

## REVIEWS

TRANSFORMING INTERNATIONAL CRIMINAL JUSTICE: RETRIBUTIVE AND RESTORATIVE JUSTICE IN THE TRIAL PROCESS. BY MARK FINDLAY and RALPH HENHAM (Cullompton: Willan Publishing, 2005, 448pp. £40.00 hb)

*Transforming International Criminal Justice* is a product of the International and Comparative Criminal Trial Project (ICTP) at Nottingham Trent University, which was founded by the authors. They position themselves in the gap between the ‘currently competing paradigms of restorative and retributive justice within the international criminal trial’ and seek some form of harmonization between these two sets of discourses. Their aim is to investigate the key elements of criminal trial processes and practices at national, regional and international levels; to examine the influence of international criminal trials of the processes at local and regional levels; and to challenge ‘conventional understandings of trial justice’. In doing this, they have developed an approach which entails comparative contextual analysis, combining qualitative and quantitative techniques to provide ‘the capacity to add value and meaning to contextual accounts of the trial decision-making process’.

The book is divided into three sections. The first addresses the issue of comparative research in the trial process. It begins in Chapter One by tackling the theoretical issues of conducting comparative research. In Chapter Two, alternative approaches to modelling criminal justice are criticized in order to demonstrate the advantages of a more contextual approach. In Chapter Three, the particular elements of a trial process to be compared are identified, and include the role of the judge, application of rules, and the interaction between professional and lay participants.

The second section of the book focuses on comparative trial practice within the civil law jurisdiction of Italy and the common law jurisdiction of England. It considers whether the influences of the civil and common law jurisdictions can be identified in international trials, particularly during the verdict and sentencing stages. This section argues that broadening and improving access for a wider range of victims and their communities to trial rights ‘will enliven the place of victims in trial decision-making and give them greater presence in determining formal justice outcomes’. It begins in Chapter Four by focusing on trials conducted in civil law jurisdictions and in particular on the relationship between lay and professional participants in the trial process. The function of the trial as a forum to reveal the truth is also reflected upon. Chapter Five considers trials conducted in common law jurisdictions. These are compared to the trials analysed in the previous chapter, which enables the identification of elements which are common to trial decision making in both legal systems, and which can be tested in regional and international systems. Subsequently, in Chapter Six, the relationship between the judge and the victim is investigated. This focuses on the influence of the victim on the sentence that is imposed and the authors argue in favour of greater inclusivity for the victims.

The third and final section speculates on how international trials might be transformed in order to merge retributive and restorative justice practices. This section was described by the authors as the book’s ‘radical dimension’, and consequently will be focus of the remainder of this review.

The ambition of the authors' objective of harmonization should not be understated. They argue that their objective is to create mechanisms that can provide justice in a manner that is responsive to the needs of the victims and society as a whole, promote reconciliation between previously warring communities and reinforce the rule of law. They contend that making international criminal justice more restorative would enhance its legitimacy within the communities most affected by creating a greater sense of ownership over the process. They also assert that it would make the proceedings more reflective of conceptions of justice within the society under scrutiny. Furthermore, they suggest introducing more restorative elements to international criminal proceedings would make them more victim-centred and consequently permit a greater range of outcomes to meet the needs of victims, rather than simply criminal sanctions. Finally, the possibility of increased community participation through restorative processes is posited as helping to re-affirm the moral norms within the society, and demonstrate that it is possible for individuals from previously adversarial communities to work together to resolve disputes peacefully and break the cycles of violence that previously existed.

Whilst these aims are laudable, clearly they are extremely difficult to achieve, particularly within the complex uncertainties of post-conflict societies. In tackling the problem, the authors made the following suggestions as to how international criminal justice trials could be made more restorative.

First, they argued that victims should be allowed a greater voice within the trial proceedings, possibly by being permitted to conduct conversations, rather than simply communicating through written evidence or their legal representatives. The increased involvement of victims should be facilitated through using more informal language. The authors have recognized that international criminal justice has made progress towards greater involvement for victims, notably in the 1998 Rome Statute of the International Criminal Court, but they argue that this progress is merely 'symbolic' as it does little to ensure that the outcomes of the proceedings fulfil the victims' needs.

Secondly, they suggest that the focus of the proceedings should not be on attributing individual responsibility and imposing punishment, but rather on finding a settlement that satisfies the needs of the victims. The authors suggest that this could be achieved through mediated settlements, which are common in national restorative justice processes. They suggest that any mediation process should involve all stakeholders in the dispute, including representatives from both the victim's and the offender's communities. It is envisaged that in these circumstances, the role of the legal practitioners would be to act as mediators in order to broker a compromise between the parties to the dispute. In the view of the authors, the decision whether to pursue mediation will be a discretionary decision to be made by the judge.

It was in this section of the book that I think a number of issues would have benefited from further elucidation. For example, in their discussion of the importance of mediation, the authors largely fail however to consider the existing practice of the regional human rights institutions that frequently work to towards achieving 'friendly settlements' in response to human rights violations. The literature on such friendly settlements raises a number of issues, including whether they are an appropriate response to serious crimes committed against individuals, and whether these agreements undermine the grave nature of the crimes in question and inhibit the re-establishment of norms within the country where the crimes occurred. More substantive analysis of this field would have well complemented the mediation discussion. In addition, the authors could also have given further

consideration to the impact of a decision by one group of victims to come to a mediated agreement with their abusers at an international forum upon *other* victims who have yet to have their cases heard. Furthermore, it is also unclear whether victims would be encouraged to seek a mediated settlement. If this was the case, any encouragement to pursue such a settlement could arguably lead to the revictimization of those victims who would have preferred more retributive justice. Finally on this issue, the authors, whilst frequently praising the benefits of mediated agreements, do not discuss in any detail what should happen if mediated settlements fail to be reached or indeed the enforcement mechanisms to ensure that the parties to the dispute honour any commitments that they make.

The third proposal in the book is that focus of international criminal justice proceedings shifts from individualizing guilt to providing a forum for truth telling and acceptance of responsibility. It is envisaged that mediated settlements and non-criminal sanctions would facilitate this objective, whereas automatically imposing criminal sanctions on those who admit guilt would inhibit it. The authors do stipulate, however, that this transformation would require the establishment of new rules for the treatment of evidence.

This suggestion raises concerns that individuals may choose to 'confess' in order to evade criminal responsibility, which could undermine the defendant's right to a fair trial. Furthermore, it is possible that individuals may admit to actions, but deny any responsibility, arguing instead that they were following orders or acting in self-defence and that consequently their actions were justified. Such statements could of course cause harm to the victims.

The fourth suggestion is that transformed trials should have a greater range of sentencing options than are imposed following either mediated settlements or exercises of judicial discretion. It is argued that even where a mediated settlement has been reached, the victims and their communities should be able to communicate their preferred outcomes to the judge. The importance of a range of outcomes is twofold: first, the possibility of evading a criminal sanction in return for telling the truth and admitting responsibility might encourage some perpetrators to co-operate with the search for a mediated settlement; secondly, not all victims want their former abusers to be imprisoned, they may instead wish that those individuals are reintegrated into the communities where they committed their crimes so that they have to live every day with the consequences of their actions. The victims may also wish to be compensated for their suffering in order to help rebuild their lives.

A final quibble is that whilst this book has tackled a very important and interesting subject, its arguments and prescriptions are occasionally obscured by inaccessible and occasionally even inaccurate language. For example, the authors frequently use the phrase 'victim community' and place great importance on international criminal justice becoming more inclusive and responsive to this community, but, unfortunately, they fail to describe whether this phrase refers to groups made up entirely of victims, or communities in which victims live. It is not clear who is a victim in this context and it is therefore difficult to distinguish between victim communities and society as a whole.

These critical points aside, these authors deserve real credit for the ambition and scope of their intellectual gaze. The preoccupation of international criminal justice with its traditional focus upon retributive justice is a serious theoretical and practical impediment to its ongoing development. These authors will rightly be lauded for at least pointing the way towards beginning to think through the complex process of harmonizing the retributive and restorative frameworks. I suspect there will be much more to come in this field.

*Louise Mallinder*

*Queen's University, Belfast*

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