

# BOOK REVIEW

## ***SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN AD HOC TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC***

**BY SILVIA D'ASCOLI**

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On receiving this text, I turned to the dust jacket and read:

This book deals with sentencing in international criminal law, focusing on the approach of the UN *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). In contrast to sentencing in domestic jurisdictions, and in spite of its growing importance, sentencing law is a part of international criminal law that is still 'under construction' and is unregulated in many aspects.<sup>1</sup>

I went on to read that the goal pursued by the author, a lawyer with the Appeals Division of the Office of the Prosecutor for the International Criminal Tribunal of the former Yugoslavia (ICTY) and the holder of a Doctorate in Law, was quite ambitious: to make plain how international sentencing law and practice is not yet defined by exact norms and principles and to investigate and analyse the process of international sentencing in order to explain how an offender responsible for multiple deaths associated with a heinous motive often receives a sanction far inferior to that meted out by domestic courts.

Ambitious though the goal might be, it has been reached!

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<sup>1</sup> Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Hart, 2011).

Indeed, I cannot recall reading a text on the subject of sentencing, one I consider of foremost interest,<sup>2</sup> which so often surprised me by the breadth of its statistical analysis. One is often pleased to read a book which is superlative in terms of the depth and rigour of the analysis,<sup>3</sup> but it is quite rare to be provided with a coherent terracing of numbers and figures to support the conclusions advanced. In this vein, I commend in particular ch 4, 'Quantitative Analysis of Sentencing: Data in the Case Law of the *ad hoc* Tribunals'.<sup>4</sup> The author presents a *tour de force* justification for each submission advanced, based on a rigorous review of the various factors at play, whether age of offender, number of victims, motivation for wrongdoing, etc. In the final analysis, we are able to accept fully the views advanced as to the overall greater degree of severity in terms of the sanctions meted out by the judges presiding in the International Criminal Tribunal for Rwanda as opposed to the ICTY but, as well and more importantly, we are offered a rich review of the method of sentencing pursued by the courts, and the various panels in certain cases.

The next Chapter, 'The Sentencing System of the International Criminal Court',<sup>5</sup> builds upon the foregoing analysis and will serve to predict, as far as possible, how future sanctions might be selected in the case of atrocities in the years ahead, if regrettably further events of this nature come to pass.

All that being said, anyone vitally interested in the subject of domestic sentencing, be it in Canada, the United States, Australia, New Zealand, England and Wales, or other common law countries, will profit from reading ch 6, 'Assessment of Some Important Legal Issues for International Sentencing',<sup>6</sup> as the author offers a comprehensive analysis of the proportionality principle, the principle of legality of penalties, and of the purposes of punishment. I note that the discussion is oriented chiefly towards the international dimensions of sentencing, but the fact remains that any scholar, practitioner or sentencer will gain immensely from the in-depth discussion of the factors which mitigate or aggravate the case at Bar. I note in particular on the issue of guilty pleas.<sup>7</sup> All

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<sup>2</sup> I have written: *The Sentencing Code of Canada: Principles and Objectives* (LexisNexis, 2009); *Les Misérables on Sentencing* (Academic Press, 2007); *Speaking to Sentence: A Practical Guide* (Carswell, 2005); *Principes de la détermination de la peine* (Les Éditions Yvon Blais, 2004).

<sup>3</sup> Two recent outstanding examples follow: AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) reviewed by the undersigned in (2012) 36 *Criminal Law Journal* 192; Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) also reviewed by the undersigned, in (2012) 36 *Criminal Law Journal* 317.

<sup>4</sup> D'Ascoli, above n 1, 203–61.

<sup>5</sup> *Ibid* 263–88.

<sup>6</sup> *Ibid* 289–320.

<sup>7</sup> *Ibid* 315–17.

in all, there are insights of great assistance for all types of cases and for all jurisdictions with a common law foundation.

Pursuing this line of thought, there are a number of passages that are also of general assistance to those concerned with sentencing, such as the question of the age of offenders;<sup>8</sup> the wisdom of a closed list of aggravating factors;<sup>9</sup> the concerns arising out of the issue of potential double-counting of elements of culpability, such as in cases where the constituent elements of the offence established includes singling out victims by reason of race or religion;<sup>10</sup> the totality principle;<sup>11</sup> and the influence of group pressure in the decision to commit a crime.<sup>12</sup> In addition, quite rare guidance is found on the issue of the culpability of a physician who violated his oath to heal by his participation in a signal crime.<sup>13</sup>

I also wish to stress the importance of the discussion surrounding guilty pleas in such cases, together with the question of the acceptance of responsibility,<sup>14</sup> and the thorny issue of the dilution of the factual background as alleged.<sup>15</sup>

As a former prosecutor in the Canadian War Crimes and Crimes Against Humanity Section of the Department of Justice, I was looking forward to receiving this text and my anticipation was rewarded. Ms D'Ascoli has submitted a comprehensive, coherent and cogent analysis of the work of the *ad hoc* tribunals on the matter of sentencing, a feat of great value in and of itself, but the ultimate value of her text lies in the oft-repeated justification for a thorough baseline calculus upon which future offenders may be punished for war crimes and crimes against humanity, especially before the International Criminal Court.

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<sup>8</sup> Ibid 42.

<sup>9</sup> Ibid 89.

<sup>10</sup> Ibid 91, 153.

<sup>11</sup> Ibid 129.

<sup>12</sup> Ibid 151.

<sup>13</sup> Ibid 517.

<sup>14</sup> Ibid 178–83, 315–6.

<sup>15</sup> Ibid at 194.