

Enriching trial justice for crime victims in common law systems: lessons from transitional environments

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ABSTRACT

The role of victims in the criminal trial has been subject to considerable critique in recent years. This article argues that scholarship and policy governing the treatment of victims and witnesses in 'ordinary' criminal trials within 'settled' societies may be substantially enriched by drawing lessons from the roles of, and practices affecting, victims within post-conflict societies. There is a clear need for policymakers and law reformers to look beyond the familiar spheres of the domestic criminal process if the justice system is to become more effective, just and legitimate in the eyes of both victims and the wider public. This article draws on both theory and praxis on the role of victims within transitional justice, and contends that trial justice in common law systems may be enriched through centring processes on three key themes which are commonly emphasised in transitional justice frameworks, these being (1) truth recovery; (2) victim participation and (3) reparation.

KEYWORDS: victims, trials, transitional justice, participation, reparation

Introduction

In contrast to continental Europe, most Anglo-American criminal trial systems are adversarial in nature and have been succinctly characterised as a 'sharp clash of proofs presented by litigants in a highly structured forensic setting' (Landsman, 1984: 2). There is no shortage of literature documenting the plight of victims in their capacities as witnesses (Bala et al, 2010; Commissioner for Victims and Witnesses in England and Wales, 2011; Ellison 2001; Spencer and Lamb, 2012; Tinsley and McDonald, 2011); their exclusion from proceedings (Fielding, 2006; Rock, 1993; Shapland et al, 1985); their inability to participate in any meaningful way (Roberts and Erez, 2010; Shapland and Hall, 2010; Wemmers, 2009) and the lack of opportunity to seek either symbolic or material redress (Davis, 1992; Doak, 2008; Williams, 2005). Despite the expansion of protective measures for vulnerable witnesses and various schemes enabling victims to exercise a voice in criminal sentencing, adversarialism and bipartisanship remain firmly ingrained in the mechanics of the common law criminal trial.

In a seminal article published just over three decades ago, Doreen McBarnet was critical of efforts to ease the plight of the victim in adversarial courtrooms. All too often, she argued, analysis of the problems facing victims focused on visible issues, as opposed to questioning 'the deeper structures that help create them' (McBarnet, 1983: 303). Her observation proved apposite; whilst many policy and law reforms have since been promoted in the name of victims, their underlying rationale is often attributed to the lucrative political appeal of the crime victim (Geis, 1990; Garland, 2001), rather than any desire to grapple with such problems in a principled and systemic manner.

Yet the prospects of more the far-reaching, structural reforms that McBarnet envisaged have seemingly been boosted in recent years, as policymakers, victim groups, and academic criminologists have illustrated an increasing readiness to look beyond the familiar to practices that appear to be working well in other jurisdictions. There can be little doubt, that if engineered carefully, comparative criminal justice can reap benefits in the form of fresh insights and novel solutions for areas of both theory and practice that has become parched and stagnant over time (Brants, 2011). While we have become increasingly adept at drawing

lessons from elsewhere, there remains a marked reluctance to look beyond the disciplinary parameters of criminal justice and criminology, to explore how other fields of study might enrich criminal justice policymaking. Notwithstanding a recent surge in the criminology of state crime (see eg. Cohen, 1995; Green and Ward, 2000), there has been relatively little engagement among criminologists with the potential lessons that might be extrapolated for 'ordinary' criminal justice from post-conflict environments. In many (though by no means all) such settings, victims have featured prominently in the language of transition; with those facilitating such processes being acutely aware of the need to acknowledge and provide redress for those who have borne the brunt of suffering in settings which are frequently marked by the abuse or absence of the rule of law, human rights and international humanitarian law.

This article contends that scholarship and policy governing the treatment of victims and witnesses of 'ordinary' crime within 'settled' societies may be substantially enriched by drawing lessons from the roles of, and practices affecting, victims within transitional justice processes. It is not claimed that such processes are perfect, or that they offer a particular model of practice that might be readily transplanted into domestic systems. However, it is suggested that the rise of transitional justice has heralded a creative space for a number of diverse and innovative practices – as well as different ways of conceptualising harm and victimhood - which might act as a catalyst for challenging entrenched normative conceptions of the role of victims, as well as their practical treatment, within common law trial frameworks.

The article begins by clarifying a number of key concepts and explores the feasibility of drawing lessons from transitional justice frameworks to inform the practices of domestic criminal justice. The second part of the article explores how 'ordinary' criminal justice might be enriched through reconfiguring criminal trials around three key values which are commonly emphasised in transitional justice discourse, these being (1) truth recovery; (2) victim participation and (3) reparation. Finally, in conclusion, it is argued that the lens of criminal justice needs to be recalibrated so that reformers are emboldened to look beyond familiar legal spheres for ideas that might make justice more effective, more just and more legitimate for both victims and the wider public.

Is cross-fertilisation feasible?

Before questioning which specific lessons might be drawn from transitional justice for application within criminal justice, it may be useful to ponder some of the more subtle – and potentially problematic – aspects of this fertilisation. As a starting point, it cannot be denied that these two forms of justice are concerned with quite different objectives. While there is a reasonably settled consensus that the academic study of criminal justice concerns the institutional response of society to criminal behaviour (Roberts, 1998), the boundaries of the relatively nascent field of transitional justice are much more uncertain. The United Nations defines transitional justice as the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation (United Nations Security Council, 2004). To this end, transitional justice adopts a broad range of tools, including the use of international courts and tribunals, hybrid national-international trials, regional human rights courts; as well as domestic devices such as trials, truth commissions, lustrations, memorial events, institutional reform and other mechanisms designed to deal with the past and build peace for the future.¹

While criminal justice may therefore constitute a tool from which transitional justice responses may draw, the prosecution of ex-combatants is often intentionally partial in post-conflict settings because it best serves the interests of transition (Bell, 2009). Other goals, such as the pursuit of truth, the entrenchment of human rights, democracy and the rule of law, the need for social and economic investment and the construction of infrastructure may

be deemed to be of equal or greater importance. Even where prosecutions do form part of the transitional package, the concepts of blame and responsibility are often different since radical evil involves horrific acts that even ordinary criminals may find appalling (Aukerman, 2002). In short, the need for transitional justice tends to arise in highly difficult and complex settings. While these may differ substantially from each other, the majority are fundamentally different from settled societies in that they lack the institutional resources and infrastructure to mete out justice in the usual way. This raises the question as to whether the importation of aspects of theory or praxis is desirable, or even feasible at all, with certain commentators advancing the view that it operates in such unusual circumstances it essentially constitutes a form of 'extraordinary' justice, which is theoretically and practically distinct from 'ordinary' forms of justice (Gray, 2005). A more persuasive view places transitional justice at the extreme end of a legal and political continuum (Posner and Vermuele, 2004); indeed, there are a number of conceptual overlaps which suggest that these spheres do not stand in absolute isolation from one another.

First, both sub-disciplines share certain common rationales and objectives, insofar as criminal justice and transitional justice are both societal responses to human conflict caused by a breakdown in social control. While themes such as conflict resolution and peace-making tend to be associated much more with transitional justice discourse rather than criminal justice, the historical rationale for the establishment of the criminal justice systems was the exertion of social control to safeguard the interests of the monarch. Although in more recent times the criminal law has still been used to protect the interests of elites, it has also been used as a tool of social reform, and has played some role in shifting the traditional balances of power and offering protection to the socially weak (Sorochinsky, 2009). In a similar vein, transitional justice holds a transformative potential: by providing a legal framework under which perpetrators can be held to account; the entrenchment of human rights and the rule of law; and through facilitating the empowerment of groups that have been historically excluded or disadvantaged under previous regimes.

Secondly, on a related note, the key stakeholders – perpetrators, victims and communities – are essentially the same. While transitional justice is perhaps more concerned with addressing macro-level, inter-communal conflicts, the individual conflicts that regulated the criminal law also entail wider ramifications insofar as crime is not solely harmful to individual victims, but is also injurious to local communities as well as the public at large. While the two forms of justice often place different degrees of emphasis on the intended outcomes, the primary actors affected are the same, and similar conundrums apply, such as the potential overlap between victims and offenders, as well as notions of hierarchy and blameworthiness (McEvoy and MacConnachie, 2013). In essence, both transitional justice and criminal justice seek to provide normative frameworks for accountability for individual conflicts. From a victim's perspective in particular, it has been noted that victims of non-state actors in 'ordinary' criminal justice, and victims of international crimes or human rights abuses in transitional justice, have much in common; both groups suffer similar emotional plights and psychological responses, such as self-blame and outrage; the impact of the offence on their lives may be similar, and both feel the need for some form of redress from the offender (Elias, 1986; Doak, 2008). Despite the latter group of victims often suffering more in both the extent and severity of victimisation, their unmet needs and the responses they seek are often similar within the criminal and transitional spheres.

Thirdly, cross-fertilisation between criminal justice and transitional justice is already de facto reality, in that criminal processes are frequently adopted as tools of transitional justice: the considerable range of international and hybridised courts and tribunals that have evolved in recent decades bear testament to this.² Despite dealing with crimes which have been committed in a different social context and which may be of a different magnitude from those typically encountered in domestic settings, we should not discount the potential lessons that international criminal justice might hold. Unlike regional permanent human rights institutions

such as the European Court of Human Rights and the Inter-American Court of Human Rights, these criminal tribunals are directly concerned with the individual perpetrators of crimes, rather than the broader issue of the failure of states to abide by human rights norms. Rather than looking *downwards* (towards states) and *backwards* (towards evaluating whether their processes are human rights-compliant), we might instead look *upwards* (towards supra-national fora) and *forwards* (towards the emerging systems, processes and jurisprudence of these new institutions). Moreover, and in part due to the post-conflict environments from which they have tended to emerge, international criminal justice policymakers are becoming more keenly aware of the need to ensure that their future success is ultimately dependent on their perceived legitimacy in the eyes of individual victims and the wider victim communities (Henham, 2011).

It can therefore be argued that there are essentially sound grounds for criminal justice policymakers and academics alike to draw on carefully selected aspects of theory, policy and practice of transitional justice that appear to work most effectively as far as victims are concerned. Its potential to enrich justice for victims stems primarily from the fact that the need for innovation and individually tailored responses is a *sine qua non* of the transitional paradigm. While the rationales, objectives and processes of adversarial criminal justice have evolved over many centuries, there is something of an innovative urgency among transitional justice solutions; they are borne out of a pressing need to make political peace between communities, rather than creating a social peace between individuals who are in the midst of ongoing conflicts with each other. In recognising the need that they are perceived as legitimate, they have had to confront head-on certain problematic issues which are all too often fudged within conventional criminal justice theory and practice, such as victimisation of indigenous communities; the prevalence of victim/offender overlap and the collective nature of offending and victimisation. In turn, this means that transitional processes – whilst imperfect – are often better attuned to the needs of victims. As such, the best transitional justice arrangements do not rest on linear assumptions on how best to deal with conflict and tend not to be overly-institutionalised, but are instead multi-faceted, often cutting across the formal and informal; the top-down and the bottom-up; and making the most effective use of social capital and civil society (Woolford and Ratner, 2008).

Part III: Areas for Enrichment

It is argued that there are three key prevalent values within transitional justice discourse which may provide a normative basis around which reform of conventional criminal justice may gravitate. These values, which are somewhat interlinked, are (1) Truth recovery, (2) Victim Participation and (3) Reparation. This section discusses each of these themes in turn and provides an overview of, firstly, why a particular value matters, both from the victim's perspective and as far as the broader objectives of criminal justice are concerned. Secondly, the discussion outlines how each theme has emerged as a focal point in transitional justice discourse, before proffering some suggestions as to how established adversarial models of justice might be adapted to enhance the ways in which these values might be protected and promoted.

(1) Truth recovery

The truth about what happened – and why – is often cited as a priority for both victims of state and non-state actors alike (UN Office of the High Commissioner for Human Rights, 2009). Truth recovery in transitional justice frameworks often goes beyond the idea of a 'factual' or 'forensic' truth, and emphasises the need to explore a broader form of truth which is capable of giving insights into the political, social, and ideological context by which their actions are understood (McEvoy, 2006). Whilst uncovering the truth cannot resurrect the

dead or heal physical or psychological scars, it may help victims come to terms with past events by helping them to re-organise their thoughts into a coherent narrative that allows them to better understand past events and experience a sense of closure (Smyth and Pennebaker, 1999). A further potential benefit lies in the fact that the public revelation of hitherto concealed facts may for the public record of events, thereby acknowledging the suffering of victims and vindicating their status (Cohen, 1995).

The concept of a 'right to truth' for victims of gross human rights violations is increasingly regarded as either a rule of customary international law or a widely accepted general principle (Naqvi, 2006). In the seminal case of *Ellacuria*³ before the Inter-American Court of Human Rights, it was held that such a right comprises two constituent elements: a collective right 'that ensures society access to information that is essential for the workings of democratic systems' and a private right for victims and their families, which 'affords a form of compensation' (at para 224). Similar precepts are to be found in the United Nations Set of Principles to Combat Impunity, which were recently updated to recognise the right to victim's 'inalienable' right to truth (Principle 2), including the rights of victims' families to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fates (Principle 4).

Irrespective of its legal status, the notion of a right to truth has underpinned many post-conflict transitions over the past two decades under the auspices of the archetypal truth commission, a body set up to inquire and report into past wrongdoing. Whilst the South African Truth and Reconciliation Commission has undoubtedly received the most attention, similar commissions have been widely adopted in Latin America, Asia and other parts of Africa (see generally Hayner, 2011).⁴ Truth commissions have been subject to a range of both principled and pragmatic objections, not least because they are often used as an alternative to criminal prosecution. Moreover, empirical studies suggest that victims' experiences with such institutions are far from perfect. In the case of South Africa, for example, many victims reported that their expectations had not been met and only few victims felt that they had received the 'truth' that had been promised to them (see eg Byrne, 2004; Hamber et al, 2000; Kaminer et al, 2001). Nevertheless, truth recovery is rightly recognised as an essential element in conflict resolution, and is clearly highly valued by victims.

While truth recovery features prominently in transitional contexts, its potential in relation to healing micro-level conflicts between individuals in settled societies has not received such widespread attention. However, we do know from existing studies of crime victims that one of their main concerns revolves around the need to have questions answered; the 'why me?' question, in particular, is one which holds particular importance for many victims of serious crime (Sherman and Strang, 2003). Likewise, studies into the mental health of crime victims reveal that post-traumatic stress disorder and depression are more prevalent than may previously have been thought (Herman, 2003; Kilpatrick and Acierno, 2003). It follows that the provision of information concerning, for example, why an offender acted in a particular way, or why a specific person was targeted, may help victims to better understand what happened and thereby aid the healing process (Miller, 2008).

Regrettably, the notion of a right to truth within the 'ordinary' criminal justice process has not been widely discussed, and does not appear to feature within the policy agenda on either the national or international platforms. Indeed, the adversarial criminal process is remarkably inept at eliciting the truth of past events and offers, at best, only a partial insight into past events. From the moment an offence is reported, the criminal process readily compromises the search for truth. Recollections of past events, along with associated evidence, are routinely manipulated, decontextualised and recategorised, before an attempt is made to re-organise them so that they correspond with abstract legal principles (Cole, 2001). Ericson (1981: 9) famously noted how the evidence-gathering process is a form of 'information

control' by the police, dependent upon 'the investigation they do or do not undertake; the questions they do and do not ask; the interpretations they do and do not give to the answers; the written accounts they give and what they leave out'. Plea negotiation and the acceptance of guilty pleas generally bring to a close any inquiry into the nature of past events, which can then leave victims feeling further marginalised and irrelevant (Doak, 2008).

Such 'information control' remains in place in the trial arena. Here, the prosecution and defence counsel hold a near-complete autonomy to select which evidence (and which witnesses) are brought before the trier of fact, and will generally seek to elicit only those facts which the advocate feels will support their version of events. It has been well documented how advocates use stories to relate to juries, and encourage them to make experiential connections with a particular story frame that is presented to them (Bennett and Feldman, 1981; Hall, 2009). Evidence is carefully selected, omitted, and reframed in a way that supports this constructed narrative, and is presented to the court through carefully crafted questions and answers (Doak, 2008). For their part, victims have no right to offer their own narrative to the court, and, where they are called as witnesses, their narratives accounts are often stifled by both the adversarial environment and over-zealous advocates (Ellison, 2001; Fielding, 2006; Hall, 2009). There is something of an irony in the fact that the adversarial system demands that victims and offenders testify in open court, swearing an oath 'to tell the truth, the whole truth, and nothing but the truth,' when, in fact the nature of advocacy establishes parameters within which all witnesses are expected to confine their answers. In short, the adversarial model of proof serves to thwart a robust and rigorous assessment of past events in favour of constructing dominant and linear narrative that favours either the prosecution or defence.

The trial process culminates in the declaration of the verdict, with the fact-finder determining the outcome of the trial by declaring a 'guilty' or 'not guilty' verdict in respect of each individual charge.⁵ While the verdict may be said to constitute a form of 'official' truth, such a 'truth' is ultimately based on a process which places a relatively low value on truth recovery. No narrative is offered concerning the strengths and weaknesses of the parties' evidence, or which particular parts of it the trier of fact elected to accept. At the end of the day, victims (and indeed defendants) are offered a narrow and vastly simplified version of the truth in the form of a one (or two) word verdict, with no requirement for the fact-finder to explain its reasoning. It is not suggested here that the pursuit of truth ought to be the sole objective of the criminal trial; other important goals include the need to account for due process and fair trial rights, upholding matters of public policy and imposing practical time restraints. However, it is suggested that truth recovery ought to at least carry a higher priority and it may - failing an unlikely overnight move to an inquisitorial model of proof - be possible to reconfigure certain aspects of the adversarial tradition to strengthen its truth recovery potential without compromising on such goals.

First, defendants should be incentivised to disclose full information about the offence at an early point in the criminal process. It is unfortunate that many defendants tend to admit factual guilt to police before deciding – on the basis of legal advice – to contest legal guilt, thereby triggering a full trial or, more likely, prompting the prosecution to propose a plea bargain (Daly, 2008). As noted above, this can leave victims feeling as though they have been denied justice. Writing in the context of international criminal justice, Nancy Armory Combs (2007, cited by Daly, 2008) proposes a mechanism that may be able to counteract this tendency. She proposes a 'restorative justice guilty plea', whereby defendants would proffer a full and complete account of their activities to the victim in exchange for the prosecution agreeing not to charge certain crimes or to dismiss charges already brought. Combs does not give full details on the precise logistics of the victim / offender interaction that might occur, but it is clear that some form of direct restorative encounter is envisaged, citing the South African TRC as 'a useful model' (Combs, 2007: 143). In addition, defendants would be encouraged to offer apologies and other forms of reparation including, for example,

the location of a body or cause of death as part of their plea. This information would then be taken into account by the court in determining the sentence. While Combs' research was carried out in the specific context of international criminal tribunals, there is no compelling reason why a similar approach could not be adopted within domestic criminal processes.

Secondly, in relation to the trial itself, there is a need for greater judicial muscularity in controlling the excesses of the adversary system. While judges are under a notional obligation to protect victims from aggressive or irrelevant questioning by counsel, the dichotomous nature of the adversarial trial means that excessive intervention may be perceived as partisanship on the part of the trial judge and possible grounds for an appeal (Doak, 2008). For that reason, judges have been reluctant to interrupt and rebuke counsel where the testimony of witnesses is being tightly contained by rigorous question-and-answer, without any opportunity for witnesses to relate their experiences to the court using their own words (Ellison, 2001). To this end, stronger judicial guidance and training is needed to encourage judges to allow witnesses greater freedom to answer questions in a full and comprehensive manner. Indeed, Hall (2009) proposes that victims - and indeed all witnesses - could begin their testimony with a 'free narrative' phase. Counsel would then be free to clarify or challenge any issues raised through questioning. This should, in theory at least, increase the flow of information to the trier of fact.

Thirdly, we ought to reconsider the nature of verdicts themselves. In any criminal justice system which purports to subscribe to international human rights standards, it seems intuitively odd that juries are empowered to deprive someone of their liberty without offering reasons for their verdict. While this *prima facie* stands as an affront to principles of both natural justice and the most basic element of a right to a fair hearing, international human rights fora have tended to steer a wide berth around the issue given the centrality of the jury system to common law criminal trials. This is not a question that has been probed in any detail either on the policy or academic fronts, but a recent case from the European Court of Human Rights has begun to ignite debate on the issue (see eg Coen, 2014; Roberts, 2011).⁶ The future prospect of requiring criminal courts to offer some sort of explanation for their verdicts may not be so far off on the horizon as had once been assumed.

Participation

A second key value is the notion of participation. Until recently, victims were largely excluded from transitional justice mechanisms (Karstedt, 2010), and their treatment – particularly before international courts and tribunals – was widely criticised (Dembour and Haslam, 2004; Kelsall and Stepakoff, 2007; Zacklin, 2004). Institutions and top-down processes have tended to regard victims' voices as irrelevant – if not hindrances – to the more pressing social and political objectives of ending conflict and building peace. Victims may be something of an awkward adjunct, with divergent yet pressing needs that impoverished, war-torn societies are unable to meet. Their accounts are unpredictable, and may sit uneasily alongside official or reconciliatory narratives of the conflict peace (McEvoy and MacConnachie, 2013).

Nevertheless, the potential benefits of victim participation now feature prominently in transitional justice discourse (Bonacker et al, 2011; Kelsall and Stepakoff 2007; McEvoy and MacConnachie, 2013.; McGonigle-Leyh, 2011). It is now broadly accepted that transitions are unlikely to be successful without the support of victims and their communities. There is also some evidence to suggest that (as with 'ordinary' criminal justice) victim participation increases satisfaction with justice processes, and may – under certain conditions - even provide potential mental health benefits to crime victims through normalising emotions and assuaging feelings of anger, resentment, depression, discouragement, self-hatred and guilt (see Doak, 2011).

Undoubtedly, practice has improved in recent years. Under Article 68(3) of the Rome Statute, the International Criminal Court has the discretion to permit the views of victims and their concerns to be presented and considered at whatever stages in the proceedings it thinks fit, where the personal interests of victims are affected. Victims may choose their own legal representatives, who in turn may present their views and make submissions when their interests are likely to be affected provided that the leave of the Court is obtained. While such mechanisms resonate with the procedures available to victims in many civil law jurisdictions, they are highly unusual in common law settings. Although some concerns have been raised as to how effectively these provisions operate in practice (McGonigle-Leyh, 2011; Van den Wyngaert, 2012), many of these problems seem to stem from the sheer number of cases and the related resourcing issues. The very existence of the provision constitutes a turning point for international criminal justice, though it may take some time before it can be said to be a wholly positive development for victims.

Notwithstanding progress at the ICC, it is the truth commission, rather than the court, which is frequently lauded as the more 'victim-friendly' mechanism of transitional justice. The concept of a public forum where victims may recount their stories and hear directly from perpetrators (Weitekamp et al, 2006) carries an innate appeal. Victims may, after all, receive vital information about the fate of a loved one, hear an acknowledgement of responsibility, or even receive some form of apology. However, as noted in the previous section, empirical insights into the practical operation of truth commissions all too often reveal that victims are left dissatisfied (Byrne, 2004; Hamber et al, 2000; Kaminer et al, 2001). Indeed, opportunities for actual interaction between the parties is often limited or non-existent (Clamp and Doak, 2012; Doak, 2011). While some of these problems may be attributable to matters of praxis, such as weak infrastructure, inadequate planning and insufficient resourcing, arguably there is also a normative barrier for victims too, insofar as truth commissions are concerned first and foremost with ending conflict and building peace (Clamp and Doak, 2012). In most truth commissions therefore, the role of victims tends to be purely instrumental. This role is similar to that exercised to the one which they exercise in the criminal court (ie, as a provider of information). Whilst truth commissions may give victims greater leeway to tell their own stories in their own words, their own narratives about what happened in the past, and indeed with how the perpetrator(s) ought to be dealt with in the future are subsumed by the torrent of the grander narrative of the transition. As McEvoy and MacConnachie (2013) illustrate, the South African Truth and Reconciliation Commission frequently 'eulogised' reconciliatory or forgiving accounts of victims, while those narratives which offered a different 'truth' went largely unheard. Such a situation, they argue, was a direct result of 'the elite-driven social and political mood of music in South Africa' (at p. 8). It is perhaps unsurprising then, that truth commissions can often seem tepid and ineffectual to victims, and that, on occasions, courts may actually seem to be a better guarantor of their rights and interests (Freeman, 2006).

Despite the predominance of courts and truth commissions, there are other transitional justice tools through which victims are able to participate and which arguably offer significantly better prospects. Transitional justice need not always come 'from above', and it is clear that, on occasion, mechanisms which have either emerged from, or are based on, new or existing grassroots practices are often deemed to do a better job in engaging victims and communities (see generally McEvoy and McGregor, 2008). Illustrations from Northern Ireland, in particular, are readily found in the literature, and include the role of the Peace People (Byrne, 2001), the Ardoyne Commemoration Project (Lundy and McGovern, 2008), and more recently the evolution of community-based restorative justice schemes in traditional 'no-go' areas for the police during the Troubles (McEvoy and Mika, 2001). Examples from elsewhere include the use of Street Committees during the Apartheid era in South Africa (Burman and Schärf, 1990), grassroots reconciliation projects in Colombia (Diaz, 2008) or the work of the Peace Foundation in Bougainville in the aftermath of the civil war (Braithwaite, 2010).

On occasions, policymakers will seek to co-opt or modify pre-existing forms of informal and community justice in an effort to boost the legitimacy of top-down transitional justice arrangements. The most widely cited example is perhaps the revival of the *gacaca* system in Rwanda, although concerns have been expressed about the alleged use of coercion, issues of gender equality, and excessively punitive sanctions (Waldorf, 2006). A practice known as *nahe bitu* in Timor Leste has arguably done a better (albeit imperfect job) of securing support from victims and communities (see Grenfell, 2006; Kingston, 2006). Here the Commission for Reception, Truth, and Reconciliation permitted perpetrators of “less serious crimes” who gave full confessions to avoid prosecution, but they were instead urged to participate in a localised ‘Community Reconciliation Process’, which was, broadly speaking, a form of mediation based on customary law (Commission for Reception, Truth and Reconciliation in East Timor, 2005).⁷

While the varied mechanisms of transitional justice differ in the extent to which they offer meaningful participation, it is clear that the *value* placed on victim participation is significant. There is a broad appreciation of the fact that post-conflict justice cannot be meted out in an effective or fair manner where victims are essentially precluded from exercising a central role.

As far as conventional criminal justice is concerned, there has been no shortage of critique levied at it to the effect that the victim is the ‘forgotten man’ of the criminal justice system. Christie’s (1977) seminal critique as to how the state came to ‘appropriate’ the criminal conflict over the centuries is widely accepted. While recent years have undoubtedly witnessed a trend whereby the participatory role of the victim has been significantly improved, victims still cannot be considered to be active participants or be able to exercise a voice to any meaningful extent. As illustrated above, the adversarial structure of the trial dictates that advocates effectively own the trial arena. Victims – and indeed defendants – are relegated to the role of ‘evidentiary cannon fodder’ in the form of witnesses for either side (Braithwaite, 1992). Once the trial stage has been completed, the victim’s role as a witness comes to an end, and he or she effectively becomes a spectator to any sentencing proceedings. While defence counsel will often produce a lengthy statement of mitigation, traditionally victims have had no standing either to exercise their own voice or to challenge mitigation but forward by the defence (Sanders and Jones, 2007).

However, the past two decades have witnessed in change in attitudes towards the victim’s role at sentencing. Although victims remain structurally isolated from the adversarial paradigm, significant efforts have been made in recent years to confer victims with some form of procedural involvement. The most common device for this purpose is the victim impact statement, which is now widely used across the common law world. In most jurisdictions, the impact statement is primarily to inform the court of the physical, emotional or financial harm suffered by the victim as the result of an offence. This information is then used by the court to assess the severity of the offence. There is some evidence that victim impact statements may give victims a sense of confidence and control, which can also serve to reduce feelings of anger and retribution (Karremans and Van Lange, 2005).⁸ While some commentators are sceptical about either the utility or desirability of victim impact evidence (see eg Ashworth, 2000; Buruma, 2004), Erez (1999: 550) has stated that “[t]he cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims often benefit from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering.”⁹ It might, however, be added that such therapeutic effects will not be universally experienced by all victims; and indeed there is some evidence that while participation may help victims in some cases, it may hinder it in others (Hoyle, 2011).

A 'right' to participate in sentencing is now contained within various constitutional instruments of some US states (Gewurz and Mercurio, 2012), but elsewhere many such rights are often laid down in national codes of practice and charters. In many cases, these tend to be declaratory in nature and are non-binding in the sense that they are not justiciable in the courts (Hall, 2010). For example, although the Victims' Code of Practice in England and Wales is enshrined in statute,¹⁰ its provisions are not legally binding; victims have no means of enforcing rights or entitlements contained therein (Ministry of Justice, 2013). Complaints may, of course, be made to service-providers who breach the Code, and a Member of Parliament may refer such a matter to the Parliamentary Ombudsman, but the fact remains that victims cannot cite the Code as an *ipso facto* source of law.

Secondly, there is significant confusion in many jurisdictions about the overall purpose of victim impact evidence and how, precisely, this is factored into the sentencing process alongside other aggravating and mitigating factors. Ambiguous instructions, stating that such evidence is to be 'considered' or 'taken into account' is used in both England /Wales and Canada, but there is often little further guidance for courts to consider (Roberts and Manikis, 2011). In their interviews with judges in Scotland, Chalmers et al (2007) found it difficult to isolate the effect of the victim impact statement from the vast array of other factors that were built into the sentencing equation, though the researchers do note a number of incidents where judges were minded to 'consider a sentence of a different nature from the one they were initially minded to impose' (at p. 376). Similar findings were uncovered by Erez and Tontodonato (1990) in South Australia.

This leads to a third difficulty, namely that the content of such statements is almost always limited in that victims may only comment on the impact of the crime upon them and no specific demands may be made as to sentence. The statement is essentially a source of information to the sentencer; there is no opportunity to *engage* in any meaningful sense with the offender (for example, by asking questions). If victims feel overly constrained in what they can or cannot say, there is a risk that a process that was established with the objective of delivering a 'voice' for victims may not constitute a true 'voice' at all, but rather be replaced with a sanitised and innocuous version of events which is less capable of fully conveying to the court the full intricacies of the crime's impact upon the victim (Doak and Taylor, 2013).

While the sentencing stage of proceedings is certainly more inclusive than it once was, it remains the case that victims remain structurally excluded from adversarial justice in most common law systems. However, an international perspective suggests that there is no normative reason why victims ought not to be able to exercise participatory rights within an adversarial paradigm. Serious consideration ought to be afforded to the question as to whether it might be possible to confer victims in domestic courts with rights of participation similar to those held by victims at the ICC. Indeed, limited forms of independent legal representation have already been introduced in a number of common law jurisdictions. Examples include Canada, where complainants in cases of rape and sexual assault are able to make submissions to the court on the disclosure of medical records, and the Republic of Ireland, where victims have a statutory right to legal representation on questions concerning the admissibility of previous sexual history evidence (see generally Raitt, 2010). Nsereko (2010) suggests that national jurisdictions could also learn from the emphasis placed on 'personal' harm by the ICC. This emphasis, he believes, could also allow indirect victims to participate in cases where their personal interests are at stake (though – as with the ICC – the decision as to what constitutes 'the personal interests of the victims' is likely to be a matter which is left to the Court's discretion).

It is also possible that victims could play a much more meaningful role at the sentencing stage of proceedings than through reading aloud a traditional victim impact statement. Such a role could be effected through referral to a restorative justice process (as discussed in the

next section), or through conferring victims with a direct right of allocution, whereby they would prepare and read their own statements in court. They ought to be conferred with a relatively broad remit as to its content, and might also include photographs, drawings or poems as is currently permitted in the Australian state of Victoria (Bandes, 1996). Importantly, victims could also ask questions directly to the offender. Of course, defence counsel should also be offered the opportunity to respond to victims' statements, and, indeed challenge them where appropriate. There are two obvious risks with such a move. First, it could be that the victim's account is rendered more prevalent than the other evidence that needs to be factored into account (Bandes, 1996), and thus carry a degree of weight that ought not be attached to it. Secondly, there is a risk that proceedings could become unwieldy and protracted, which could actually exacerbate the stress that the victim may have felt in giving evidence in the first place. Nevertheless, it is suggested with close judicial management, proper preparation, and carefully formulated ground rules, both of these risks could be substantially offset.

Reparation

The provision of redress – or reparation – to victims is routinely provided for within many transitional societies (de Greiff, 2010; Elster, 2004; Torpey, 2006). Whilst the specific modalities of individual reparation programmes vary significantly, the moral justification is said to be twofold: first, to validate the status of the victim as a citizen whose rights have been violated, and secondly, to contribute towards fostering trust between victim communities and State institutions (de Greiff, 2010).

Indeed, recent years have seen the notion of a 'right' to reparation being placed on a robust legal footing. The concept has been significantly advanced through recent jurisprudence of both the Inter-American Court of Human Rights and its European counterpart, and is now regarded as a principle of customary international law (Henckaerts and Doswald-Beck, 2006). Reparation may assume different forms. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law categorise reparations according to whether they are material or symbolic in nature. Examples of the former include proprietary and pecuniary measures, most notably restitution of rights and property and compensation for physical and mental harm or damage to property, whereas symbolic restitution is potentially much broader, including concepts such as 'rehabilitation', 'satisfaction' (including verification of facts, official apologies, judicial sanctions against violations, and acts of commemoration) and 'guarantees of non-repetition' (which may include entrenching international human rights standards and putting in place mechanisms to monitor conflict resolution. Of course, not all reparation programmes will be capable of realising all these objectives, but the instrument reflects the fact that victims have a complex range of needs which ought to be addressed using a diverse range of methods.

While there is a dearth of empirical research documenting the specific needs and desires of victims of conflict, it is accepted that there is significant overlap with what we do know concerning the experiences of victims of violent crime in the domestic sphere (Doak, 2008). The needs of such victims may be either material or psychological in nature (Shapland and Hall, 2007). Whereas material needs may include compensation for loss of earnings, assistance with medical or funeral expenses and the replacement of damaged or stolen property, psychological needs may include coming to terms with past events, overcoming feelings of anger and powerlessness, as well as clinical conditions including depression and post-traumatic stress. Research appears to suggest that victims place as high a priority on symbolic forms of reparation as they do upon material recompense (Braithwaite, 2002; Shapland et al, 1985; Strang, 2002). There is, for example, an abundance of evidence that

victims place a high value on receiving apologies (Fercello and Umbreit, 1998; Strang, 2002.), and this prospect is often an important factor influencing their decision to become involved in mediation and restorative justice programmes (Strang, 2002). However, there is a risk such forms of reparation may be perceived as being grossly disproportionate and may trivialize suffering, so justice may be seen as being belittled or degraded if not backed up by something more tangible, such as the restitution of property or financial compensation (Aukerman, 2002). Indeed, Clamp (2013) has argued that victims prioritise peace and stability over other forms of reparation.

Just as many transitional justice mechanisms have often failed to deliver effective participation for victims, their efforts to provide effective redress to victims have also fallen short on occasion. The nature of the difficulties present in many post-conflict societies mean that the reparatory ideal is often difficult to obtain in practice owing to the complexities of transitional environments, the scale and seriousness of the acts committed; the blurred line between victims and offenders and the large numbers typically involved in the conflict (Clamp, 2013). Thus whilst the South African TRC has been widely lauded for its contribution to the political transition to democracy, empirical research illustrates victims' material needs largely remained unaddressed (Byrne, 2004; Hamber et al, 2000). Compensation payments – in particular – have been widely criticised. De Greiff (2010) notes that while the South African Truth and Reconciliation Commission had proposed giving victims a yearly grant of around \$2,700 for six years, the Government ended up making a one-off payment of less than \$4,000. This figure, he observes, compares unfavourably with Latin American jurisdictions, where substantially greater sums were offered to victims of state violence and families of the disappeared (de Greiff, 2010). State-led reparation programmes thus differ substantially from each other, but the sheer proliferation of such programmes in recent times is indicative of the growing consensus that transitional justice mechanisms are becoming increasingly victim-orientated in their character. The specific components of the best formula for reparation are likely to vary according to the needs and social context of a particular set of victims, and may comprise a mixture of symbolic and material awards.

The provision of reparation, however, need not emanate from a stand-alone programme. Particularly pertinent for the purposes of this article, however, is the fact that reparation may, in fact, be effected through the criminal process. The provision of redress is arguably as important, if not more so, than the punishment of perpetrators, and its importance to the overall 'package' of justice is highlighted through the inclusion of reparatory mechanisms within the Rome Statute of the International Criminal Court. Not only are victims potential participants in the trial process, but they are also potential recipients of reparations pursuant to Article 75(1) which stipulates that the Court shall 'establish principles relating to reparations to, or in respect of, victims.' It may then 'determine the scope and extent of any damage, loss and injury to, or in respect of, victims' and, under para (2), 'make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.'

Whilst this definition of reparation is much narrower than that provided by the United Nations in its 2006 Body of Principles, the conception is broad enough to embrace different modalities of rectifying harm (Wemmers, 2006). From a legal perspective, this is the most straightforward means of awarding reparations, although, as an alternative, the Court may order that reparations be made available through the Trust Fund established under Article 79 of the Statute.¹¹ Although the inclusion of these provisions have been widely lauded (Doak, 2008; Nserko, 2010; Wemmers, 2006;), doubts remain as to how effective they are likely to be in practice, not least because the sheer scale of international crimes would likely dwarf monetary resources of both individual perpetrators and the Trust Fund (Van den Wyngaert, 2012).

Traditionally, the concept of redress has not received much attention within common law criminal justice systems. From a structural perspective, the pursuit for reparation is made through the civil rather than the criminal courts or, alternatively, through stand-alone state compensation programmes. Whilst criminal courts in many jurisdictions have held the power to issue compensation orders in the course of criminal proceedings for some time, such an approach is problematic insofar as such orders may not cover any psychological or emotional injuries of the victim. The model is also built on the rather dubious assumption that any material harm can be quantified in purely pecuniary terms. Compensation orders aside, there is little room in common law courts for any value to be attached to the more symbolic forms of reparation that commonly feature in transitional societies, such as formal apologies, truth-telling; guarantees of non-repetition, or the restoration of rights. Adversarial trials simply do not create the necessary space for victims and perpetrators to interact in a meaningful way, let alone enter any form of dialogue. In some ways, this should not come as a surprise as criminal courts are normatively concerned with the punishment of the offender in the name of the state. It is thereby feared that infusing the victims' reparatory interests within the public function of criminal justice system would create fresh tensions and ambiguity concerning the function and organisation of both civil and criminal law (Frehsee, 1999).

Perhaps the primary lesson that may be drawn from transitional environments for 'ordinary' criminal justice is that 'doing justice' ought not to be a task that is solely concerned with punishing the perpetrator. Some form of punishment may well be a moral imperative, but punishment alone cannot be justified as the only - or primary - need of victims (Elster, 2004). Some jurisdictions have now expressly provided that redress ought to form one of the core objectives of the penal system. In England and Wales, the Criminal Justice Act 2003 placed the goals of sentencing on a statutory footing, meaning that reparation was now to be considered alongside the four classic objectives.¹² In theory at least, contemporary sentencing ought to reflect a combination of several or all of these elements. However, no guidance is available as to what weight ought to be afforded to each of these objectives; and the extent to which the reparation - as something of a novel interloper - will feature alongside the more established aims of sentencing is very much dependent on the subjective view of sentencers. If reparation is to play an active role in sentencing considerations, then it is also incumbent upon the state to facilitate the provision of reparation through some form of practical and accessible mechanism.

The most obvious means of achieving this would be through the widespread provision of mediation and restorative justice programmes which would be triggered once an offender admitted guilt and consented to such a process. Recent years have seen such conferencing programmes, in particular, expand dramatically with statutory schemes now operating for young offenders in New Zealand, Northern Ireland, and most Australian jurisdictions. The use of restorative interventions for adult offenders are less commonplace and tend not to be embedded within the formal criminal justice system. For the most part, programmes tend to operate on an ad hoc basis, often in partnership with local government or criminal justice agencies (Hopkins, 2012; Johnstone, 2011). That said, their use is certainly becoming more commonplace, and legislation was recently introduced in England and Wales to provide a statutory basis by which courts may defer imposing sentence until a restorative activity has taken place.¹³ It remains to be seen how the provision will be used in practice, and whether it might act as something of a precursor to placing restorative justice on a more prominent (and legally certain) footing within the criminal justice system. If this were to happen, it would provide a considerable boost to the role afforded to reparation within the criminal justice system. Rather than compensation being enforced by the court, parties might themselves negotiate their own reparation agreement, which might then weave some form or restorative component into the sentence.

The type of restorative intervention envisaged by this legislation is only one way in which reparation might gain a better foothold within mainstream criminal justice. Another possibility would be for the court to refer certain cases to a restorative justice programme provider, which would then aim to resolve the dispute between the parties, with the outcome being subject to the agreement of the court; a similar model of court-referral already operates in respect of young offenders in Northern Ireland and New Zealand. Alternatively, as the proposal in the previous section suggested, sentencing hearings themselves could be recalibrated so that they allow some of direct deliberation between victims and offenders. Provided both parties agreed and appropriate safeguards were put in place, parties themselves might negotiate their own reparation agreement with judicial oversight, which may then be taken into account by the court in formulating the final sentence.

Even where the parties have not had an opportunity to engage in a restorative encounter, there is still scope for the current sentencing exercise to acknowledge the desirability of reparation. For example, in England and Wales current sentencing guidelines offer very little detail as to the weight that sentencers ought to attach to personal mitigation in general, and expressions of remorse in particular (Doak and Taylor, 2013). Judges could, for example, be offered guidance as to how remorse might be assessed; whether it might carry more weight if accompanied by an unconditional apology, an offer of reparation or any other step taken to make amends. Bibas (2007) proposes that US federal sentencing law should be amended to replace the almost-automatic 35% sentence discount for guilty pleas with a sliding scale that reflects remorse, apology, forgiveness and any acts of contrition. It is thus possible that the English sentencing system, which also operates a similar automatic discount, might also benefit through the introduction of a scaled mechanism which would encourage reparatory acts from the offender in exchange for a lighter sentence.

An alternative course of action might draw directly from Article 75 of the Rome Statute, whereby a form of adhesion or *partie civile* process could be instigated – not dissimilar to that which currently operates in certain continental jurisdictions (see further Brienen and Hoegen, 2000). The effect of this would be that the civil and criminal issues would effectively be resolved through a unitary process, thus eradicating the need for victims to pursue a prolonged civil action which is unlikely to be financially viable in any case. Randy Barnett (1977: 290) famously proposed such a system which would give consideration ‘to the conduct, broadly defined, of the parties to the case with a view toward the protection of individual liberty and private property.’ Viewing conflicts through such a unitary lens would potentially address a much wider set of aims above and beyond either criminal justice or the private law of tort. Instead, the resolution of the victim / offender conflict would be reconceptualised as part of the wider public interest, since the community is made up of ‘victims, potential victims and the fellow citizens of victims’ (Cavadino and Dignan, 1996: 237). Whilst the adhesion and *partie civile* models of both continental Europe and the ICC are far from perfect (Brienen and Hoegen, 2000), their operation illustrates that there ought to be no practical barrier to enabling unitary actions capable of addressing both the public wrongs committed against society as well as the private wrongs committed against the victim. However, the deeply entrenched nature of the common law paradigm which draws a neat (though unconvincing) line between the private and public realms means that such a radical reconfiguration of the criminal trial remains an indeterminate prospect.

Conclusions

This article began by identifying three prevalent themes in transitional justice discourse which might be used to inform ‘ordinary’ criminal justice policymaking in ‘settled’ societies. These themes or values are widely used as benchmarks of victim-orientated justice in post-conflict environments and are acknowledged to be vital in order to bolster both satisfaction rates among victims as well as the overall moral legitimacy of justice processes. The fact

that transitional justice mechanisms often fall short in terms of delivery does not undermine the inherent value of truth recovery, participation and reparation. Rather, it underlines the need to sharpen praxis so that it is capable, as far as possible, to safeguard these values irrespective of the particular mechanism(s) that may be used to deliver transitional justice.

It is recognised that transitional environments differ substantially from each other, and the transitional justice paradigm itself differs from that of 'ordinary' criminal justice in a number of ways. Certainly, it would be foolhardy to advocate an automated importation of any one set of practices before carefully unpacking and recalibrating them to work so that they could operate effectively within the existing parameters of the common law adversarial system. To some extent, some positive signals are emerging which suggest that these values are already fertilising the criminal justice arena; the 2012 EU Directive on Victims' Rights and the 2009 UN Guidelines on Justice in matters involving child victims and witnesses affirm the desirability of effective participation and reparation as benchmarks of good practice. Moreover, the growing prominence of restorative justice is undoubtedly a positive development. Although transitional justice cannot claim credit for its recent international proliferation, the conceptual overlap between the restorative and transitional paradigms has informed both theory and practice, and its inherent appeal to post-conflict societies stems from the value it places on the participation of all parties, as well as its capacity to provide both material and symbolic forms of redress directly from the perpetrator. However, restorative justice remains, for the time being at least, on the periphery of the 'ordinary' criminal justice system in most common law systems. Indeed, even the most passionate proponents of restorative justice acknowledge it is not a magic bullet. It cannot, for example, operate as a fact-finding mechanism where the accused does not accept responsibility for the offence, or where either party does not consent to the process. There are also difficult questions to resolve in terms of its limits in relation to serious offences including sexual offences and domestic abuse (Stubbs, 2007; Cossins, 2008).

It is therefore important that victims' rights proponents (who often overlap with proponents of restorative justice) recognise that restorative interventions will never displace conventional criminal justice entirely, one of the key questions that must therefore be explored is whether – and, if so, how – the key values of truth recovery, participation and reparation might be bolstered within the parameters of existing criminal justice trial structures. Thus developments such as victim impact statements are and will continue to be an important mechanism for participation, but the time has also come to give more careful consideration to innovative policy options which may succeed in helping to transform the adversarial trial arena into a more agreeable – and more just environment – for victims of crime.

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References

Ashworth, A. (2000), 'Victims' Rights, Defendants' Rights and Criminal Procedure'. In: A. Crawford and J. Goodey (eds.), *Integrating a Victim Perspective Within Criminal Justice: international debates*, Aldershot: Ashgate Dartmouth, 185-204.

- Aukerman, M (2002) Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice. *Harvard Human Rights Journal*, 15: 39-97.
- Bala, N., Evans, A., & Bala, E. (2010). Hearing the Voices of Children in Canada's Criminal Justice System: Recognising Capacity and Facilitating Testimony. *Child & Family Law Quarterly*, 22: 21-45.
- Bandes, S (1996) Empathy, Narrative, and Victim Impact Statements. *University of Chicago Law Review* 63(2): 361-413.
- Bell, C (2009) Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-field'. *International Journal of Transitional Justice* 3(1), 5-27.
- Bibas, S (2007) Forgiveness in Criminal Procedure. *Ohio State Journal of Criminal Law* 4(3): 329-348.
- Bonacker, T, Form, W and Pfeiffer, D. (2011) Transitional justice and victim participation in Cambodia: a world polity perspective. *Global Society* 25(1): 113-134.
- Braithwaite, J. (1992). 'Juvenile Offending: New Theory and Practice.' Address to the National Conference on Juvenile Justice, Adelaide, Institute of Criminology, September 1992.
- Braithwaite, J. (2002) *Restorative Justice and Responsive Regulation*. Oxford: Oxford University Press.
- Braithwaite, J. (2010). *Reconciliation and architectures of commitment: sequencing peace in Bougainville*. Canberra: ANU Press.
- Brants, C (2011) Comparing criminal process as part of legal culture. In: Nelken D (ed), *Comparative Criminal Justice and Globalisation*. Surrey: Ashgate.
- Brienen, M, and Hoegen, H, (2000) *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*. Niemegen: Wolf Legal Publishers.
- Burman, S., & Schärf, W. (1990). Creating people's justice: Street committees and people's courts in a South African city. *Law and Society Review* 24(3): 693-744.
- Buruma, Y, (2004) Doubts on the Upsurge of the Victim's Role in Criminal Law. In: Kaptein H and Malsch M (eds), *Crime, Victims, and Justice. Essays on Principles and Practice*. Aldershot: Ashgate.
- Byrne, C (2004) Benefit or Burden: Victims' Reflections on TRC Participation. *Peace and Conflict* 10(3): 237-256.
- Chalmers, J, Duff, P, and Leverick, F. (2007) Victim impact statements: can work, do work (for those who bother to make them). *Criminal Law Review* (May): 360-379.
- Clamp, K. (2013). *Restorative justice in transition*. London: Routledge.
- Clamp, K and Doak J (2012) More than words: restorative justice concepts in transitional justice settings. *International Criminal Law Review* 12(3): 339-360.
- Coen, M. (2014) 'With Cat-Like Tread': Jury Trial and the European Court of Human Rights. *Human Rights Law Review* 14(1): 107-131.

- Cohen, S (1995) State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past. *Law and Social Inquiry* 20: 7-50.
- Cole, D (2001) Psychodrama and the Training of Trial Lawyers: Finding the Story. *North Illinois University Law Review* 21: 1-40.
- Combs, N (2007) *Guilty Pleas in International Criminal Law*. Stanford: Stanford University Press.
- Commission for Reception, Truth and Reconciliation in East Timor (2006) *Final Report*. Available at <http://www.etan.org/news/2006/cavr.htm> [accessed 4 November 2013].
- Commissioner for Victims and Witnesses in England and Wales (2011) *Victims' Views of Court and Sentencing*. London: Ministry of Justice.
- Cossins, A (2008) Restorative Justice and Child Sex Offences: The Theory and the Practice. *British Journal of Criminology*, 48: 359-78.
- Daly, K (2008) Setting the Record Straight and A Call for Radical Change: A Reply to Annie Cossins on 'Restorative Justice and Child Sex Offences'. *British Journal of Criminology* 48(4): 557-566.
- Davis, G (1992) *Making amends: Mediation and reparation in criminal justice*. Routledge.
- De Greiff, P (2010) Reparation programs: Patterns, Tendencies, and Challenges. *Politorbis: Dealing with the Past* 50(3): 53-64.
- Dembour, M. B., & Haslam, E. (2004). Silencing hearings? Victim-witnesses at war crimes trials. *European Journal of International Law* 15(1): 151-177.
- Diaz, C. (2008) Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia. In: McEvoy, K and McGregor, L (eds). *Transitional justice from below: Grassroots activism and the struggle for change*. Oxford: Hart, 2008..
- Doak, J (2008) *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*. Oxford: Hart.
- Doak, J. (2011) The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions. *International Criminal Law Review* 11(2): 263-298.
- Doak, J and Taylor L (2013) Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing. *Northern Ireland Legal Quarterly* 64(1): 25-46.
- Ellison, L (2001) *The Adversarial Process and the Vulnerable Witness*. Oxford: Oxford University Press.
- Elster, J (2004) *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press.
- Erez, E (1999) Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice. *Criminal Law Review* (July): 545-556.
- Erez, E., & Tontodonato, P. (1990). The Effect of Victim Participation in Sentencing on Sentence Outcome. *Criminology* 28(3): 451-474.
- Ericson, R (1981) *Making Crime: A Study of Detective Work*. Toronto: Butterworths.

Fercello, C and Umbreit, M (1998) *Client Evaluation of Family Group Conferencing in 12 Sites in the First Judicial District of Minnesota*. St. Paul, MN: Center for Restorative Justice and Mediation.

Fielding, N (2006) *Courting Violence*. Oxford, Oxford University Press.

Freeman, M (2006) *Truth Commissions and Procedural Fairness*. Cambridge: Cambridge University Press.

Frehsee, D (1999) Restitution and the Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications. *Buffalo Criminal Law Review* 3(1): 235-259.

Garland, D. (2001), *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Geis, G (1990) Crime victims—practices and prospects. In A Lurigio, WG Skogan and RC Davis (eds), *Victims of Crime: Problems, Policies, Programs*. Newbury Park, CA: Sage, pp. 50-57.

Gewurz, D and Mercurio, M (2012). The Victims' Bill of Rights: Are Victims All Dressed Up with No Place To Go? *Journal of Civil Rights and Economic Development* 8(1).

Gray, D (2005) An Excuse-Centered Approach to Transitional Justice. *Fordham Law Review*, 74: 2621–2693.

Green, PJ and Ward, T (2000) State Crime, Human Rights, and the Limits of Criminology. *Social Justice* 27(1): 101-115.

Hall, M. (2010) *Victims and Policy-Making: A Comparative Perspective*. London: Routledge.

Hamber, B, Nageng, D and O'Malley, G (2000). 'Telling It Like It Is...': Understanding the Truth and Reconciliation Commission from the Perspective of Survivors. *Psychology in Society* 26: 18-41.

Haynes, PB (2010) *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. London: Routledge.

Henckaerts, JM and Doswald-Beck, L (2006) *Customary International Humanitarian Law*. Geneva: International Committee of the Red Cross.

Henham, R (2011) *Sentencing and the Legitimacy of Trial Justice*. London: Routledge.

Herman, JL (2003) The Mental Health of Crime Victims: Impact of Legal Intervention. *Journal of Traumatic Stress* 16(2): 159-166.

Hopkins, B (2012). Restorative Justice as Social Justice. *Nottingham Law Journal*, 21, 121-132.

Hoyle, C (2011) Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence. In: Erez, E, Kilchling, M and Wemmers, J (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives*. North Carolina: Carolina Academic Press.

Johnstone, G. (2011). *Restorative justice: Ideas, values, debates*. London: Routledge.

Kaminer, D, Stein, DJ, Mbanga, I and Nompumelelo Z. (2001) The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness among Survivors of Human Rights Abuses. *British Journal of Psychiatry* 178: 373-377.

- Karstedt, S. (2010). From absence to presence, from silence to voice: Victims in international and transitional justice since the Nuremberg trials. *International Review of Victimology*, 17(1), 9-30.
- Kelsall, MS and Stepakoff, S (2007) 'When we wanted to talk about rape': silencing sexual violence at the Special Court for Sierra Leone. *International Journal of Transitional Justice* 1: 355-374.
- Kilpatrick, DG and Acierno, R (2003) Mental health needs of crime victims: Epidemiology and outcomes. *Journal of Traumatic Stress* 16(2): 119-132.
- Laudan, L (2006) *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge, Cambridge University Press).
- Landsman, S (1984) *The Adversary System, a Description and Defence* (Washington, The American Enterprise Institute).
- Lundy, P and McGovern, M (2008) Whose justice? Rethinking transitional justice from the bottom up. *Journal of Law and Society*, 35(2): 265-292.
- McBarnet, D. (1983) Victim in the Witness Box—Confronting Victimology's Stereotype. *Contemporary Crises* 7: 293-303.
- McEvoy, K (2006) *Making Peace with the Past: Options for Truth Recovery in Northern Ireland*. Belfast: Healing Through Remembering.
- McEvoy, K and McGregor, L (eds) (2008) *Transitional justice from below: Grassroots activism and the struggle for change*. Oxford: Hart.
- McEvoy, K and McConnachie, K. (2013). Victims and Transitional Justice Voice, Agency and Blame. *Social & Legal Studies* 22: 489-513.
- McEvoy, K and Mika, H (2001). Punishment, policing and praxis: Restorative justice and non-violent alternatives to paramilitary punishments in Northern Ireland. *Policing and Society: An International Journal* 11(3-4): 359-382.
- McEwan, J (1998) *Evidence and the Adversarial Process*. Oxford: Oxford University Press.
- McGonigle-Leyh, BN (2011) *Procedural Justice? Victim Participation in International Criminal Proceedings*. Antwerp: Intersentia.
- Miller, L. (2008). *Counseling crime victims: Practical strategies for mental health professionals*. New York: Springer Publishing Company.
- Ministry of Justice (2013) *Code of Practice for Victims of Crime*. London: Ministry of Justice
- Naqvi, Y (2006) The right to the truth in international law: fact or fiction? *International Review of the Red Cross* 88(682): 245- 273.
- Nsereko, DDN (2010) The Role of Victims in Criminal Proceedings – Lessons National Jurisdictions can learn from the ICC. *Criminal Law Forum* 21(3/4): 399-415.
- Posner, EA and Vermeule, A (2004) Transitional justice as ordinary justice. *Harvard Law Review* 117(3): 761-825.
- Raitt, F (2010) *Independent Legal Representation for Complainers in Sexual Offence Trials*. Glasgow: Rape Crisis Scotland.

- Roberts, P (1998) On the Preconditions and Possibilities of Criminal Law Theory. *South African Journal of Criminal Justice* 11: 285-324.
- Roberts, P (2011) Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials? *Human Rights Law Review* 11(2): 213-235
- Roberts, JV and Erez, E (2010) Victim Impact Statements at Sentencing: Expressive and Instrumental Purposes. In: Bottoms, AE and Roberts, JV (eds) *Hearing the Victim: Adversarial Justice, Crime Victims, and the State*. Cullompton: Willan Publishing.
- Rock, P. (1993), *The Social World of an English Crown Court: witnesses and professionals in the Crown Court Centre at Wood Green*. Oxford: Clarendon Press.
- Sanders, A and Jones, I (2007) The Victim in Court. In: S Walkate (ed), *Handbook of Victims and Victimology*. Cullompton: Willan.
- Shapland, J and Hall, M (2007) What do we know about the effects of crime on victims? *International Review of Victimology* 14: 175-217.
- Shapland, J and Hall, M (2010). Victims at Court: Necessary Accessories or Principal Players at Centre Stage? In: Bottoms, A and Roberts, JV (eds) *Hearing the Victim: Adversarial Justice, Crime Victims and the State*. Cullompton: Willan.
- Shapland, J, Wilmore, J and Duff, P (1985) *Victims and the Criminal Justice System*. Aldershot: Gower.
- Sherman, LW and Strang, H (2003) Repairing the Harm: Victims and Restorative Justice. *Utah Law Review* 1: 15-42.
- Smyth, JM and Pennebaker, JW (1999) Sharing One's Story: Translating Emotional Experiences into Words as a Coping Tool. In: Snyder, CR (ed) *Coping: The Psychology of What Works* (New York and Oxford, Oxford University Press).
- Sorochinsky, M (2009) Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law. *Michigan Journal of International Law* 31: 157-213.
- Spencer, JR and Lamb, ME (2012) *Children and Cross-Examination: Time to Change the Rules?* Oxford: Hart.
- Tinsley, Y, and McDonald, E (2011) Use of alternative ways of giving evidence by vulnerable witnesses: Current proposals, issues and challenges. *Victoria U. Wellington L. Rev.*, 42, 705.
- Torpey, J (2006) *Making Whole What Has Been Smashed: On Reparations Politics*. Cambridge, MA: Harvard University Press.
- UN Office of the High Commissioner for Human Rights (2009) *Report: The Right to Truth*, UN Doc A/HRC/12/19. Geneva: United Nations.
- United Nations Security Council (2004) *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, 23 August 2004 (S/2004/616).
- Van den Wyngaert, C (2012) Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge. *Case Western Reserve Journal of International Law* 44: 475-496.
- Waldorf, L (2006). Rwanda's failing experiment in restorative justice. In Sullivan, D and Tift, L (eds), *Handbook of Restorative justice: A global perspective*. Routledge: London.

Weitekamp, E, Vanspauwen, K, Parmentier, S, Valiñas, M and Gerits, R (2006) How to deal with mass victimization and gross human rights violations. A restorative justice approach. In: Ewald, U and Turkovic, K (eds), *Large-Scale Victimisation as a Potential Source of Terrorist Activities - Importance of Regaining Security in Post-Conflict Societies*. IOS Press: Amsterdam.

Wemmers, J (2006) *Reparation and the International Criminal Court: Meeting the Needs of Victims*. Research Group Victimology and Restorative Justice, International Centre for Comparative Criminology, University of Montreal; Montreal.

Wemmers, J (2009, November). Where do they belong? Giving victims a place in the criminal justice process. *Criminal Law Forum* 20(4): 395-416.

Williams, B (2005) *Victims of Crime and Community Justice*. London: Jessica Kingsley.

Woolford, A and Ratner, RS (2008). *Informal reckonings: Conflict resolution in mediation, restorative justice, and reparations*. London: Routledge.

Zacklin, R. (2004). Failings of Ad Hoc International Tribunals. *Journal of International Criminal Justice* 2(2): 541-545.

¹ The field is portrayed as inherently cross-disciplinary, or something of a melting pot of hitherto distinct academic disciplines: the legal, the criminological, the political, the psychological, and the sociological. This has given rise to contention about its overall place in academic taxonomy; there is debate as to whether it ought to be viewed as a field (or sub-discipline) of law, politics, or conflict studies, or whether it ought to be regarded as free-floating or self-standing (see generally Bell, 2009).

² In addition to the creation of the International Criminal Court in 1998, the United Nations has overseen the establishment of many ad hoc tribunals in recent years including the International Criminal Tribunal for Rwanda; the International Criminal Tribunal for the Former Yugoslavia; the Special Court for Sierra Leone, the Regulation 64 Panels in Kosovo, the Iraqi High Tribunal; the Special Tribunal for Lebanon; the Special Panels for Serious Crimes in Dili District Court and the Extraordinary Chambers in the Courts of Cambodia.

³ *Ellacuria* (Case 10.488, Report N° 136/99, December 22, 1999). The comparative lack of any recent military regimes in Europe has meant that the concept of a 'right to truth' has only arisen in a very peripheral sense before the court.

⁴ However, the truth commission model has not been deemed appropriate for all post-conflict societies. Fifteen years after the Belfast Agreement of 1998, such a truth commission remains – for various reasons – a distant prospect in Northern Ireland. Nevertheless, it is apparent that truth recovery is widely accepted as a value; public inquiries have thus been used to explore issues such as collusion; and, most famously, the events of Bloody Sunday in 1972.

⁵ It is often open to the jury to acquit the accused of some charges whilst convicting on others. There is, on occasion, scope for the jury to convict the accused of a lesser charge (for example, by substituting a murder verdict with one of manslaughter), thus, in effect, allowing the fact-finder to partly transcend the terms of the dispute as framed by the parties. However, it remains the case that the trier of fact bases any such decision on the material presented by the parties themselves.

⁶ Although the European Court of Human Rights has stated that there is a general rule that courts should give reasons for their decisions, this has been held by the ECHR not to apply to juries. However, in *Taxquet v Belgium* (2012) 54 EHRR 26, the Court held that a Belgian defendant had not been given 'sufficient safeguards enabling him to understand why he was found guilty'. Although most commentators suggest that the decision poses no imminent threat to the English jury system, both the Irish and the UK governments were sufficiently concerned to submit third party observer submissions to Strasbourg, and there has been increased debate on the role of the jury in the UK media as well as in academic journals.

⁷ These crimes included theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock or destruction of crops: UNTAET/REG/2001/10 (July 13, 2001), sch. 1.

⁸ J C Karremans and P Van Lange, "Does activating justice help or hurt in promoting forgiveness?" (2005) 41 *Journal of Experimental Social Psychology* 290; H Strang, *Repair or Revenge? Victims and Restorative Justice* (Oxford: Clarendon, 2002).

⁹ E Erez, "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice" [1999] *Crim LR* 545, pp. 550–51.

¹⁰ Domestic Violence, Crime and Victims Act 2004, section 32.

¹¹ Victims can access the Trust Fund even if they do not appear before the Court.

¹² Section 142 of the Criminal Justice Act 2003 stipulates that "Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing... the punishment of offenders; the reduction of crime (including its reduction by deterrence); reformation and rehabilitation of offenders; protection; the making of reparation by offenders to persons affected by their offences.

¹³ Providing that such a course of action is opted for by both the victim and the offender: see Crime and Courts Act 2013, sch 16(2), inserting a new Section 1ZA of the Powers of Criminal Courts (Sentencing) Act 2000.