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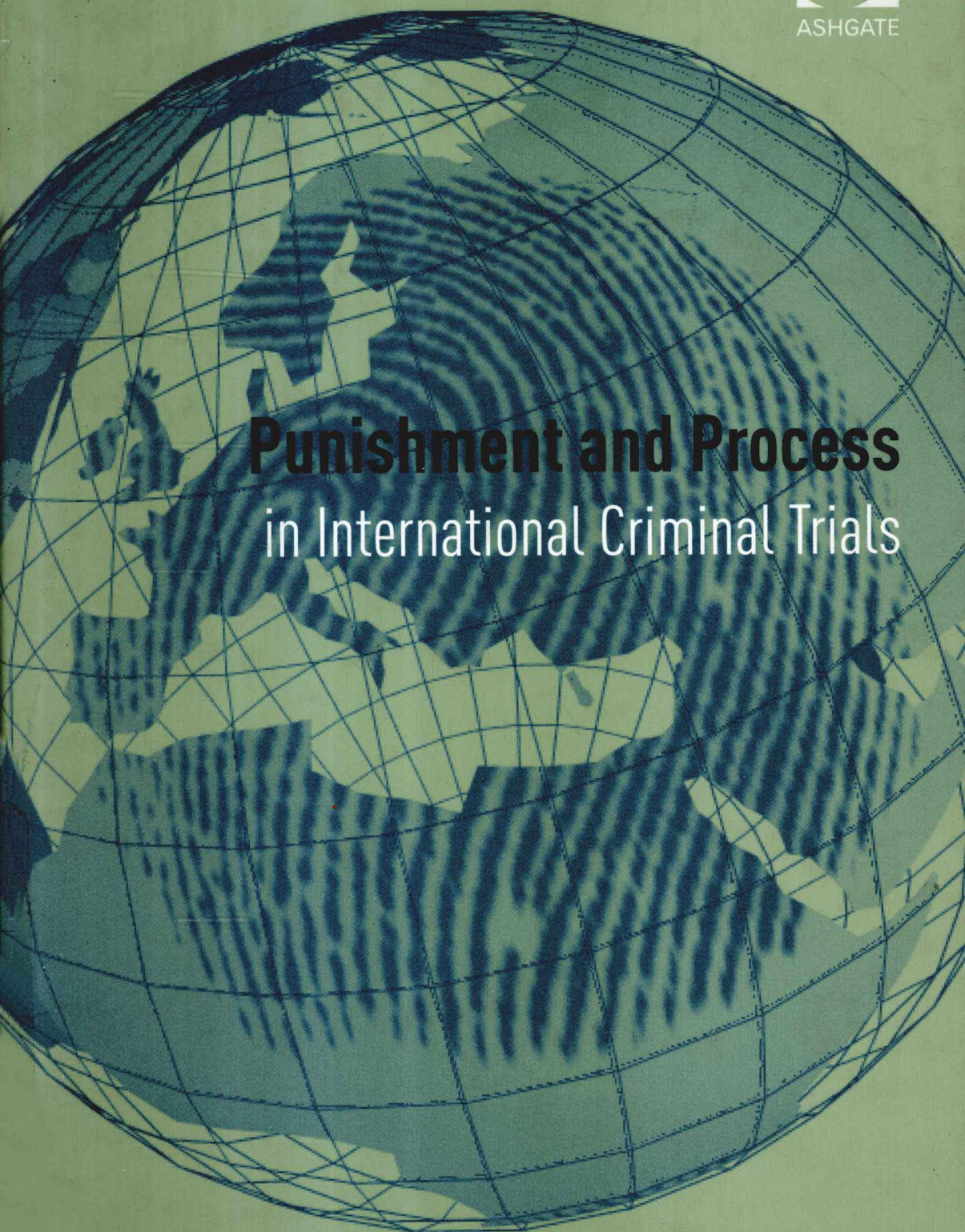

Punishment and Process in International Criminal Trials

Ralph Henham

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The material presented and discussed in this book arises from the author's work on the International and Comparative Criminal Trial Project, which was founded by the author and Professor Mark Findlay (University of Sydney) in 1999 and is based in the Centre for Legal Research at Nottingham Law School.

The purpose of this volume is to bring together several themes concerned with sentencing in international criminal trials that have been discussed in a number of articles and working papers produced by the author for the ICTP. A primary rationale for the collection is to emphasise the author's enduring concern with the ideology and legitimacy of international sentencing, and its broader significance for the philosophy and sociology of international criminal justice. In that sense, it is both a socio-legal and philosophical inquiry. However, it also has more pervasive theoretical and methodological implications for understanding socio-legal process comparatively (and internationally) due to the perspective of comparative contextual analysis which is adopted throughout the text. More particularly, it is argued that the theory, modelling and method suggested by this approach provides a tool for understanding the relationship between normative structures and human agency within the context of trial ideologies and cultures at the global and local level. As such, the analysis suggests a means for translating our aspirations for international penality into a reality which has moral legitimacy and delivers a form of collective justice that contributes to peace and reconciliation.

The author would like to thank Mark Findlay for his inspiration and perceptive criticism and also Roger Cotterrell for his encouragement and support. Thanks are also due to Nottingham Law School for its continued support of my work and the provision of a period of sabbatical leave. As always, I have benefited in innumerable ways from the constant support and encouragement of my wife Annemarie, to whom this book is dedicated.

I have drawn upon the following published materials in the preparation of this text, with substantial additions and revisions where appropriate:

'Some Issues for Sentencing in the International Criminal Court' (2003) *International and Comparative Law Quarterly* 52: 81–114

'The Philosophical Foundations of International Sentencing' (2003) *Journal of International Criminal Justice* 1/1: 64–85

'Conceptualising Access to Justice and Victims' Rights in International Sentencing' (2004) *Social & Legal Studies* 13/1: 21–55

Ralph Henham
Nottingham

Series Editors' Preface

This book is the first in a new series devoted to exploring the new and rapidly developing field of international and comparative criminal justice. The series aims to encourage authors from a wide variety of disciplines to engage with its most important emerging themes and debates, focusing on three interrelated aspects of scholarship which go to the root of understanding the nature and significance of international criminal justice in the broader context of globalisation and global governance.

Firstly, the series aims to address the theoretical and methodological problems posed by the development of international and comparative criminal justice. It therefore seeks to locate this new area of study within existing theoretical debates in criminology, legal philosophy, international relations, international law and the sociology of law. In addition, as editors, we wish to stimulate debate about the methodological issues raised in seeking to understand the relationship between human agency, structure and process within comparative and international justice contexts. The series will therefore include books dealing with such diverse topics as international criminal justice theory and comparative research methodology and policy.

The series also aims to promote scholarship that enhances our understanding of the operation of criminal justice processes and policy. In particular, it concentrates on developing comparative understandings of trial ideology, its transformation into normative structures, and the significance of trial process for trial participants and relevant communities of justice. In addition to comparative accounts of criminal justice processes, it includes discussions of comparative sentencing and penology and explores the interface between law and morality against the realities of cultural relativism.

Finally, the series reflects on the recursive relationship between comparative and international criminal justice and aims to build understandings of global justice on foundations of comparative contextual analysis. Significant areas include developments in the international legal order; contextual analyses of international criminal procedure and rights paradigms; victimology and international criminal justice; contemporary issues in alternative justice; and the role of the international criminal trial.

Mark Findlay

Ralph Henham

Contents

List of Figures

Introduction

The purpose of this book is to provide an integrated socio-legal analysis of the law and process of international sentencing. It considers the rationale and development of international sentencing structures and processes, the nature and scope of legal and procedural constraints on decision-making, access to justice and rights issues and, in addition, provides a detailed evaluation of the philosophical and theoretical difficulties raised by this rapidly developing area of international criminal justice.

The fact that the analysis claims to be both 'integrated' and 'socio-legal' requires some preliminary explanation. The basic premise which informs the work is that sentencing is *instrumental.* By this is implied a conceptualisation of sentencing that is purposeful, one which provides a context where the ideological and philosophical rationales that inform policy and structure are negotiated in ways that reflect meaningful connections between the institutions of punishment and citizens. As Tamanaha (1997, p.237) recognises, the exercise of judicial discretion has an autonomous quality which goes beyond rule-orientation and procedural concerns towards the attainment of social purposes; the direction and control of this cognitive framework being crucial to the consistent and principled development of sentencing practice. Such arguments invest the instrumentality of legal reasoning with a principled form of rationality which is oriented towards the social consequences of punishment. In the context of the nation state the instrumental rationality of judicial reasoning and what constitutes substantive justice are circumscribed by cultural parameters.

However, for sentencing in the international criminal trial institutions the connections between judicial attitudes and the instrumentality of discretionary behaviour are more difficult to draw and reconcile with the international dimensions of penality. For example, it may be argued that the ideological merits of international punishment are determined by the position taken on the legitimacy of western forms of liberal democracy to pursue their ambitions through war and the threat of military power. Alternatively, this argument may be countered by espousing the legitimacy of international punishment on the basis of the need for the international community to punish gross violations of international humanitarian law. Such arguments serve to highlight the fact that the ideological merits of international punishment and the motives for the establishment and operation of international punishment structures are conjectural and cannot be divorced from global politics. However, they also indicate the difficulties faced by sentencers in providing rationalisations for international punishment that transcend its symbolism and connect in some meaningful way with victims and communities.

It is also arguable that the problems faced by international institutions are *qualitatively* different from those faced by national trial institutions and, therefore, the development of international sentencing principles and normative procedures are

essentially *sui generis* (Rubin, 2001). This view implies that since international institutions are dealing with distinctive international forms of criminality, domestic and regional jurisdictional practices, or inquisitorial and adversarial forms of trial (or their hybrids) have little (or no) relevance in determining the future development of international sentencing praxis.[1]

The position adopted in this book is very different in that it views the creation and development of international sentencing norms as essentially a recursive process grounded in social contexts which reflect diverse legal cultures and conventions. Pragmatically, this recognises that the forces that have informed the debates and substantive content of the foundation instruments and sentencing practices of the international institutions have been driven in equal measure by diverse ideologies, jurisdictional forms, process styles and rights paradigms as they have by multinational political imperatives (Dennis, 1997). However, the theoretical and methodological implications of this approach are profound, since it requires the integrated development of concepts, models and methods that are capable of delivering convincing comparative contextual accounts of process and ideology at different jurisdictional levels and describing their influence (if any) and impact on international sentencing praxis, and reciprocally, the impact on regional and domestic sentencing regimes of institutionalised global sentencing practice.

The remainder of this introductory chapter aims to clarify for the reader some of the theoretical concepts and methodological assumptions which underpin this endeavour and which are explicitly referred to throughout the substantive analysis that follows.

The Concept of Internationalisation

This book is essentially concerned with the description and analysis of international sentencing process and procedure in the United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the more recently established International Criminal Court.[2] However, the notion of 'internationalisation' is deliberately invoked to suggest that international trial processes need to be understood in terms which are able to make sense of their origins. This injunction is more than just a plea for contextual analysis; it implies that to determine the content and parameters of international sentencing depends upon our ability to comprehend the origins and significance of structure and process. It also serves to draw a conceptual distinction between the creation and development of new, exclusive forms of international sentencing process and principles and those that signify accommodation and compromise between existing (or hybridised) domestic or regional jurisdictional forms upon which they are based. This imperative is also driven by a desire to appreciate the dichotomy between local jurisdictions with transplanted forms of process originating from other domestic jurisdictions (hybridised), and the internationalisation of process in domestic jurisdictions achieved through the transplantation of international forms of process (internationalised).

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[1] It nevertheless remains consistent with the notion that the international tribunals are distinguished from national systems through their humanitarian mission (Cassese 1999).

[2] Hereinafter referred to as the ICTY, ICTR and ICC respectively.

The phenomenon of internationalisation in sentencing is an enigma. Internationalisation suggests movement or transition, in the sense of some form of development or evolutionary process towards harmonisation and uniformity in sentencing process across and beyond specific jurisdictional contexts. Like globalisation, it is a notion which conveys a sense of inevitability and relentlessness. It also implies that there are beneficial consequences to be derived for sentencing from the merging of trial traditions, or their hybridisation. However, such an assertion cannot be made by simply extrapolating from descriptions derived from the juxtaposition and comparison of process styles from different legal cultures (Nelken, 2000). Our understanding of internationalisation in sentencing is shaped by our capacity to deconstruct the relationship between domestic, regional and international sentencing contexts.

As Figure I.1 suggests, the cultural transmission of process styles is reciprocal, and has both horizontal and vertical effects. Hence, the essence of internationalisation is concerned with the extent to which we are able to provide meaningful descriptions of sentencing process at different jurisdictional levels and to draw conclusions about the emergence of common themes, process styles or procedures which are truly based on shared experience (Findlay and Henham, 2005).

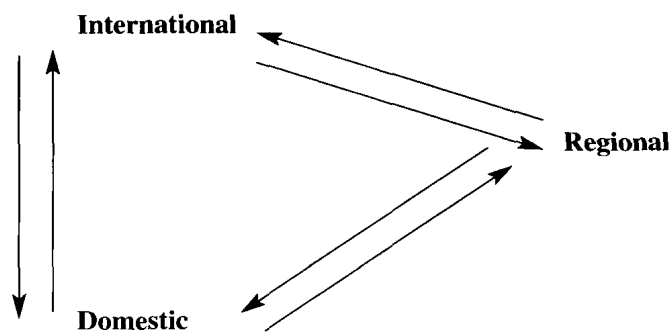

Figure I.1 Cultural transmission of process styles

In adopting this perspective this book seeks to address several complex issues raised by the phenomenon of internationalisation in sentencing. The most fundamental of these is whether meaningful comparative generalisations can be made regarding the extent (or not) of any merging in trial traditions, as reflected in the foundation instruments and sentencing practices of international institutions. As suggested, this depends on our ability to generalise about areas of synthesis and difference (Findlay, 2001).

The notion of internationalisation also provides an important perspective from which to explore the extent to which international sentencing practice conforms with particular rights paradigms that might be taken as measures of international criminal justice, and to test the adequacy of such paradigms. Such normative evaluation leads

to a consideration of the relationship between law and morality and its reflection in sentence decision-making at the international level. More particularly, it questions whether international sentencing should be regarded as in some way transformative, in the sense that it forms part of the institutional machinery which enables the moral sentiments of the international community with respect to serious breaches of international humanitarian law to find practical expression, or, alternatively, whether the legitimacy of international sentencing ultimately depends on its ability to link retributive and communitarian aspirations for punishment. These interrelated issues of principle and practice force us to (re-)examine the philosophical rationales for international criminal trials and their effect on shaping process. More broadly, they also invite a reconsideration of the nature of penality in the late postmodern era and its meaning for international criminal justice.

The Concept of Integration

The approach adopted in this book presupposes the desirability of integrated sentencing. However, the meaning of this concept is dependent upon perspective.[3] Firstly, the notion of integrated decision-making as it relates to international sentencing recognises that the sentencing decision should be conceived as an amalgam of relevant process decisions, rather than simply representing the processual climax of those decisions. It also acknowledges the problematic nature of focusing on the relevance of sentencing within the 'trial' as the context for analysis, particularly the relativity of meaning and significance for the concept of 'trial' in different jurisdictional contexts.

Secondly, a distinction is drawn between the conception of integration as representing a distillation of relevant decisions, and the notion of integration promoted through the fusion of process; the latter recognising that the meaning accorded to 'sentencing' within the criminal process not only depends on cultural context, but is also distinguished by the significance it is accorded within different regimes of criminal process and procedure.

Thirdly, the notion of integration encompasses the adequate representation of both lay and professional interests in trial decision-making, and is concerned with evaluating different modalities of discretionary behaviour and intervention regarding the perception, evaluation and use of information for sentencing purposes. These are ultimately reflected in the connections that are made between penal justifications, policy and decision-making.

Finally, this conceptualisation of sentencing also moves beyond the notion of decision sites and their relative significance as process variables and focuses on *context*; more specifically, the cultural contexts in which significant trial relationships are created and merge to determine the exercise of discretionary power at significant decision sites for sentencing in the trial process. In this sense, the analysis seeks to determine how sentencing serves to integrate the requirements and aspirations of disparate cultural contexts.

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[3] Integration in the present context is distinguished from the integration of theory and method in socio-legal analysis referred to earlier.

Theoretical Dimensions

The notion of internationalisation presupposes the existence of discernable contexts of rationality and purpose, and social processes which facilitate the achievement of principled objectives through international forms of punishment. It also countenances the possibility that penality[4] is a fluid conceptualisation whose elements are readily transformed and capable of transgressing jurisdictional boundaries, whether laterally (as between nation states or regional entities), or vertically (as between local and global contexts). Internationalisation implies some synergy of ideology, structure and normative practice in sentencing reflective of local and regional contexts. However, our understanding of the complexities and significance of sentencing as a social process in transition is inevitably conditioned and constrained by our ability to explain it as a phenomenon in any context. Such epistemological and methodological difficulties are compounded by the comparative dimensions of the analytical endeavour and must be adequately addressed from the outset.

As a decision-site implicated in publicly resolving the consequences of 'criminality' or 'criminalised' behaviour,[5] the processual activity which is sentencing suggests a convergence of certain moral, legal and sociological imperatives. The identification, description and explanation of each constituent of process is, therefore, epistemologically conjectural terrain, reflecting broad and fundamental disagreements in legal and social theory (Cotterrell, 1998a; Nelken, 1998; Banakar, 2000). This book does not engage directly in this debate, but makes explicit a commitment to the need for legal contexts to be interpreted sociologically (Cotterrell, 1998a). Understanding sentencing is essentially an exercise in legal sociology; one which seeks to ask questions about the nature of law in a social context, rather than the nature of a social process which involves law (Henham, 2001, p.257). The argument between the relative contributions of legal sociology and mainstream sociology is well summarised by Cotterrell (1998a, p.175) in his suggestion that 'as sociology interprets law, law is reduced to sociological terms'. However, the crucial question is the extent to which sociological approaches are capable of delivering understanding and explain the motivations and meanings of legal phenomena such as sentence decision-making. As an alternative to legal positivism, a sociological approach to deconstructing legal contexts should at least provide us, as Banakar (2000, p.284) puts it, 'with systematic empirical knowledge of the limits of institutional action'.

Nevertheless, the position adopted here goes further in insisting that there are two key issues to be considered. The first concerns the relationship between values,

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[4] 'Penality' is used here to describe the dimensions of punishment as a social phenomenon which, for Garland, entails a recognition that '... penality communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of tangential matters' (Garland 1990, p.252). This clearly includes the ideological, normative and empirical dimensions pertaining to punishment.

[5] The observations of labelling theorists such as Becker (1973) are particularly apposite in analysing the social forces that determine the limits of criminality and deviance. It is significant, for example, that mass atrocity may not be conceived as deviance within specific social contexts (Drumbl 2003). Furthermore, these parameters may be culturally influenced by rationalisations similar to the 'techniques of neutralisation' described by Matza (1969). Sentencing is, of course, implicated in the symbolism of labelling and the public affirmation of definitions of deviance through the exercise of hegemonic power.

norms and process. In particular, it is argued that the relationship between legal reasoning and punishment in sentencing needs to be explained in terms which are capable of accounting for the transformation of sentencing law's narrative principles into morally significant reasons for action. In other words, an examination of the law and process of sentencing at any level must explain how (and in what sense) law is transformed into normative guides to conduct for relevant audiences (Henham 2001, p.267). As suggested, this does not require law's reality to be subsumed or distorted by sociological interpretations, but rather an acknowledgement that sociological insights are capable of providing conceptual settings which facilitate the deconstruction of different legal discourses (and systems) (Nelken, 1998).

The second issue is concerned with the theory and method of comparative contextual analysis. From the outset it is necessary to re-emphasise that understanding the internationalisation of sentencing is essentially a problem of comparative method for socio-legal analysis. This is implicit in the proposition that the social reality or practice of sentencing is an activity which both reflects and creates *context.* As elaborated in Chapter 7, existing models of criminal process provide inadequate paradigms through which to explain the relevant dimensions of trial praxis at the comparative level. In particular, sentence modelling has largely reflected the narrow positivist preoccupation in criminology with identifying and measuring presumed 'explanatory' variables in an effort to understand the reasons for *inconsistent* sentencing. A more appropriate context in which to conceptualise sentencing is suggested by Skolnick (1966). In his opinion, a study of law in action (such as discretionary decision-making in the sentencing process) is in essence concerned to deconstruct the meanings attributed to action by social actors through studying the interrelationship and transformation of legal principles and rules within legal institutions. An important recognition in Skolnick's analysis is that revealing contexts of meaning is contingent on multifaceted sociological interpretation. This analysis is consistent with the approach to sentence modelling developed later in this book.

This book also adopts the view that the conceptual framework implicit in Giddens's (1979, 1984) theory of structuration can be refined to provide a macro-theoretical conceptualisation which is capable of distinguishing and accommodating the contextual analysis of sentencing process at three significant levels of understanding; namely the legal, organisational and interactive components of sentence decision-making.[6] More particularly, it is argued that such levels signify interconnected aspects of the same social practice, offering three levels of understanding depending on context. They are essential preconditions to understanding the comparative analysis of social interaction in international sentencing (Figure I.2). Hence, a key theoretical assumption underlying the following analysis is that structuration theory provides an important conceptual tool which facilitates the identification of elements and processes concerned in the recursive nature of the application of legal rules and resources in sentencing, both global and local (Layder, 1994).

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[6] It is not proposed to elaborate the arguments supporting this view in this book. For detailed exposition of the theoretical, modelling and methodological foundations of comparative contextual analysis the reader is referred to Findlay and Henham (2005); Henham and Findlay (2001; 2002). See also Chapter 7 for further consideration of these issues in the context of international sentencing.

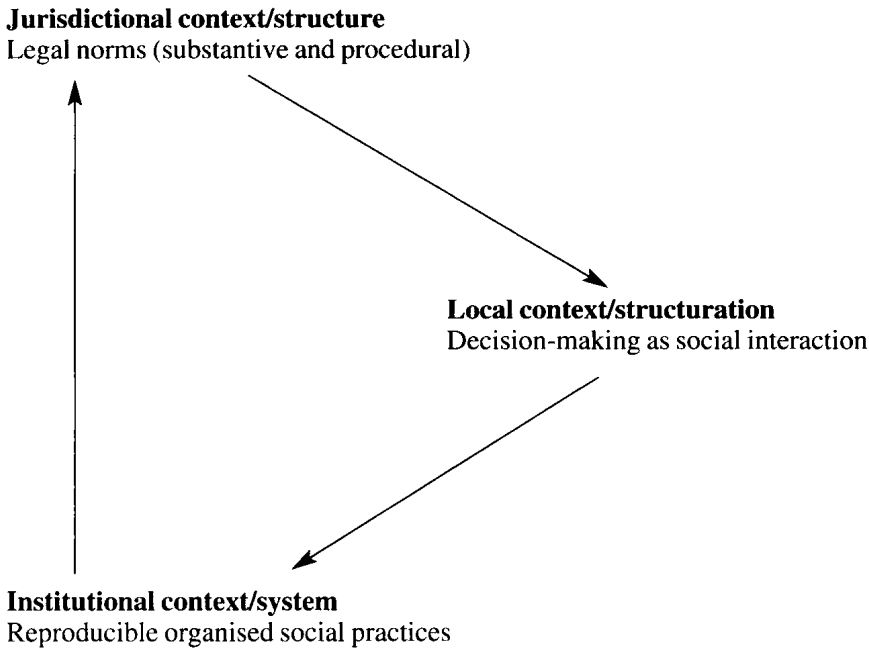

Figure I.2 Conceptualising sentence decision-making as a process of structuration[7]

Finally, it is widely acknowledged that the contextual appreciation of law and legal processes within different legal cultures and across legal jurisdictional boundaries is problematic (Nelken, 1997), and that, as Hodgson puts it (2000, p.141), may create only 'an illusion of understanding'. The objectivity of process exists to the extent that we are able to identify the criteria whereby relevant participants recognise external reality, i.e. the reality of objects, events or states. The connections between subjective experience and objectivity therefore exist in so far as there are common definitions of process as objective reality. As Bell suggests:

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[7] This sentencing model is a micro-representation of structuration adapted to show the predominant influences on sentence decision-making within the framework for action suggested by structuration theory. Essentially, it is a conceptualisation which is designed to elucidate the various dimensions of sentence decision-making. Hence, processes of decision-making are conceptualised as a series of frames of action with each frame of action contributing to mould the sentencing process. The social reality and significance of the sentencing process is therefore dependent on the constituents of previous frames of action because structuration recursively contructs contextualised social action. Thus, context is three-dimensional and *dynamic* across time and space, whilst the relationship between structure and agency depends for its relative existence upon context from which it is never separate or autonomous. As such, the relativity of each frame of action is established through our ability to consider interaction within the context of the frame against past and present action outcomes. In summary, this approach envisages various dimensions of sentence decision-making and sees their contextualisation and comparison in terms of a series of frames which comprise a moving picture – contextualised social action.

> ... categorisation depends on what the various legal actors think is happening in a legal situation ... Although the participant has a personal perspective on legal events, culture is a collective phenomenon where groups use the same language and have a common identity despite other differences ... assignment of meaning to natural facts depends on collective intentionality ... the community acting creates the institutional reality, which individuals can then use to explain events. But it is clear that this institutional system and practice precedes them (2001, Ch. 1).

However, in our interpretation of legal culture we must, as Hodgson (2000) also observes,[8] be mindful of the fact that legal language exists within the *context* of legal culture, and that mere categorisation and comparison does not equate with objectivity (Casanovas, 1999). In this sense the challenge for comparative contextual analysis is to provide authentic descriptions and explanations of the commonality of shared experience across jurisdictional boundaries.

In addition to the different levels of meaning and understanding attributed to action and process by researchers, comparative scholars such as Twining (1999) have also highlighted the problems caused by the absence of any definite and uniform legal vocabulary. The rules which operate within any legal context have deliberate narrative structure and form, and, as Bennett and Feldman (1981) suggest, both actors and interpreters have an important margin of control over the definition of what constitutes the reality of legal process. For interpreters of international sentencing praxis,[9] therefore, a fundamental prerequisite is the ability to infer that interpretative methodologies are addressing culturally meaningful questions.

Structure of the Book

This book contends that understanding must proceed at the levels of inference and meaning to produce accounts of how rules, procedures and processes are conceptualised and understood by trial participants in the daily interaction of sentencing. As Rogers and Erez (1999) suggest, the social reality of sentencing for trial participants is revealed by exploring the 'objectivity' or common experience of process whilst also deconstructing its 'subjectivity'. These theoretical and methodological imperatives are critical for understanding international forms of process where comparable definitions of what participants in the sentencing process understand by a particular event and its significance must be established (Ewald, 1998). Furthermore, it only through developing concepts and methodologies for comparative contextual analysis that progress can be made towards providing meaningful evaluations of international sentencing praxis.

The chapters which follow refer to and develop the concepts and implicit assumptions upon which this analysis is based in terms of their relevance for understanding particular aspects of international penality, as expressed or represented in the sentencing practices of the *ad hoc* criminal tribunals and the newly

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[8] For Crawford (2000, p.225) this means developing 'ways of understanding *contrasts* and *differences* without slipping into cultural relativism'.

[9] This expression is holistic in that it refers to everything that is to do with the conception of international sentencing in terms of its ideology and institutional practice.

created ICC. Within this framework the analysis and evaluation of international penality is developed critically, from a perspective which is sensitive to the relativity of justice as reflected in international criminal trials. Throughout the analysis questions are asked about the moral significance and legitimacy of international punishment and process for individuals, groups and states implicated in social conflict and war, and how international penality can best serve the interests of peace and reconciliation.

Chapter 1 analyses the nature and extent of internationalisation in sentencing. It focuses particularly on those factors influencing the sentencing structures of the ICTY, ICTR and the ICC. It is argued that understanding discretionary sentence decision-making in international criminal trials is pivotal for developing meaningful interpretations of international criminal justice. It is suggested that the absence of penological justifications in the foundation instruments of the *ad hoc* tribunals and the ICC weakens their claims to provide a rational foundation for the exercise of any universally accepted principles of criminal justice. The chapter also evaluates internationalised sentencing structures (such as East Timor and Kosovo) and alternative processes (such as Truth and Reconciliation Commissions, or TRCs) in the context of providing moral and legitimate resolutions for breach of international humanitarian law.

In Chapter 2 the procedural rules and trial practice of international criminal process are analysed in so far as they relate to sentencing. Consequently, the analysis focuses on evidential stages relevant to sentence and the nature and quality of the evidence permitted. It focuses particularly on the roles of the judge, prosecution and defence in relation to the presentation and assessment of such evidence, and the significance of victim evidence for sentencing. The analysis also questions the heuristic value of conventional criminal process models in the comparative contextual analysis of international sentencing. It suggests that process models should not only be capable of accommodating propositions associated with competing goals, but also their normative implications, and the rationales which should determine the balance to be accorded to each.

Chapter 3 describes the context in which the process of sentencing takes place in international criminal trials, concentrating on the nature and significance of sentence decision-making and delivery, particularly the interplay between legal form and discretion, and issues of transparency and integration in international sentencing. The analytical focus for this chapter is the social reality of decision-making in international criminal trials and the deconstruction of sentence decision-making; issues whose understanding is crucial before we can begin to address questions of rationality and purpose for international penality.

Chapter 4 analyses the structural constraints that threaten notions of fair trial within international sentencing processes, particularly procedural mechanisms for sentence reduction, by considering the nature and form of plea bargaining in international criminal tribunals and the discretionary power of professional trial participants. The implications are assessed in terms of victims and process transparency, in addition to the paradigms of proportionality and desert, and contrasts between adversarial/inquisitorial process styles. The argument seeks to demonstrate that international procedural justice cannot be satisfactorily evaluated on the sole basis of the extent to which procedures conform to 'objectively' defined

characteristics, since ideology and power are invariably crucial to the development of procedural norms and the policies which inform them. It is suggested that, for generalised notions of justice to be developed which transcend process constraints and are tolerant of representative participation and communitarian objectives, a wider role for the victim in the penality of international justice must be elaborated.

The relevance of conventional notions and justifications for punishment as they relate to institutionalised forms of international sentencing are addressed in detail in Chapter 5. After analysing the philosophical justifications for international punishment, reasons are suggested for challenging the legitimacy and relevance of current justifications for international sentencing. It is argued that the morality and symbolism of sentencing in international criminal trials should provide a means for connecting the citizens of communities affected by conflict and victims to the values and norms of international humanitarian law. The chapter explores the degree to which particular philosophical justifications might validly be utilised to promote competing moral claims for punishment. Arguments are put forward for the adoption of philosophical paradigms for international sentencing which appear more reflective of communitarian concerns.

Chapter 6 focuses on issues relating to the conceptualisation of access to justice and rights in international sentencing. It discusses why it is necessary to understand how the dynamics of power exercised within the context of international penal structures actually determine the relationship between the normative and factual dimensions of rights law and what this reality actually signifies in a comparative context. It is argued that due process principles are meaningless unless they are truly effective in enabling victims and citizens of victim communities to assert rights which have some relevance to the institutions of international penality.

In Chapter 7 the theoretical and methodological issues facing the comparative contextual analysis of international punishment and process are addressed, especially the potential for developing alternative theoretical paradigms for international sentencing and assessing their validity. The chapter explores the potential for utilising contextual modelling as a methodology for reconstructing judicial discretionary sentence decision-making and engaging restorative justice as a significant rationale for international criminal justice.

The concluding chapter suggests how the debates over punishment and penal philosophy, consistency and discretion, crime control and due process and access to justice in international sentencing may be resolved. The chapter argues strongly that the ideological purposes of the international criminal trial need to be carefully redefined to reflect competing purposes for punishment, and penal measures focused on those areas where the most productive outcomes for all parties can be forged. I argue that international penality should be reconceptualised and reconstructed to facilitate the implementation of dynamic, creative and innovative solutions and strategies for peace and reconciliation, rather than symbolic outcomes for international criminal trials.

This book is therefore timely and significant in addressing important issues and questions regarding the nature and justifications for punishment in international criminal trials. However, it is not simply an atheoretical inquiry about the technicalities of sentencing practice. It is much broader in scope and puts the issues about trial outcomes in wider perspective. In essence, it is a book about victims, trial