EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW

EUI Working Group on International Criminal Law
Meeting of 19.01.2005 on
Issues of Sentencing in International Criminal Law

Presentation by Silvia D'Ascoli of her Research Project:
Sentencing Practice in International Criminal Law – Approaches of the two UN ad hoc Tribunals and Future Perspectives for the International Criminal Court

I. Introduction and General Framework

The topic was introduced by Silvia D'Ascoli, first year-researcher at the EUI, who made a substantial presentation on her ongoing research project focused on the issue of sentencing in international criminal law. She started, by way of introduction, outlining the background and the general legal framework of the problem of sentencing at the international level.

As of today, there is no established body of international principles regarding the determination of sentences, notwithstanding the fact that the debate around the purposes of sentencing is not a recent one and has been developed from different perspectives. The International Tribunals of Nuremberg and Tokyo (and the following trials held by various national military tribunals) left few sentencing guidelines applicable to cases of war crimes and crimes against humanity. As regards the statutory provisions, Statutes of past and existing Tribunals only contain few norms on the application of penalties and do not provide for detailed sentencing principles. The fact that very little guidance is provided and that international judges have quite a

wide degree of discretion in sentencing can result in the fact that similar or identical cases might be sentenced in different ways. Therefore, a sentencing policy might be useful and opportune to ensure proportionality and uniformity, so contributing to the *fairness* of sentences.

The goal of the project would be to investigate the possibility of having *sentencing guidelines* to be utilised by international judges and to be applied by the International Criminal Court (ICC).

Some preliminary reflections were deemed necessary and opportune, as to the completeness of the research, firstly with regard to the traditional rationales of punishment (*i.e.* retribution, deterrence and rehabilitation) and, secondly, with regard to the dimension of punishment in international criminal law.

A specific analysis of the international case-law, in particular of the jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) was mentioned as being a core part of the research.

Besides the question of the identification of the current *status* of sentencing in international criminal law, a comparison with the way in which particularly heinous crimes are treated in national jurisdictions was presented as a plausible and interesting addition to the research, in so far as it can help the understanding of differences and similarities between the national and the international level. Analysing the sentencing practice at the national level and the particular characteristics of different systems (*common law* countries v. *civil law* countries) would also facilitate the identification of major legal issues to be addressed when dealing with the attempt to draw sentencing guidelines for international courts. For instance, at the international level, the absence of a legislator comparable to the one of national legal systems renders the role of judges more crucial, given that they have a broader discretion. Furthermore, at the international level the task of proceeding to a preliminary and abstract assessment of the *seriousness* of crimes, in order to determine penalties for each of them, is not carried out by any 'legislator', as it happens in municipal law. These aspects were included amongst the ones to deal with in the proposed research.

II. ICTY – ICTR

Article 24 of the ICTY Statute and Article 23 of the ICTR Statute – after stating that the penalty imposed by the Chambers shall be limited to imprisonment – provide for

‘factors’ which should be taken into account in sentencing. These criteria include the “*general practice regarding prison sentences*” in the courts of the former Yugoslavia and Rwanda, respectively; the “*gravity of the offence*”; and the “*individual circumstances*” of the convicted person.

The Rules of Procedure and Evidence (RPE) of the two Tribunals (Rule 101) provide for slightly more details, identifying some of the aggravating and mitigating circumstances that may be taken into account (*i.e.* substantial co-operation with the Prosecutor by the convicted person and credit for time already served).

Neither the Statutes nor the Rules of Procedure and Evidence determine any specific penalty for each of the crimes falling under the jurisdiction of the Tribunals. Moreover, the Statutes do not even rank the various crimes and, in theory, sentences are the same for each of the three crimes namely, a maximum term of life imprisonment. This means that the determination of sentences is left to the discretion of the Chambers, taking into account the factors listed in the mentioned provisions. In determining sentences, the judges are therefore called upon to interpret the terms of the Statute and to use quite broad discretion.

From a brief review of the judgements rendered by the ICTY and the ICTR, it is clear that there exists an intense debate created by the issue of sentencing, which can also be seen through the proliferation of dissenting and separate opinions.

III. ICC

Issues of “sentencing” will rise in the system of the ICC as well; thus the proposed research would be undertaken especially in the perspective of the future activities of the ICC.

The ICC has jurisdiction over only the most serious violations, yet it must somehow distinguish between the gravity of these crimes and their circumstances. In Article 77, the ICC Statute provides for two types of custodial sentences: “*imprisonment for a specified number of years, which may not exceed a maximum of 30 years*”; and life imprisonment “*when justified by the extreme gravity of the crime and the individual circumstances of the convicted person*”. The Statute thus reserves the penalty of life imprisonment for only the most egregious crimes, and only when individual aggravating circumstances are present. It seems, therefore, to make a first step

towards a range of imprisonment by providing a general maximum term of imprisonment of 30 years.

General sentencing criteria are then found in Article 78 of the Statute, which states that "*in determining the sentence, the Court shall, in accordance with the Rule of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person*".

The Rules of Procedure and Evidence of the ICC (Rule 145) specify in more details some of the relevant factors which must be considered, such as – amongst other – the extent of the damage caused (in particular, the harm caused to the victims and their families), the degree of intent, and the personal circumstances of the accused.

Although, during the Rome Conference, the Working Group on Penalties debated whether the ICC Statute should specify a range of penalties (*i.e.* a minimum and a maximum sentence), the final text agreed upon is characterised by flexibility and does not specify any range of penalties.

The issue of assessing the main purposes of international sentencing is relevant in the ICC system itself. In fact, in the *Preamble* of the Rome Statute, States "*recognizing that such grave crimes threaten the peace, security and well-being of the world*", considered themselves "*determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*" and affirmed "*that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured*". It is therefore important, while considering the purposes of international sentencing, to investigate whether these aims can be effectively achieved and implemented through international criminal justice.

All considered, in the absence of precise sentencing provisions, also the ICC will have quite a broad discretion in its sentencing. The situation will be further complicated by the interface of international criminal law and domestic law, as the ICC's jurisdiction is complementary to that of national courts.

All these aspects were presented as important elements to take into consideration for the purposes of the proposed research.

Silvia D'Ascoli concluded by presenting the provisional structure of her research project and the methodology intended to be used.

Participants raised several questions, which enriched the discussion particularly in relation to the relevance of guilty pleas within the sentencing decision-making process, to the question of cultural factors which are likely to influence the sentencing, and to the importance of a reflection on the principle of legality for better framing the problem of sentencing at the international level.

It was concluded that a very good start was made, that the research-questions to be addressed were clear and that the principle of legality should be given a central place within the research.