Sentencing in International Criminal Law: The Need for Clear Standards

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Before the Nuremberg and Tokyo tribunals, sentencing was left entirely to the judges' discretion. They could sentence the defendants to the death penalty "or such other punishment as shall be determined by (…) [them] to be just"[1]. As they were left with hardly any guidance, the judges, in particular at the Tokyo trial, struggled with the determination of the sentences. The Tokyo judges were clearly divided on the issue, as a careful reading of the separate opinions shows. The post-World War II developments in international criminal law, such as the adoption of the Nuremberg Principles by the United Nations General Assembly in 1950[2] and the discussions on a Draft Code of Crimes within the International Law Commission in the 1950s, did not add much to the law in the area of sentencing. A mere reference to the gravity of the offence in order to determine the appropriate penalty was introduced in the 1951 draft, but was removed in the 1954 draft due to criticism by some States[3]. The Statutes and Rules of Procedure and Evidence of the *ad hoc* tribunals for Rwanda and the former Yugoslavia have debatable sentencing provisions, upon which a rather uncertain case law has developed. The Statutes of both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda provide that the Trial Chambers "shall have recourse to the general practice regarding prison sentences in the courts" of respectively the former Yugoslavia[4] and Rwanda[5]. These provisions were introduced in order to ensure some form of respect of the *nulla poena sine lege* principle. However, in practice, these provisions have triggered much debate and have arguably created, rather than solved, problems. Finally, even in the Statute and Rules of Procedure and Evidence of the International Criminal Court, the provisions regarding penalties are short and certainly cannot be equated with a proper sentencing scale.

Against this background, the paper will first suggest that contemporary international criminal law lacks clear sentencing guidelines due to the fact that the texts are not very precise and the case law is not always consistent, which is at odds with a strict interpretation of the principle of *nulla poena sine lege*. As a consequence, states – who remain primarily responsible for the implementation of international criminal law – are not only free to determine the sentences themselves, but also cannot even rely on international practice as a possible model or inspiration upon which to legislate or simply to take sentencing decisions in given cases. The paper will conclude on the idea that perhaps the Assembly of State parties of the International Criminal Court should tackle the issue instead of leaving it solely in the hands of international judges, given the uncertainty that this choice has produced and the related consequences in terms of the rights of the accused.

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[1] Nuremberg Charter, Article 27 ; Tokyo Charter, Article 16.

[2] UNGA Res. 488 (V), 12 December 1950.

[3] Yearbook of the International Law Commission, Report of the Commission to the General Assembly on the work of its forty-third session, 1992, Vol. II, Part II, A/CN.4/SER.A/1991/Add.1 (Part 2), 84.

[4] ICTY Statute, Article 24.

[5] ICTR Statute, Article 23.