fairness and retributive/restorative resolve. The vast majority of victim interests will still await recognition and resolution in the alternative justice domain. The limited resources of the juridical professional

and the progressive politicization of the prosecution process will confirm this inevitability.

If a limited didactic or expressive role for the international trial prevails, why do we justify, or even require, trial transformation embracing new restorative possibilities, and the 'truths' on which these are founded? Is this not expecting a radical repositioning of the trial without adequate victim coverage? Perhaps this is a sound criticism in the context of contemporary trial practice. But as Damaska[35] concedes even for the retributive adversarial trial, it is a dominant and valuable didactic rather than a reconstructive enterprise. In this sense trial transformation may not always or necessarily change this exemplary purpose into more practical outcomes. Truth-telling and historicising may necessarily replace guilt and penalty without essentially enhancing the possibility of individual responsibility. That is why collective perpetration and victimisation suggests a more vital arena for trial histories as a means to identify and apportion moral responsibility.

In light of the practical limitations of the international criminal trial ongoing (transformed or not) as a general context for examining the interests of humanity how can we re-argue access, inclusivity and integration in a more didactic sense? The answer lies in the representative the inclusion of 'interests' rather than armies of victims. In that, a transformed trial recognises the needs of humanity as central 'pathways of influence'[36] in a decision site model, even if the trial outcomes could only ever (as is the case with retribution) satisfy these interests at the most symbolic level. In this expressive and truth-telling form, victim communities are championed in a small number of transformed trials for the wider restorative impact in associated alternative (and fairer?) justice paradigms. In addition, if collective responsibility is better enforced within the transformed trial setting then victim community interests are more likely to be achieved

The transformed trial, selective as its resolutions will remain, gives exciting new possibilities to the victim interests identified for access, inclusivity and integration. To achieve this, liability and responsibility will be on offer as possible resolutions within the trial process, enunciated through fact and or

[35] 2008.
[36] Findlay & Henham, 2005: Chap 3

truth sources. In light of negotiation through judicial discretion the dichotomy of truth and liability v fact and responsibility (discussed later) can be viewed as false at the level of both ideology and process if the transformed trial breaks free of its adversarial strait-jacket and recognises and values cultural plurality. A more central place for victim communities within the transformed trial will necessarily promote this harmonization.

As Tamanaha[37] suggests, both fact and value are essentially cultural entities, through which they receive real social location. In this respect a new approach to fact and value as co-existing non problematically (or at least outside adversarial discrimination) opens up the opportunity for transformative justice in a holistic sense, focusing on humanity and its protection. If there is a paradox between fact and value within international criminal justice it may lie in the recognition that transformed trial processes must integrate retributive and restorative justice to provide a wide normative context which is capable of satisfying different and sometimes contesting demands for justice.

In suggesting the transformative path we accept the following reservations:

- Limitations in victim access, inclusivity and integration depending on the political and prosecutorial dynamics of case selection and management;
- The significance of 'humanity' over partiality and sectarianism in focusing trial constituency and the interests it should reflect; and
- The continuing need to grow alternative, transformative and restorative justice processes and resolutions to satisfy victim interests outside the didactic and conciliatory capacities of trial decision-making.

Trial transformation envisages adversarial and mediatory phases of the trial where fact and/or truth will be established for transformative purposes. However, it would be wrong to suppose that retributive or restorative objectives will predominate in either mode because the transformative rationale depends on negotiating, recognizing and managing legitimate victim

[37] Tamanaha, B. (1979) *Realistic Social Theory: Pragmatism and social theory of law,* Oxford: Clarendon Press.

interests at any stage pre-trial and trial. These may or may not approximate retributive or restorative concerns. What transformation does mean is that conventional adversarial concepts of liability, the nature of the evidence required for liability attribution, and how much truth and fact comes to be admitted for any purpose, need to be detached from their primary association with retributive outcomes.

It is through reconciling potential outcome modes through different styles of negotiation that a wider range of harm and a larger field of perpetrators can be brought within the justice net. The logical consequence of this is that more legitimate victim community interests are satisfied. However, to achieve this it is necessary to augment the search for individual responsibility with options for truth-telling and ascription of responsibility which may not meet evidentiary proof or adversarial predominance. Even so responsibility can draw in collective perpetration and communal suffering when criminal liability fails to technically achieve the limits of the law.

Truth/Fact Divide? – Much ado about nothing?

Before embarking on a brief interrogation of the separation between truth and fact, an observation on the place of truth within the trial is merited. In his illuminating essay on 'The Jury and Reality' Zen Bankowski[38] explores the search for truth within the trial. He suggests that any such search is based on epistemological premises requiring further testing. Bankowski challenges any assumption that the trial is about 'finding' truth in the manner that an explorer finds a new land. In his view the context of the adversarial trial not only restricts this, but was never essentially designed for any such eventuality. As a purposive exercise, fact-finding is not finding facts (or for that matter truth) in the trial at all. Rather than an epistemological exercise of uncovering what 'is', the trial suggests to the jury what 'ought' to be in a normative sense. Allan Norrie confirms this view in his critique of the subjective interpretation of the 'guilty mind'.[39] It is an inductive rather than empirical process of psychopathology. In this regard Norrie reminds us that historiographic as well as legal methodologies need to be employed in understanding the rise of individualised criminal liability.

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[38] Bankowski, Z. (1988) 'The Jury in Reality', in M. Findlay & P. Duff (eds.) *The Jury under Attack* London & Sydney: Butterworths; chap 2.

[39] Norrie, A. (2006) *Crime History and Reason* London: Butterworths; chap 1.

Bankowski next suggests that there is a 'sociology' (or social interaction) that is the adversarial trial which gives a particular impetus to truth in the trial. In discussing the 'coherence of the case' Bankowski identifies fact as the outcome of decisions about persuasion and the minimizing of doubt. Can the product be truth? From here the trial of fact becomes at the very least a 'truth certifying' process; a game adjudicated by the rules of evidence where one side wins the contest over guilt or innocence by overcoming pre-determined hurdles of proof, or countering these with justification or excuse. Is the product necessarily truth? Bankowski concludes that fact finding mechanisms within the conventional adversarial system say more about our aspirations for society and its governance than it does the achievement of epistemological truths.

Truth, as much as fact, has a vital place in the discourse and narrative of international trial justice. Under this recognition, the adversarial model of trial fact finding can co-exist at least in the pre-trial phase with mediation processes more common in the truth and reconciliation environment.[40] The conditions under which mediation may be the preferred approach in trial deliberations will obviously depend on where truth in place of contested fact is deemed through judicial discretion to best determine prevailing victim interests at any particular time in the process. The shift from fact to truth, and adversarial to mediation styles will evidence the dynamic process of transformed trial justice. So saying, it is the conventional trial format, and the self-interested investment of trial professionals in the status quo that will stand in the way of the transformation project. The achievement of wider court goals and the quest for legitimacy will counter structural resistance.

If judicial discretion is to be mobilised to orchestrate the shift between fact and truth, adversarial contest and mediation, it will need to become familiar with techniques for encouraging compromise and truth telling to promote healing, as well as proportioning individual blame on the basis of legally defined harm. This choice will be pre-determined by whatever the revelation of truth or the determination of fact predominates at any decision-making stage[41] leading on to alternative concerns for responsibility and reconciliation or liability and retribution.

The essence of the trial as it currently stands is fact. Value needs inclusion for contested fact to assume the status of truth. The role of the judge in any such transition is crucial if the trial is to provide its context. These

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[40] Trankle, S. (2007) 'In the Shadow of Penal Law: Victim offender mediation in Germany and France', *Punishment and Society* 9: 395-416

[41] See for example Findlay & Henham (2005) chap 3.

imperatives envisage a decision paradigm where the attribution of value to fact through the exercise of discretion provides the power for change. So the judge will have a pivotal role in deciding whether truth supports a determination of responsibility or liability, and their appropriate outcomes, and how fact and value should merge for these purposes. Judicial discretion will also negotiate how the choice and selection of outcomes may be derived from what is accepted as definitive truth and the ways in which legitimate victim and community interests will be recognised to drive the choice of alternative resolutions and their outcomes.

Harmonisation Possibilities – liability v responsibility

Trial transformation is as much about diversifying trial decision-making processes as it is about opening up alternative outcomes. A crucial indicator of trial transformation is the radical and applied "harmonisation" of two crucial decision-making paradigms. The first is the nexus between fact and liability around which the adversarial trial conventionally revolves. Next is the more broad concern for truth and responsibility which have featured in alternative international criminal justice resolution frameworks such as truth and reconciliation commissions.

The merging of these two paradigms is the natural, if not challenging, consequence of introducing restorative justice possibilities into a retributive trial process.[42] At the very least this means a reconceptualisation of the foundations of trial decision making such as 'fact' and 'evidence' against wider interpretations of 'truth'. We have indicated in *Transforming International Criminal Justice* that evidence as both a facilitator of and an outcome from trial decision-making will through transformation be re-envisaged so that it may be employed for retributive and then where appropriate restorative deliberations.[43]

Well known themes germane to fact/value debates have long fuelled socio-legal critique.[44] With this as a background the discussion of the purposes of 'evidence' within the transformed trial structure where the normative constituency is 'humanity' and the deliberative outcomes can be either retributive or restorative, can critically proceed.

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[42] Argued for more fully in Findlay & Henham (2005) chaps 7 & 8.

[43] There will be particular difficulties however, in the status of evidence once applied to restorative contexts such as mediation, if it is then to return to its procedurally recognised standing in adversarial argument.

[44] Tamanaha (1997) chap 2.

The current divide in international criminal justice is between liability-focused trials and restorative truth-centred commissions. UN discourse narrows this down somewhat misleadingly as a tension between justice and peace-making. As an unproductive institutional and process divide, it fails at least to encapsulate and broadly satisfy the diverse and legitimate interests of victim communities.

Building on the case for integrating restorative and retributive justice within the international criminal trial, it is logical to open up the manner in which facts and truth can be established and applied for different but not inconsistent trial purposes. The widening application of what up until now, in the adversarial context, might be viewed as incompatible sources, necessitates unlocking the trial from narrow notions of liability and its retributive outcomes, without diminishing or dismissing these as they represent legitimate victim interests.

Juridical discretion is proposed as a constructive and creative context where evidence and truth can co-exist for enhanced trial objectives. The transformed trial can explore the stories which need to be told by victims and the truth to be negotiated for community reconciliation in a similar manner as conventionally the trial objective has focused on liability in preference to broader determinations of responsibility.

The challenge is to introduce a more active victim voice along with the establishment of truth and the responsibility which follows, not at the expense of retributive punishment where liability may also be up for grabs. Up until now, these objectives have remained corralled in international criminal justice to distinctly separate contexts of legal determination and regulation.[45]

Depending on the context of collective perpetration and communal harm in particular, truth and responsibility may be the appropriate negotiation at the expense of liability through adversarial contest, within a new decision-making trial format. Hence, notions of individual criminal responsibility need to be broadened beyond individual culpability, recognising that conventional concepts of individual and collective fault must be argued against the

[45] Roche, D. (2005) 'Truth Commission Amnesties and the International Criminal Court', *British Journal of Criminology'* 45: 565-581.

communitarian understandings of what this means for legitimate victim interests. There are several important procedural and substantive hurdles to achieving this within current international trial models.

The first hurdle – jurisdictional challenges

Particularly in Western Europe victim/offender mediation (VOM) is common as a precursor to the adversarial trial. In a detailed qualitative study of victim/offender mediation in Germany and in France, Stefani Trankle[46] presents problems which contradict the aims and working principles of VOM as well as the legal rights of participants even if an agreement between the parties has been reached. Trankle puts down the essence of the problem as being that VOM is not able to secure in practice its specific modus operandi in the framework of penal procedure. She argues that the informal and pedagogical logic of mediation is constrained by the penal framework, namely its power to impose its formal and bureaucratic logic on the mediation process. In her study it was the penal law that dominates the procedure of VOM and impedes the interaction process.

Trankle's research highlights the conceptual and procedural impossibility of successfully incorporating even early stage victim/offender mediation in a trial process not subject to transformation. The integration essential for mediation to work in any true sense of parity will be thwarted by the functional and structural imperative of adversarial trial justice where prosecutorial dominance and victim marginalisation undermine the conciliatory nature of mediation. Trankle concludes that victim/offender mediation in the two jurisdictions targeted in her research does not work well within a system of penal law. Victim/offender mediation is based on ideals that are not easily compatible with the structural conditions laid down by the judicial framework in an adversarial and retributive model.

> From my point of view the main problem is the structural link between mediation and the penal system. The empirical problems described (in the study) add up to the question of whether victim/offender mediation ought to be institutionalised within, or outside, the penal system. The

[46] (2007)

> question is how much 'shadow of leviathan', that is how much formality and power control is necessary to guarantee procedural rights and how much mediation can endure without losing its specific character.[47]

The issue of destructive tension between mediation paradigms and penal decision-making frameworks has been widely discussed in the literature of legal sociology.[48] It is recognised that the more informal mediation is the more elements that do not belong to the penal procedure are introduced as such, and the less it can be controlled.

If the judiciary is to keep control over VOM and in so doing retain the conciliatory integrity of a restorative mode, then both the nature and framework for exercising judicial discretion needs to transform. The judiciary, in a conventional trial model, has at its disposal sufficient power to exert control on mediation officers and the progress of the mediation they deliver. On the other hand, too much control on formalism by the judiciary or trial professionals will so adulterate the restorative context of mediation as to make the essentials of parity between the non-professional parties impossible to obtain.

Trankle discusses the possibilities to improve the practice of victim/offender mediation within a penal system of trial justice. However, she does so within a very limited reform framework, not one which envisages the possibility or achievement of wholesale trial transformation. She warns against confusing a penal and psychological procedure which will tend to confuse participants regarding what it includes and excludes. In this sense the extension of the study is to:

- identify the impracticality of restorative justice within a conventional penal model;
- highlight the significance of judicial discretion in the management of restorative trial opportunities (conventional or transformed); and
- identify the particular relationships in a restorative enterprise which would need to transform its decision-making pathways were to avoid

[47] (Trankle (2007) 411.

[48] Amongst others by Spittler, 1980; Von Trotha, 1982; Jung, 1998, 1999; and Trenzek, 2002, 2003; referred to in Tankle (2007).

> the constrictions of retributive penality, and at the same time embrace restorative possibilities within a rights-protection trial framework. The essential consideration here is the management of otherwise alternative trial sources be a reconstituted judicial discretion.

Once jurisdiction for whatever intervention is preferred, has been settled, the issue of attributing liability or responsibility presents itself. For collective liability in particular, the legal individual remains the unrealistic focus of conventional international criminal trials. Crimes by groups against groups necessitate a broader engagement either for liability and punishment to follow, or at least for truth and responsibility to be attributed.

The Second Hurdle – Collectivising liability

International victim/offender interaction in the context of crimes against humanity or genocide realistically demands collective rather than individual engagement. Despite the reluctance of international criminal legislation and its instrumental processes to venture outside the crimes of the individual (and tortuous interpretations of liability through association), collectivized responsibility has been a major consideration in truth and reconciliation settings.

The ICTY in a number of decisions wrestled with the scope of 'joint criminal enterprise'.[49] This intention behind the doctrine is to construct through the commission of similar or collaborative acts, agreed to or contemplated, a culpable association with the perpetrator. In this way it is a doctrine to impute individual liability through association across a group. From an evidentiary standpoint the doctrine saves the prosecutor the necessity to prove communicated agreement or a causal link to the perpetration of the criminal act.

As Damaska concedes of the doctrine:

> …its animating idea – that of reaching the criminal masterminds – is sound. It responds to the fact that most international crimes are committed in an organizational context, so that looking for principal culprits beyond hands-on perpetrators makes eminent sense. It is the

[49] For a discussion of this see Haan, V. (2005) 'The Development of the Concept of Joint Criminal Enterprise at the International criminal Tribunal for the Former Yugoslavia', *Int. Crm. L R* 5: 167 at 169-94. Recent judicial discussion can be found in the *Prosecutor v Brdjanin,* Case No. IT-99-36-A, Judgement, 357-450 (ICTY Ap. Ch. April 3, 2007)

> elaboration of that idea that causes concern. Under the presently prevailing understanding, the scope of membership in the enterprise, as well as its spatial and temporal range, are uncertain and liable to arbitrary extension.[50]

The sharpest criticism of 'common purpose' or joint criminal enterprise approaches to collective liability has been in circumstances where agreement is inferred from foresight of consequences, or as being within the accused's contemplation. [51] The slippage between judicial hindsight and actual foresight (or not) within the pressures and confusions of conflict and armed struggle can tend to dislocate evidentiary construction from truth.[52]

The difficulties facing courts in being satisfied that degrees of involvement equate with perpetration and individual liability, highlight the tensions when forcing inclination, impression and predisposition into a form of evidence equating with the guilty mind of the individual. The legal wrangling over the interpretation of superior orders,[53] command responsibility[54] and equal culpability[55] emphasizes the incapacity for collective liability to be viewed outside the constraints of the individual and his 'mind'.

Amann looks at the problem of collective liability with particular reference to genocide. [56]The state of mind required for the crime is the intent to destroy in whole or in part, a national, ethical, racial or religious group as such'[57], much more than mass killings. Conviction requires that the victim belongs to one of 4 designated protected groups. Evidence of the intent to destroy can take other crime forms but it must be directed against the designated protected group. Therefore, liability is essentially dependent on harming a specific victim community. Here, the group mentality in question is not merely that of certain perpetrators. It is the collective mentality which

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[50] (2008) 352.

[51] Cassese, A. (2007) 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', *J Intl Crm J* 5: 109

[52] Rachlinski, J. (2007) 'A Positive Psychological Theory of Judging in Hindsight', *U Chi L R* 65: 571

[53] Ambos (2007).

[54] Marston Danner, A. & Martinez, J. (2005) 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal law' *Cal L R* 93:75

[55] Ohlin, D. (2007) 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', *J Intl Crm J* 5: 69

[56] Amann, D. (2002) 'Group Mentality, Expressivism and Genocide', *Int. Crm. L R* 2: 93

[57] Convention on the Prevention and Punishment of the Crime of Genocide Art II

binds the protected group that also gives purchase to the prosecution and punishment endeavour.

The question is asked with respect to genocide as against other forms of collective harm; so what? Does naming an act genocide bring it any added significance. Amann holds it does because international and domestic laws against collectivized harm and victimization, it is argued, 'operates as a means for articulation and nourishment of social values'.[58] To this extent the declaratory purpose of criminalizing (or even holding responsibility for) genocide is as important as the punishment of the individual or the group.

> This expressive function has special force in international criminal law, only now entering an era in which ongoing international criminal tribunals reinforce pronouncements of norms, such as the proscription against genocide in the 1948 Convention '.[59]

Even so, it is recognized that for genocide as a unique form of criminal liability, the limited range of protected groups affected by the collective harm so as to substantiate genocide resists upsetting the singular status of the proscription. For groups falling outside the protected range, with individual liability not sufficiently answering other heinous forms of collective victimization, responsibility may await truth telling and restorative interventions beyond failed punishment.

If collective liability remains a narrow legal construct in international criminal law then the argument to include considerations of truth and responsibility within the transformed international trial become a clearer aspiration. The attribution of responsibility depends on truth-telling beyond adversarial argument. The tensions inherent in adversarial contest are exacerbated when victimization and perpetration are collectivized and cases are multiple. Contrary accounts are difficult enough to resolve as truth when there are two self-interested individuals in the frame. Multiply that through collective liability, and even legal fictions such as reasonable contemplation will not produce a credible truth-telling environment. As Haack suggests truth is not a consequence of the 'clash of bias and counter-

[58] P.95.
[59] Ibid.

bias' because, as with collective liability determinations, the more complex the investigated question, the more partisan polarization becomes the straitjacket to historians.[60]

The Third Hurdle – Criminalising Organisations

In Australian domestic jurisdictions there are several recent models for the criminalizing of organizations within which collective liability can be constructed. Kyriakakis[61] suggests that the integration of ICC crimes within the Commonwealth Criminal Code, aligned with the Codes approach to corporate liability, has created an opportunity to prosecute corporations for global crime, even under the universal jurisdiction principle.[62] The possible reach of the Code when testing Australian international crimes provisions against its framework of corporate liability might, it is argued, fill the void left by the ICC's restriction to the individual legal personality. The Code (at Part 2.5 section 12.1) makes it clear that all offences contained therein apply equally to bodies corporate as to natural persons.

The possibilities under the Commonwealth Code for making corporations responsible for the harm they cause may be wider than what is offered through the civil reparations route of the US *Alien Tort Claims Act 1789*,[63] provided the Code is extended off-shore reach. The Code would not need to rely on the authority of the law of nations or customary international law[64] in order to move corporate responsibility to a determination of criminal liability.

In the Code drafting conventional notions of the mind of the company are relied upon to establish liability through identification and transference. Constructing the mind of the company for the purposes of criminal liability is not possible, however, through aggregating individual 'culpabilities' exhibited by groups of individuals in the company. The unique feature of determining

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[60] (2004) 49.

[61] Kyriakakis, J. (2007) 'Australian Prosecution of Corporations for International Crimes: The potential of the Commonwealth Criminal Code', *Journal of International Criminal Justice* 5: 809-826.

[62] Kyriakakis refers to the investigation by the Australian Federal Police into the possible role of Anvil Mining Limited in facilitating a military offensive in the Democratic Republic of Congo. This investigation, she alleges, indicates that Australia like many other nations, is grappling locally with the possibility of corporate involvement in International crime.

[63] 28 USC 1350

[6464] Joseph, S. (2004) *Corporations and Transnational Human Rights Litigation,* Oxford: Hart.

liability which would particularly lend itself to global crime, is the notion of 'criminal corporate cultures'.[65] Part 2.5 section 12.3 of the Code provides two routes for proving fault where culture is concerned. A company can be liable where:

1) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

2) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

It cannot be said that the Code criminalises organisations per se. Rather, it either identifies the mind of the company or a criminal culture that influences that mind. In jurisdictions such as China, criminal liability and sanctions can attack organisational structures and entities, as well as their membership (Findlay, 2008; pp.205-206). In Hong Kong the *Societies Ordinance* advances the proscription model for the control of outlawed organisations and their membership. Interestingly, the criminalisation of the organisation was not the stated purpose of the recently enacted *Crimes (Criminal Organisations Control) Act (NSW) 2009.* This legislation was a criminal justice response to an outbreak of bikie gang violence in NSW. The Act claims extraterritorial operation to in part, have organisations 'declared' which will have criminal consequences for membership and association. A judge making a declaration needs to be satisfied that members associate 'for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, or the organisation represents a risk to public safety and order (section 9). Proof is only required on the balance of probabilities. Associated with declaration is the facility for the court to make control orders against individuals who associate with the organisation.

This is not the place to analyse the many problems associated with proving and prosecuting membership or association as determined in the Act. For the purpose of a concern with collective liability and the transferability to international criminal law, the issue of *association* is crucial. The Act views

[65] "Corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

association as being in company with, or communicating with a member. Association becomes a criminal offence. It would appear under section 23 of the Act that association is a status offence; that is where criminal conduct is confirmed through the act of association. It is not clear whether an accused is also required:

- to share the objectives of the organization regarding serious criminal activity;
- to agree with others to share these objectives, or to have this agreement implied;
- to have agreement or shared objectives inferred as a natural consequence of association; or
- to intend to associate for any serious criminal purpose, or otherwise.[66]

It would seem, however, that some mental state is required for liability. This assumption can be drawn from the construction of defences to a charge of association. On the one hand, section 26 (5) lists certain types of association (like close family membership, or in the course of lawful occupation) which might be disregarded for the purposes of the offence. While it can be assumed that the onus shifts to the accuse to raise these issues in justification of association, the motive or intention for association outside the charge on the part of the accused is an essential proof. Beyond denying association, or that an associate was a member of a declared organization the other defence against association would be that the accused knew that the organization had been otherwise authorized to conduct activities which would in ordinary circumstance be considered seriously criminal or a challenge to order.[67]

If little else these two legislative approaches to collective liability identify the challenges in redirecting international criminal law away from approaches dealing with joint criminal enterprise, command responsibility or common purpose. Is it then best for the ICC to move more towards considerations of the collective challenge to human rights? In answering this question we

[66] Section 26 (6) relieves the prosecutor of the necessity to prove that the defendant associated with any particular purpose or that the association would have lead to the commission of any offence.
[67] See section 27 (6) for the circumstances of authorisation.

continue to address corporations as criminal organizations, rather than say political resistance groups in transitional state conflict. Despite the obvious and documented impact of multi-national corporations in fomenting civil unrest, corporations represent a legal fiction as individual legal entities, but resist criminal liability because of their collective and incorporated form. This increases the challenge for conventional criminalization through prosecution and trial processes

The Fourth Hurdle – Agency against Collective Human Rights Abuses.

Schabas considers general principles of international individual criminal responsibility (accomplice liability in particular) and how they could be employed to prosecute 'economic actors' who participate in international crimes.[68] In the context of corporate crime these principles might be applied to the prosecution of individuals within the body corporate. As Schabas argues, Article 25 of the Rome Statute has at least two potentials for linking accessorial liability to the nexus between business and international crime:

1) article 25 does not stipulate that the assistance provided (economically or through business) should be substantial in order to constitute aiding and abetting;

2) the wording of the Article entitles the prosecution of an individual on the basis of having acted through a corporate entity to commit an international crime.[69]

The problems associated with working from the liability of the individual to that of the corporation in the economic sphere challenges a broader consideration of morality and good global citizenship. As Braithwaite and Fisse suggest for punishing corporations[70] the complexity of collective responsibility requires a rethink of conventional responses which might be appropriate for individuals, but not corporations. How can it be right that corporations profit from what would be considered as criminal for individuals simply because the

[68] Schabas, W.A. (2001) 'International Humanitarian Law: Catching the accomplices', *International Review of the Red Cross* 83: 439-456.

[69] For an expansion of this position see Chapman, A. (2004) 'The Complexity of International Criminal Law: Looking beyond individual responsibility to the responsibility of organisations, corporations and states', in R. Thakur and P. Malcontent (eds.) *From Sovereign Impunity to International Accountability: The search for justice in a world of states,* Tokyo: United Nations Press.

[70] Braithwaite, J. & Fisse, B. (1993) *Corporations, Crime and Accountability,* Cambridge: CUP.

law of global liability cannot find the technology to encompass the company perpetrator? Legal incapacity could never be equated with innocence, or to a lesser extent, moral probity and hence impunity.

McCorquodale and Simons[71] argue that states routinely support and assist their corporate nationals in prosecuting and advancing global trading interests. Even though states may not advocate human rights violations as a consequence of these extraterritorial adventures, through acts or omissions states may unwittingly contribute to corporations violating rights off-shore. Therefore, is there a case for home state responsibility in such situations of rights violations?

Corporations do carry human rights obligations. The nature of transnational corporations and their impact on the international legal system in a commercial sense at least is prefaced on good corporate citizenship. Where states carry human rights obligations for actions of all corporations within the state's territory, global governance requires that international human rights law (IHL) has purchase over human rights violations by corporations advantaging themselves extraterritorially.[72]

It could be argued that states become internationally responsible for rights violations [73] by their corporate citizens where:

- a corporation is exercising government authority, including where it has exceeded that authority;
- a corporation is acting under the instruction, direction or control of the state, including where it has ignored or contravened instruction;
- a state aids and assists the corporation with its activities, in the knowledge of circumstances of unlawful activity;

[71] McCorquodale, R. & Simons, P. (2007) 'Responsibility Beyond Borders: State responsibility for extraterritorial violations by corporations of international human rights law', *Modern Law Review* 70/4: 598-625.

[72] It should be remembered that IHL is often more seen as legitimating rights violations through armed conflict rather than presenting a framework of rights protections.

[73] In methods similar to states responsibility in international law, rather than through the domestic enactment of international criminal law.

A state may have international responsibility for a foreign subsidiary of a corporate national where:

- state practice shows that the state's relationship with transnational corporations is not territorially limited, and
- a duty of due diligence to protect from harm applies to the state, whether knowledge is actual or constructive, and the state facilitates that duty.

International organizations such as the OECD recognize the need for states to shoulder responsibility through their domestic jurisdictions (state responsibility), for rights violations by corporations where international law alone may not have clear purchase.

> (States should encourage corporate nationals) to respect human rights of those affected by their activities consistent with the host government's international obligations and commitments.[74]

In this guideline may lie the seeds of its own impotence. If international customary law fails to regulate corporate rights violators, why should we believe domestic regulations will be any more effective if the domestic jurisdiction has a checkered rights record through a reluctance to act on international rights obligations? Isn't this a more fundamental challenge to the state as the holder of both rights and obligations? Perhaps the notion of state responsibility in international law needs to give way where global crime is concerned to considerations of collective liability or responsibility effectively determined through a transformed ICJ. Once again the call for corporate responsibility may rely on histories of truth and costly revelations against corporate reputation.

Imperatives for Truth: the historiography of justice

Recording history as an aim of ICJ is closely connected to wider concerns for conflict resolution. Cassese[75] identifies the enunciation of an accurate historical record so that 'future generations can remember and be made fully cognizant of what happened' as a worthy purpose of ICJ.

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[74] OECD (2000) *Guidelines for Multinational Enterprises,* para. 11.

[75] Cassese, A (1998) 'Reflections on International Criminal Justice', *Modern Law Review* 61/1: 1-10 at 6-7.

This is no simple task. Contested histories proliferate as much in the experience of truth and reconciliation commissions, as alternate facts fuel adversarial examination. Even so, the didactic purpose of justice is undeniable in the widest presentation of the story at issue. The question remains as to whether the trial is the place for this 'truth-telling' and if so, how is it to be managed.

Damaska denies the validity and possibility of judicial historiography because 'judges cannot sufficiently disentangle themselves from the web of legal relevancy'.[76] Even if this is so, it acts not so much as a denial of historical record for the achievement of ICJ, but rather the need for trial narrative to break free from the procedural strictures of fact-finding.

We assert that trial transformation makes truth-telling possible and appropriate. Why so?

- It acts as a precursor to restorative outcomes which address significant victim interests;
- It may produce justice understandings that adversarial evidence rules can conspire to restrict or conceal;
- It gives an expanded victim-voice which if not leading on to liability determinations will not necessarily compromise the rights of the accused; and
- It opens up possibilities for judge-led mediation and conciliation where retributive outcomes are unlikely or inappropriate.

The effect of the 'truthful' recording of history which promotes reconciliation was referred to in the ICTY case of *Plavsic.* On this issue the tribunal stated:

> The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. In this respect, the Trial Chamber concludes that the guilty pleas of Mrs Plavsic and her acknowledgement of responsibility, particularly in the light of her former position as President of the Republika

[76] (2008) 336.

> Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole.[77]

The *Plavsik* declaration of responsibility is all the more remarkable in an adversarial context, even if rewarded with sentencing concessions for contrition. It was a concession which allowed on to the record a wealth of 'story' which would otherwise have been excluded in a contested trial.[78]

In the appeal from the trial of *Drazen Erdemovich* the tragic case turned on a soldiers responsibility when forced by threats of his own death to kill innocent victims under superior orders.[79] The accused's conviction was as much due to the legal/moral convention that it is better to sacrifice your own life rather than the lives of others rather than any glaring determination of a criminal mind.

Generally, on the purposes of the criminalisation in this instance the majority judgement observed:

> one of the purposes of international criminal law is to protect the weak and vulnerable in armed conflict situations. Judges McDonald and Vohrah, therefore, seek to facilitate the development and effectiveness of international humanitarian law and not to impede it. Thus, they "give[s] notice in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives."[80]

On the issue of responsibility, in dissenting with the majority view Judge Sir Ninian Stephen emphasised the contextual relevance of responsibility in the face of immutable, if harsh legal principle.

> Whatever (the appellant) chose, the lives of the innocent would be lost and he had no power to avert that consequence. Hence, since the common law authorities - but for which one could say that the general principles of law favoured duress as a defence to all crimes - did not

[77] *The Prosecutor v Plavsic* ICTY Ch III 27.2.2008. Paragraph 80
[78] This should be put against an expectation of full disclosure which in turn might have increased sentence.
[79] *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, A. C., 5 May 1997
[80] http://www.icty.org/sid/7463

> address the issue at stake, and since their underlying rationale did not justify excluding duress as a defence to unlawful killing in circumstances such as those facing the Appellant, the general principles of law would allow duress to be raised as a defence even to a charge of unlawful killing.

Moral responsibility, and pragmatic rationality, in this judge's view argued against the unqualified application which imposed liability no matter at what cost. Interestingly, the accused initially pleaded guilty even though he believed he was neither liable nor culpable, on the advice that duress didn't apply. This was the only appeal point that succeeded.

The experience of corporate criminal liability has been that stories of responsibility against histories of reputation may have far greater punitive impact than conventional sentencing options. Imprisoning corporate executives when they can be replaced, fining companies when the cost is passed on to the consumer, restricting the capacity to trade when it hurts shareholders each problematise the liability/punishment nexus transferred without creative adjustment from individual to collective liability. Braithwaite and Fisse[81] suggest that corporate compliance is best ensured by challenging and negotiating otherwise marketable reputations and respected organizational and trading histories in order to ensure responsibility.

Responsibility flowing from the revelation of truth, contested or otherwise, surely represents an aspiration for more inclusive trial justice and not simply its denial within the context of evidence and fact trial 'languages'. If so, how does one represent a more balanced consideration of responsibility when the discourse of individual liability dominates international criminal justice? Part of the pathway to a more inclusive discourse on truth and responsibility is to touch on the failed 'language' of individual liability as the restrictive 'narrative' of international criminal law.

[81] (1993) chap 6.

Languages of Capacity, Liability, Justification and excuse, and Culpability

There is no time here to adequately interrogate the language of the law as it relates to fact-finding, evidence testing and liability attribution. We will restrict our consideration of language in the way it binds and ties fact (while at the same time denying the primacy of truth) to the importance of judicial narrative. The reason for this is the re-iteration of juridical discretion in the achievement of trial transformation, and the essential place of judicial narrative in holding the exercise of such discretion, accountable to victim interests. Through the process of accountability, we argue, the legitimacy of ICJ will be more significantly ensured.[82]

Trial transformation enables an engagement with truth at stages where the juridical professional determines that adversarial justice, (and its fact fascination) are inappropriate for the achievement of significant victim interests. In talking away from evidence to truth, the judicial narrative will chart an exercise of discretion no longer essentially concerned with factors determining or denying liability. In fact, by admitting the wider histories of truth, judicial narrative will breach essential rules of evidence and compromise the search for liability in a sufficiently probative sense.

Capacity will take on new meaning. No longer will it be communicated in terms of volition to commit the criminal act. Instead it will carry more moral meaning, referring to responsibility rather than liability. The consequence of this will be that justifications or excuses will be crafted not to deny the evidence of the prosecution but to qualify or mitigate responsibility, particularly where contested histories are on offer.

Culpability will give way to responsibility. Guilt will not be the essential outcome of liability proven. Culpability can take on contributory and conditional forms. This will certainly enable a language of collective responsibility more compatible with restorative outcomes which up until trial transformation remained the province of alternative justice discourse.

[82] Findlay (2008) chap 9.

In the context of a discourse on the 'right to truth' for victims of international armed conflict, Naqvi discusses the significance of 'legal truth'.[83] She holds that legal truth is merely a bi-product of a dispute settlement mechanism. We agree and as such argue that trial transformation must precede the more convincing approximation of legal truth.

> In trials dealing with international crimes, however, the significance of this bi-product of legal truth has taken on a new dimension owing no doubt to the unique objectives that international criminal law is supposed to fulfill and that go way above and beyond merely finding guilt or innocence of particular individuals. ..this legal concept intersects with international criminal processes in various ways, at times strengthening the intended purpose to prosecute persons accused of international crimes and at times overriding the focus on the individual defendant and instead turning the attention of the case to the broader implications of international criminal trials. The desire for truth may even be used to justify non prosecution of certain alleged offenders in an 'amnesty-for-truth or 'use immunity' situations.[84]

Conclusion? – Victim-driven truth and fact

Damaska represents the adversarial trial as progressing sometimes dysfunctionally 'when fact finding is organized as a sequence of two partisan cases'.[85]

If international criminal trials remains contained within a substantially adversarial model, the suggestion that fact and truth should co-exist in the evidentiary and proof project is dangerous indeed. One casualty likely is independent and impartial juridical decision-making, and there-from the potential to transform the trial into a more efficient deliberative environment:

> Judicial interference with partisan management of cases (for the purpose of historiography) deflates partisan incentives to develop more

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[83] Naqvi, Y (2006) 'The Right to Truth in International Law: fact or fiction', *International review of the Red Cross* 88/862: 245-273

[84] Ibid:246

[85] (2008) 337

> effective trial strategies, and may also appear to help one side, compromising the court's neutrality *inter partes.* [86]

In an ideal world, as Damaska denies such possibilities;

> …there would be no reason to balance (accused's rights and victim interests) – they would co-exist in harmony. But in the real world, painful tradeoffs between them must be made.[87]

It is here our analysis parts company. Those who suggest, despite its ennobling humanitarian foundations, that telling victim-centred truths beyond the confines of evidence in the trial format is misconceived, do not go the next step to ask, why not. To exclude an essential humanitarian focus under the guise of coherence with procedural conventions is to ignore the potential through trial transformation of attaining the unattainable. It is more than an inevitable tension between wide communitarian and victim-centred rights aspirations and the definitive trial focus on the rights of the accused (which are today constantly compromised for far less noble intentions), that makes trial transformation heretic.[88]

In this paper we have used the imperative of collective perpetration and the legitimate interests of victim communities, which define global crime, as the imperatives for trial transformation. In so doing we have shown how conventional exceptions to individual liability are not creating a novel and effective international criminal jurisprudence. Further, the commendable attempts of the nation state through extra-territoriality, are not effectively requiring responsibility from corporate and collective violators even through the exercise of state responsibility required by international law.

We return to the simple potential of trial transformation, and its engagement with truth and responsibility as a pathway to satisfying victim communities collectively violated. This may not produce retributive

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[86] (2008) 333
[87] Ibid

[88] L Zedner and Carolyn Hoyle, 'Victims, Victimization, and the Criminal Process' in M Maguire, R Morgan & R Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press 2007) [+]

declarations or the gaoling of otherwise-criminal corporate executives but the wide vista of restorative outcomes will be available within the due process protections of the transformed international trial to satisfy more victims collectively harmed.