

Why the Supreme Court of Uganda should reject the Constitutional Court's understanding of imprisonment for life

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Summary

The issue of life imprisonment is always a contentious one. Some people argue that life imprisonment should mean what it means, namely 'whole-life'. In Uganda, life imprisonment continues to mean imprisonment of 20 years. However, in 2005 the Constitutional Court ruled that life imprisonment should mean 'the whole of a person's life'. This decision is not yet law, because the particular case is on appeal before the Supreme Court, which will either uphold the Constitutional Court's ruling or not. This article deals with the constitutionality of long prison sentences that the Constitutional Court suggested could be imposed to avoid prisoners being released after 20 years. It also argues that the Supreme Court should reject the Constitutional Court's ruling that life imprisonment should mean the whole of the prisoner's life. The human rights and administrative implications of 'whole-life' imprisonment are discussed in detail to support

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the view that life imprisonment should remain as is, that is, 20 years in prison. The author draws inspiration from other domestic jurisdictions and international law to support his argument. In particular, the author looks at jurisprudence from Germany, South Africa, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone, the International Criminal Court and the European Court of Human Rights. Where applicable, the views of the African Commission on Human and Peoples' Rights are highlighted.

1 Introduction

The sentence of life imprisonment is ... unique in that the words, which the judge is required to pronounce, do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his [her] natural life, this is not the usual or intended effect of a sentence of life imprisonment ... But although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations ... and executive decisions ...¹

The sentence of life imprisonment is truly unique. If many people, including some lawyers, were asked to explain what exactly life imprisonment means, many would say that it means that a person sentenced to life imprisonment will spend the rest of his or her life in prison or, as the Nicosia Assize Court of Cyprus in the case of *The Republic of Cyprus v Andreas Costa Aristodemou* put it, 'the sentence "imprisonment for life" means exactly what is stated by the simple Greek words, that is, imprisonment for the remainder of the biological existence of the convicted person'.² This may be true in some countries and circumstances, but it is not always the case. One can generally say that there are five major approaches that countries have adopted in regard to life imprisonment. The first approach is that in countries such as Costa Rica, Columbia, El Salvador,³ Brazil and Portugal, the Constitutions proscribe the imposition of a sentence of life imprisonment on

¹ *R v Secretary of State for the Home Department, Ex Parte Doody* [1994] 1 AC 531 (HL) 549H-550B, as quoted in D van Zyl Smit *Taking life imprisonment seriously in national and international law* (2002) 2-3.

² *The Republic of Cyprus v Andreas Costa Aristodemou* Case 31175/87, cited in *Case of Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008) para 47.

³ D van Zyl Smit 'Life imprisonment: Recent issues in national and international law' (2006) 29 *International Journal of Law and Psychiatry* 410.

any person.⁴ The second approach is to be found in the constitutions of countries such as Croatia, Norway, Portugal, Slovenia and Spain which 'make no legislative provision for life imprisonment at all'.⁵ The third category is to be found in countries such as the United States of America, England and Wales, where some prisoners sentenced to life imprisonment cannot be considered for parole, neither can their sentences be remitted.⁶ The fourth category is to be found in countries such as Uganda, South Africa and Botswana, where there is a legislative framework which allows a prisoner sentenced to life imprisonment to be considered for parole or to have his or her sentence remitted after serving a specified number of years. The last category is to be found in countries such as Mexico and Peru, where the respective constitutional courts have 'declared life imprisonment to be unconstitutional'.⁷ With respect to the fourth category, courts in Germany⁸ and South Africa (as the discussion will shortly illustrate) have held that life imprisonment is only constitutional if the offenders have a prospect of being released.

In Uganda, as this article illustrates, section 86(3) of the Prisons Act⁹ provides that '[f]or the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment'. Courts that have been imposing life sentences in Uganda have always understood life imprisonment to mean a sentence of imprisonment of not more than 20 years. In the 1975 Court of Appeal decision of *Wasaja v Uganda*,¹⁰ the appellant was found guilty of the offences of robbery and threatening to use violence. The High Court sentenced him to 15 years' imprisonment and 24 strokes of a cane when he had already spent nearly two years in custody. He appealed the sentence. The Court of Appeal reduced the sentence to 10 years' imprisonment and 12 strokes on the ground that the High Court's sentence was exces-

⁴ The Constitution of Brazil (of 5 October 1988) prohibits the imposition of life imprisonment on any person. Art XLVII(b) provides that '[t]here may be no sentence of life imprisonment'. In Extradition 855, decision of 26 August 2004, the Supreme Federal Tribunal of Brazil ruled that it could not order the extradition on a Chilean citizen to Chile unless Chile commuted the defendant's sentence to 30 years' imprisonment, because 'Brazilian law establishes that 30 years is the maximum of actual serving time'. See <http://www.stf.gov.br/jurisprudencia/abstratos/documento.asp?seq=70&lng=ingles> (accessed 16 August 2007). It has been observed that '[i]t is noteworthy that life imprisonment is not considered everywhere as an essential form of social control. In countries such as Brazil and Portugal it is constitutionally outlawed.' See D van Zyl Smit & F Dünkel (eds) *Imprisonment today and tomorrow: International perspectives on prisoners' rights and prison conditions* (2001) 814. See also Van Zyl Smit (n 1 above) 189.

⁵ C Appleton & B Grover 'The pros and cons of life without parole' (2007) 47 *British Journal of Criminology* 601.

⁶ Generally see Van Zyl Smit (n 1 above) 20-131.

⁷ Van Zyl Smit (n 3 above) 410.

⁸ Van Zyl Smit (n 3 above) 411.

⁹ Act 17 of 2006.

¹⁰ *Wasaja v Uganda* [1975] EA 181.

sive and observed that '[t]he maximum sentence of imprisonment [for the offences the accused had committed] is life, which we take to be equivalent to a sentence of 18 to 20 years'.¹¹

The Supreme Court of Uganda in its 1994 decision of *Kakooza v Uganda*,¹² in which the High Court found the appellant guilty of manslaughter and sentenced her to 18 years' imprisonment when she had already spent two years in prison, set aside the High Court's decision on the ground that the appellant had been effectively sentenced to 20 years, which was in effect a life sentence under the Prisons Act. In 2003, in *Wanaba v Uganda*,¹³ the Court of Appeal held that 'a sentence of life imprisonment means 20 years' imprisonment'.¹⁴ However, in its 2005 judgment of *Susan Kigula and 416 Others v The Attorney-General*,¹⁵ the Constitutional Court is of the view that imprisonment for life should not merely mean 20 years, but that it should, in the words of Appleton and Grover, mean 'whole-life'.¹⁶ This judgment is pending appeal before the Supreme Court of Uganda, not on the issue of life imprisonment, but rather on the issue of the constitutionality of a mandatory death penalty in the case of murder. The Supreme Court is yet to hear this appeal because at the time of writing it lacked a quorum.¹⁷ In 2006,

¹¹ *Wasaja v Uganda* (n 10 above) 184.

¹² *Kakooza v Uganda* [1994] V KALR 54.

¹³ *Wanaba v Uganda* Criminal Appeal 156 of 2001, decided on 22 July 2003.

¹⁴ *Wanaba v Uganda* (n 13 above) 8.

¹⁵ Constitutional Petition 6 of 2003 (unreported) 140-142, quoted in n 39 below. In this case, the petitioners had been sentenced to death and they petitioned the Constitutional Court for a declaration that the death penalty was unconstitutional on the basis, *inter alia*, that it amounted to torture, cruel or degrading and inhuman treatment and that it violated the right to life. The Constitutional Court held that the death penalty was not unconstitutional and that, according to the Constitution (art 22(1)), the right to life is not absolute and it can be taken away provided due process of law has been followed. However, the Court held that a mandatory death penalty was unconstitutional because it eliminated the discretion of the courts in sentencing. The Court held that a mandatory death penalty in cases of murder meant that it was the executive and the legislature passing the sentence and not the courts.

¹⁶ Appleton & Grover (n 5 above) 603.

¹⁷ Under art 130 of the Constitution of Uganda (1995), 'The Supreme Court shall consist of (a) the Chief Justice; and (b) such number of justices of the Supreme Court, not being less than six, Parliament may by law prescribe.' Under article 131: '(1) The Supreme Court shall be duly constituted at any sitting if it consists of an uneven number not being less than five members of the court. (2) When hearing appeals from decisions of the Court of Appeal sitting as a constitutional court, the Supreme Court shall consist of a full bench of all members of the Supreme Court; and where any of them is not able to attend, the President shall, for that purpose, appoint an acting justice under article 142(2) of the Constitution.' At the time of writing, there were five justices at the Supreme Court: Justice Bart Katureebe, Justice Benjamim Odoki, Chief Justice, Justice GW Kanyeihamba, Justice JN Mulenga and Justice John WN Tsekooko. See <http://www.judicature.go.ug/supreme.php> (accessed 3 October 2007). Justice Arthur Oder passed away in June 2006 and Justice Alfred Karokora retired in 2006. See 'Appoint judges, legislators tell President Museveni' *The New Vision* 15 September 2007 <http://allafrica.com/stories/200709170134.html> (accessed 3 October 2007).

a few months after the Constitutional Court's decision, a new Prisons Act was enacted which retained the provision as it is in the old Prisons Act to the effect that life imprisonment means 20 years' imprisonment. In January 2007, in the case of *Guloba Muzamiru v Uganda*,¹⁸ in which the appellant, a 22 year-old man, was sentenced by the High Court (in 2004) to life imprisonment for defiling a two and a half year-old baby, the Court of Appeal rejected the appellant's argument that 'life imprisonment was almost as bad as death'.¹⁹ This means that courts still consider life imprisonment to mean 20 years' imprisonment until the Supreme Court has ruled on the constitutionality of that provision in the light of what the Constitutional Court observed. As at 30 September 2007, 43 prisoners, only two of whom female, were serving life sentences in Uganda for the following offences: five for robbery; five for murder (all sentenced after February 2006 when the Constitutional Court declared the mandatory death penalty for murder unconstitutional in the *Kigula* case); six for manslaughter; one for rape and manslaughter; 20 for defilement; one for failure to protect water meters (sentenced by a military court); one for attempted murder; one for aggravated robbery; one for kidnapping with intent to murder; one for simple robbery; and one for rape. Only three had been sentenced by military courts and the rest by the High Court.²⁰ The aim of this article is to highlight the challenges associated with 'whole-life' life imprisonment and to recommend that the Supreme Court should take into consideration such challenges and reject the Constitutional Court's argument that life imprisonment should mean 'whole-life'.

Before I embark on a discussion of the implications of the Constitutional Court of Uganda and its understanding of life imprisonment, I look briefly at the question regarding the purpose of punishment. However, I would like to put a *caveat* that, much as the question of justice is intrinsically linked to punishment, for want of space this article does not deal with the discussion of what constitutes justice.

2 The purposes of punishment

Philosophers, lawyers, judges and many other people interested either directly or indirectly in the punishment debate have always disagreed, and will continue to disagree, on the question as to the purpose of punishment. It is beyond the scope of this article to deal exhaustively with all the known or continuously-debated purposes of punishment. However, the author will briefly discuss the five major purposes of punishment (retribution, deterrence or prevention, rehabilitation,

¹⁸ *Guloba Muzamiru v Uganda* Criminal Appeal 289/2003 (unreported).

¹⁹ *Guloba Muzamiru v Uganda* (n 18 above) 2.

²⁰ Statistics obtained from Uganda Prisons Headquarters, Kampala in January 2008 (on file with the author).

reconciliation, and restorative justice) and illustrate the relevance of the question of life imprisonment in Uganda.

The author does not deal with the issue of alternative sentences, because in the Ugandan context this is irrelevant to people convicted of offences that attract life sentences. This is due to two reasons. The first reason is that offenders found guilty of offences that attract life sentences do not qualify for community service orders which are the only alternative sentences in Uganda under the Community Services Act.²¹ Under section 3 of the Community Services Act, courts can only issue community service orders in respect of a person who committed a 'minor offence'. A 'minor offence' is defined in section 2 of the Community Services Act to mean 'an offence for which the court may pass a sentence of not more than two years' imprisonment'. As already illustrated above, all offenders serving life sentences in Uganda committed serious offences ranging from defilement to murder, which attract severe penalties under the Penal Code Act.²² Secondly, even if they had committed offences for which they could qualify for community service orders, they would have been imprisoned because courts no longer issue community service orders as there is a lack of funding for officials who are to supervise offenders doing community service. In other words, in Uganda the community service orders project collapsed.²³ I now turn to a discussion of the purposes of punishment.

Briefly, retribution approaches punishment from a backward-looking perspective, that is, the offender is punished because of what he or she did in the past — because he or she committed an offence. He or she is not punished to be rehabilitated or to deter others or him or her from committing crime.²⁴ He or she is punished because he or she deserves to be punished — hence the notion of 'just desert'.²⁵ Retribution has been criticised for being synonymous with revenge.²⁶ Deterrence, on the other hand, as the name suggests, is meant to deter the offender (specific deterrence, for instance through incarceration) or potential

²¹ Community Services Act, ch 115 of the Laws of Uganda.

²² Penal Code Act, ch 120 of the Laws of Uganda. Under the Penal Code Act, a person convicted of rape is liable to suffer death (sec 124); a person convicted of defilement is liable to suffer death (sec 129); a person convicted of murder is liable to suffer death (sec 189); a person convicted of manslaughter is liable to imprisonment for life (sec 190); a person convicted of attempted murder is liable to imprisonment for life (sec 204); a person convicted of kidnapping with intent to murder is liable to suffer death (sec 243); a person convicted of robbery is liable to imprisonment for life (sec 286(1)(b)); and a person convicted of attempted robbery is liable to life imprisonment (sec 287(2)(b)).

²³ See L Muntingh 'Alternative sentencing in Africa' in J Sarkin (ed) *Human rights in African prisons* (2008) 178 196-197.

²⁴ EL Pincoffs *The rationale of legal punishment* (1966) 2-3. See also MA Rabie & SA Strauss *Punishment: An introduction to principles* (1994) 46-53.

²⁵ SS Terblanche *Guide to sentencing in South Africa* (2007) 170.

²⁶ A Oldenquist 'Retribution and the death penalty' (2004) 29 *University of Dayton Law Review* 335 339.

criminals (general deterrence) from committing offences. That is why some authors call it prevention. The offender is punished severely and his or her punishment is made known to others as much as possible so that they are deterred from committing the same offence as the offender.²⁷ Deterrence has thus been criticised for supporting the punishment of innocent people if the government fails to arrest the offender, but must send out a message to the community that crime is bad.²⁸

Rehabilitation aims at rehabilitating or reforming the offender so that he or she does not commit crime in the future. It is premised on the assumption that people's behaviour can change through various interventions and that they are less likely to re-offend. Various programmes, such as education, anger management and job training skills, are implemented to equip the offenders with the necessary skills to prevent them from re-offending.²⁹ Rehabilitation has been criticised on the basis that its proponents take the view that the offender is sick and thus needs treatment.³⁰ This means that a person can be detained indefinitely until he or she is cured of the illness that made him or to offend and that, in that regard, rehabilitation ignores the aspect of proportionality of punishment to the offence committed.³¹

Reconciliation, as the name suggests, aims at reconciling the offender with the victim of his or her crime.³² Finally, restorative justice aims at restoring 'good blood' between the offender and victims of his crime. It has the following features: encounter, reparation, reintegration and participation.³³

Life imprisonment in Uganda should be viewed through the lens of retribution, deterrence and rehabilitation, because Ugandan law does not accommodate reconciliation and restorative justice in any criminal cases on the basis that they encourage impunity. The same also applies to African traditional practices and their approach to punishment. They do not apply to criminal cases in Uganda.³⁴ In the few cases where reconciliation had taken place, it has been the initiative of the prison

²⁷ Terblanche (n 25 above) 156.

²⁸ CS Steiker 'No, capital punishment is not morally required: Deterrence, deontology, and the death penalty' (2005) 58 *Stanford Law Review* 751 775.

²⁹ A Dissel 'Rehabilitation and reintegration in African prisons' in Sarkin (n 23 above) 155-159.

³⁰ J Brooks 'Addressing recidivism: Legal education in correctional settings' (1992) 44 *Rutgers Law Review* 699 712.

³¹ Brooks (n 30 above) 712-713.

³² For a detailed discussion of punishment and reconciliation, see J Sarkin & E Daly 'Too many questions, too few answers: Reconciliation in transitional societies' (2004) 35 *Columbia Human Rights Law Review* 661.

³³ *David Dikoko v Thupi Zacharia Mokhatla* [2006] ZACC 10 para 114 (footnotes omitted).

³⁴ See M Ssenyonjo 'The International Criminal Court and the Lord's Resistance Army leaders: Prosecution or amnesty?' (2007) LIV *Netherlands International Law Review* 51 64-66.

authorities and religious leaders.³⁵ An offender is sentenced to life imprisonment because he or she committed an offence or offences (retribution) and also because the court wants to ensure that such a person is deterred from committing crimes against his or her community (specific deterrence through incarceration) and to send out a clear message that such a crime, if committed, would be punished severely (general deterrence through imposing a life sentence). For example, in the case of *Uganda v Bahigana William*, where the accused was found guilty of defiling a two and a half year-old baby, the High Court, in sentencing him to life imprisonment, observed that:³⁶

This Court has to be merciless if society is to learn that the maximum sentence of death provided by the Law is not a formality but that it is meant to be a deterrent to would be defilers. A heavy sentence against the accused is the only answer to the rising rate of defilement of young girls and toddlers like in this case.

While in prison, people serving life sentences in Uganda undergo various rehabilitation programmes, which include formal and informal education, vocational training, sports and recreation, and religious instruction.³⁷ This means that the three purposes of punishment, retribution, deterrence and rehabilitation, regulate the prisoner's life from sentencing right through his prison experience.

3 The Constitutional Court of Uganda and its understanding of life imprisonment

In the case of *Susan Kigula and 416 Others v The Attorney-General*,³⁸ Justice Amos Twinomujuni observed, and I quote in detail:³⁹

³⁵ NM Sita *et al* *From prison back home: Social rehabilitation and reintegration as phases of the same social process (the case of Uganda)* (2005) 32-34. See generally J Gakumba *Testimonies on the impact of peace making and conflict resolution in Luzira prisons Kampala* (2007) (on file with author).

³⁶ *Uganda v Bahigana William* (HCT-01-CR-SC-0071-2001) 6 (unreported) (on file with author).

³⁷ Personal interview with Assistant Commissioner of Welfare/Rehabilitation, Mr Robert Omita Okoth, Uganda Prisons Services Headquarters, 8 January 2008, Kampala.

³⁸ n 15 above.

³⁹ n 15 above, 140-142 (emphasis in bold in original judgment; emphasis in italics added). It has to be recalled that not all justices of the Constitutional Court expressed their views on the issue of life imprisonment. However, there were discussions between both parties – the state (as the appellant) and the petitioners (in their cross-appeal) to raise the issue of life imprisonment before the Supreme Court for the Court to clarify whether the Constitutional Court's ruling on life imprisonment should be interpreted to mean that life imprisonment should mean 'whole life'. Personal interview with a senior state counsel (who preferred to remain anonymous because the case was 'sensitive'), Ministry of Justice and Constitutional Affairs, Uganda, 7 May 2008, Royal Swazi Sun, Ezulwini, Swaziland, at the 43rd ordinary session of the African Commission on Human and Peoples' Rights.

I hold the view that section 47(6) of the Prisons Act (Cap 304 Laws of Uganda) should be brought into conformity with the Constitution. It states: **‘For the purpose of calculating remission of a sentence, imprisonment for life shall be deemed to be twenty years imprisonment.’** To my understanding, this provision has the effect of fettering the discretion of courts to pass a sentence of imprisonment which is greater than 20 years! Suppose, during sentencing, the court does not use the term **‘life imprisonment’** and for example simply imposes a sentence of 50 years, does this provision confer the discretion on the prisons authorities to deem 20 years imprisonment as the maximum sentence imposed? Is this not another attempt by the legislature to pre-determined [*sic*] sentences without hearing the parties in order to determine an appropriate sentence? *If a ‘life imprisonment’ sentence is pronounced, why can’t the convict serve imprisonment for life?* I do appreciate that there will be cases where a person sentenced to serve imprisonment for life deserves remission for good behaviour [*sic*] while in prison or indeed for any other just cause. Couldn’t such a case be taken care of under article 121(1) of the Constitution where the President has the power to grant remissions of sentences to deserving prisoners? *In my opinion, if the Supreme Court confirms a sentence of life Imprisonment, it will only do so in conformity with article 126 of the Constitution. It will only do so to give effect to the peoples [*sic*] wish that the convict is an undesirable character in society and should be removed and kept away forever. It would be unconstitutional for Parliament to authorise prisons authorities to alter the sentence in the guise of calculating remission. Such a person is not entitled to any remission at all. If, however, the prisons authorities think such a person is entitled to remission, they should make a representation to the President to exercise his constitutional powers under article 121 of the Constitution.* Other than the President and in accordance with the Constitution, nobody should be allowed to alter the order of the Supreme Court passed in accordance with the Constitution of Uganda. *In the circumstances, where the courts must fully comply with articles 22(1), 28 and 44(c), life imprisonment is a realistic alternative to a death penalty and it can only be a viable alternative if it means imprisonment for life, and not a mere 20 years as it is currently understood to mean.*

For a proper discussion of the Constitutional Court’s opinion above, I divide it into a two broad categories and under each category I will deal with the following issues: (1) the constitutionality or otherwise of sentences imposed to prevent the legislature from releasing certain offenders; and (2) the implications of ‘whole-life’ life sentences.

4 The constitutionality of sentences longer than life imprisonment

In the above quotation, the Constitutional Court poses a question to the effect that, suppose the court imposed a sentence of 50 years instead of a life sentence, would the prison authorities go ahead and release the prisoner after he or she has served 20 years? What the Constitutional Court is impliedly suggesting is that in some cases, where courts predict that the prison authorities would release a prisoner earlier than what such courts would prefer, a court may impose a sentence that would in effect mean that the prisoner should not be released until he or she has served a very long period of time, that is, a period longer

than he or she would have served had he or she been sentenced to life imprisonment. In answering such a question, the Supreme Court of Uganda is encouraged to look at the jurisprudence of the Supreme Court of Appeal of South Africa.

In South Africa, after the abolition of the death penalty in the landmark Constitutional Court decision of *S v Makwanyane and Another*,⁴⁰ and in light of the increase of violent crime in that country, at a time when a sentence of life imprisonment meant that a prisoner sentenced to life sentence would serve at least 20 years of imprisonment, some courts resorted to imposing excessively lengthy sentences with the objective of ensuring that such prisoners are, to use the words of the Constitutional Court of Uganda, 'kept away forever'. In *Mhlakaza and Others v S*,⁴¹ the accused were convicted of a number of offences, including the murder of a police officer. The first accused was sentenced to an 'effective'⁴² sentence of 47 years and the second accused to 38 years. The Supreme Court of Appeal set aside the sentences and held that they were excessive. In *Nkosi and Others v S*,⁴³ the appellants were convicted of a number of offences including murder. The first appellant was sentenced to an effective period of 120 years' imprisonment; the second and third appellants were sentenced to an effective period of 65 years' imprisonment; and the fourth appellant was sentenced to an effective term of 45 years' imprisonment. While allowing the appeal, the Supreme Court of Appeal held that:⁴⁴

The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

The holding by the Supreme Court of Appeal above should answer the question by the Constitutional Court of Uganda with regard to sentences, the aim of which is to prevent the release of a prisoner on parole. Such sentences would amount to cruel, inhuman and

⁴⁰ *S v Makwanyane & Another* 1995 3 SA 391 (CC).

⁴¹ *Mhlakaza & Others v S* [1997] 2 All SA 185 (A).

⁴² According to the judgment, effective sentence meant 'the difference between the cumulative and suspended sentence'. See 185. 'Appellant no 1 was sentenced cumulatively to 62 years of which 15 years were suspended; no 2, who was similarly to 62 years, had 20 years of his sentence suspended and a further two years were ordered to run concurrently. The so-called effective sentences were thus 47 and 38 years respectively.' See 187.

⁴³ *Nkosi & Others v S* [2002] JOL 10209 (SCA).

⁴⁴ *Nkosi* (n 43 above) 1.

degrading treating or punishment under article 24 of the Constitution of Uganda, article 7 of the International Covenant on Civil and Political Rights (CCPR),⁴⁵ which Uganda ratified on 21 September 1995⁴⁶ without any reservation or declarative interpretation,⁴⁷ and article 5 of the African Charter on Human and Peoples' Rights (African Charter), which Uganda ratified on 10 May 1986. As Judges Tulkens, Carbral Barreto, Fura-Sandström, Spiellmann and Jebens rightly wrote in their dissenting opinion in *Kafkaris v Cyprus*, '[u]nless one chooses to ignore reality, a sentence ... with no hope of release ... constitutes inhuman and degrading treatment'.⁴⁸

Related to the above is the issue of imposing sentences of more than 20 years with the aim of protecting society from such criminals. Over time, researchers have proved that lengthy prison sentences are not effective in deterring offenders from re-offending when released, neither are they effective in reducing the crime rate.⁴⁹ As the Constitutional Court of South Africa rightly observed in *S v Makwanyane*,⁵⁰ the possibility of a would-be offender being arrested has a more deterring effect than the severe punishment of the unlucky few offenders who get arrested.⁵¹ Fortunately enough, there is no court in Uganda that has ever imposed a sentence as excessive as 50 years, as the Constitutional Court noted. One remains optimistic that no court should do so in the foreseeable future. However, to avoid doubt, the Supreme Court of appeal should rule that if such a sentence were to be imposed, it would violate article 24 of the Constitution.

5 The implications of 'whole-life' life imprisonment

As mentioned earlier, in some countries, such as the United States and England, there are cases where, when a person is sentenced to life imprisonment; it means that such a person will spend the rest of his

⁴⁵ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

⁴⁶ See <http://www.unhchr.ch/pdf/report.pdf> (accessed 3 October 2007).

⁴⁷ See http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (accessed 3 October 2007).

⁴⁸ *Kafkaris v Cyprus* (n 2 above) para 6.

⁴⁹ It has been observed that '... there is no evidence to suggest that longer sentences reduce crime levels, except in so far as they keep some offenders in custody, who are thus unable to commit offences in free society ... long sentences place greater strain on the resources of the criminal justice system, undermine the rehabilitative ideal, and thus make it more likely that ... offenders will re-offend'. See C Giffard & L Muntingh *The effect of sentencing on the size of the South African prison population* (Report 3) (2006) 47. See also M O'Donovan & J Redpath *The impact of minimum sentencing in South Africa* (Report 2) (2006) 22-33.

⁵⁰ *Makwanyane* (n 40 above).

⁵¹ *Makwanyane* (n 40 above) para 126.

or her life in prison. This phenomenon is not only limited to those two countries. In Africa there are many countries in which life imprisonment means 'whole-life', unless a prisoner is pardoned by the President. There are also countries, apart from Uganda, in which life imprisonment does not mean 'whole-life'. The table below illustrates this point:

Table A: The meaning of life imprisonment in nine African countries

Country	Meaning of life sentence
Kenya	Life ⁵²
Tanzania	Life ⁵³
Zimbabwe	Life ⁵⁴
Ghana	Life ⁵⁵
South Africa	25 years ⁵⁶
Uganda	20 years ⁵⁷
Malawi	12 years ⁵⁸ (B)
Botswana	7 years ⁵⁹
Mauritius	3-60 years ⁶⁰ (B)

Key: 'Life' means that a prisoner serving a life sentence cannot be considered for parole and his or her sentence cannot be remitted unless by a presidential pardon. 'B' means that reference is being made to the Bill that is before Parliament, but otherwise the law that is intended to be amended is still in force.

The Constitutional Court of Uganda would like life imprisonment in Uganda to change from 20 years to 'whole-life'. This will raise the following problems:

5.1 Denial of parole to prisoners serving life sentences: Cruel, inhuman and degrading punishment

Section 89 of the Prisons Act⁶¹ provides that a prisoner who is serving a sentence of imprisonment for a period of three years or more may be released on parole within six months of the date he or she is due for release on conditions and for reasons approved by the Commissioner-General of Prisons in order to be temporarily absent from prison for a stated length of time which shall not be greater than three months.

⁵² Prisons Act ch 90, sec 46(1)(ii).

⁵³ Prisons Act (Cap 34 of 1967) sec 49; and Parole Boards Act (Act 25 of 1994) sec 4(a).

⁵⁴ Prisons Act (ch 7:11), secs 109, 115(1) & 121(1a); and the Criminal Procedure and Evidence Act (ch 9:07), sec 344A.

⁵⁵ Prisons Service Act, NRCD 46, sec 34.

⁵⁶ Correctional Services Act 111 of 1998, sec 73.

⁵⁷ Prisons Act 17 of 2006, sec 86(3).

⁵⁸ Prisons Bill 2003, sec 53(1)(b).

⁵⁹ Prisons Act 1980, sec 85(c).

⁶⁰ Criminal Procedure (Amendment) Bill VIII of 2007, sec 150A.

⁶¹ Act 17 of 2006.

Such a prisoner is supposed to obey the parole conditions imposed by the Commissioner-General, failure of which he or she is called back to prison.⁶² Section 84 of the Prisons Act provides for the remission of a sentence of any convicted prisoner sentenced to imprisonment for a period exceeding one month. As mentioned earlier, for a person serving life imprisonment, remission of a sentence means that such a prisoner will serve 20 years in prison. Unlike the South African Correctional Services Act,⁶³ which specifically provides that a prisoner serving a life sentence may be considered for parole after 25 years⁶⁴ and lays down in detail the conditions that may be imposed on such a prisoner released on parole,⁶⁵ the Uganda Prisons Act is not so detailed.

Section 86(3) should therefore be read together with sections 89 and 84 to mean that a prisoner serving a life sentence shall also be released on parole within six months of the date he or she is due for release on conditions that may be imposed by the Commissioner-General of Prisons. This means that, if a prisoner on a life sentence were to serve 'whole-life', they would not only not benefit from sections 84 and 89, but they will never have a chance of expecting to be released at all unless through a presidential pardon, which depends on many unknown factors. As the dissenting judges in the European Court of Human Rights case of *Kafkaris v Cyprus* rightly put it, for a prisoner sentenced to life imprisonment to wait for a presidential pardon for his release, which presidential pardon depended on factors unknown to such a prisoner, such a prisoner did not have 'a real and tangible prospect of release'.⁶⁶ One has to recall that parole is an administrative decision which must be exercised in line with article 42 of the Constitution, which provides that any administrative decision must be taken justly and fairly. Parole is not a right. As the European Court of Human Rights rightly observed in the case of *Ezeh and Connors v The United Kingdom*,⁶⁷

[t]he early release, the remission, the conditional release, the parole or whatever one chooses to call it, *cannot* be a prisoner's right. It may be a factual 'expectation', even a reasonable one, but at bottom it is still a privilege. The privilege may or may not be granted.

However, the European Court of Human Rights' above observation should be interpreted on a case-by-case basis and the issue of human dignity should always be at the back of anybody interpreting such a decision. If prisoners serving a sentence of 10 years, for example, were to be denied parole, it could be argued that such a person can still

⁶² Sec 89(2-4).

⁶³ Act 111 of 1998.

⁶⁴ Sec 73(6)(b)(iv).

⁶⁵ Ch VI & VII.

⁶⁶ *Kafkaris v Cyprus* (n 2 above), joint dissenting judgment of Judges Tulkens, Cabral Barreto, Fura- Sandström, Spielmann & Jebens, para 6.

⁶⁷ *Case of Ezeh and Connors v The United Kingdom* (Applications 39665/98 & 40086/98) [2003] ECHR 485 (9 October 2003) para 5.

serve his or her ten years without his right to human dignity being infringed, the rationale being that he or she expects to, and will for sure, unless otherwise, be released after 10 years. However, in a situation where a person has been sentenced to a 'whole-life' sentence, such a person does not expect to be released unless by a presidential pardon. Courts have held that such a sentence would amount to cruel, inhuman and degrading punishment. The Supreme Court of Appeal of South Africa observed that '... it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment'.⁶⁸ The Supreme Court of Namibia has held that:⁶⁹

A sentence of life imprisonment ... can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

The Constitutional Court of Uganda is right to assume that a person sentenced to life imprisonment, even in case where life imprisonment means 'whole-life', can be pardoned by the President under article 121 of the Constitution.⁷⁰ The problem with such an approach is that the prisoner will never know when such a pardon may come his or her way. The Federal Constitutional Court of Germany rightly held that '... the principle[s] of legal certainty ... [and] ... natural justice require that conditions, in terms of which a prisoner serving a life sentence is released and the procedure to be followed in securing his release, should be determined by legislation'.⁷¹ Practice has also shown that, in cases where the President has pardoned prisoners, no one serving a life sentence has ever been pardoned.⁷² As the Constitutional Court observes, it could all depend on the recommendations that the prison authorities may or may not make to the President that such a person

⁶⁸ *Bull & Another v The State* Case 221/2000 [2001] ZASCA 105 (26 September 2001) para 23.

⁶⁹ *S v Tcoeb* 1996 1 SACR 390 399.

⁷⁰ The President, eg, used his powers under art 121 to pardon Abudallah Nasuru who had been on death row for almost 20 years. See *Susan Kigula & 146 Others v Uganda* (n 15 above) Issue 5(iii). In early February 2003, the President pardoned 92 prisoners, including a member of parliament, who were serving sentences in prisons in Uganda. I could not establish whether any of them was serving a life sentence. See <http://www.newvision.co.ug/D/8/13/115199/Mulindwa%20Birimumaaso%20pardoned> (accessed 4 October 2007).

⁷¹ BVerfGE 45 187 246, as cited in Van Zyl Smit (n 3 above) 409.

⁷² n 50 above. In February 2007, the President pardoned over 170 prisoners, but none of them was serving a life sentence. See S Candia & P Jaramoji 'President pardons over 170 inmates' *The New Vision* 27 February 2007 <http://www.newvision.co.ug/D/8/13/551457/prisoners%20pardoned> (accessed 4 October 2007). In December 2004, the President also pardoned 173 prisoners and none of them was serving a life sentence. See J Etyang & H Kiirya 'Museveni pardons 173 inmates' *The New Vision* 8 December 2004 <http://www.newvision.co.ug/D/8/13/404696/prisoners%20pardoned> (accessed 4 October 2007).

should be considered for release. Such a recommendation could be made after 10 years, 20 years or 50 years, depending on the way prison authorities work.⁷³ This means that at the time of sentencing, the prisoner will know that he is going to be in prison for the rest of his life, which would surely infringe his right to human dignity, as courts in South Africa and Namibia have observed. Dünkel and Van Zyl Smit observe that '[t]he sentences of life without any prospect of parole should be condemned as fundamentally cruel and inhumane as the prospect of freedom is a fundamental human right'.⁷⁴ The African Commission on Human and Peoples' Rights (African Commission) is also supportive of the view that prisoners should have a chance of being released on parole and, where possible, they should have their sentences remitted.⁷⁵ The recommendation is therefore that the Supreme Court should hold that section 86(3) of the Prisons Act is in line with the Constitution.

5.2 Life imprisonment and rehabilitation of offenders

Under sections 5(b) and (c) of the Prisons Act, some of the functions of the Prisons Service are to facilitate the social rehabilitation and reformation of prisoners through specific training and education programmes, and to facilitate the re-integration of prisoners into their communities. The question that the Supreme Court should put into consideration before sanctioning a 'whole-life' for life imprisonment is whether it is possible for the Prisons Service to exercise the above functions with regard to prisoners who are aware that they will never be released. Why would a prisoner participate in any rehabilitation or reintegration programme when he or she knows that the possibility of being released is almost non-existent? Even in South Africa, where the law provides that a prisoner serving a life sentence will be considered for parole after 25 years, the Supreme Court of Appeal held in *S v Sikhapha*,⁷⁶ where the appellant, a 31 year-old man, was found guilty of raping a 13 year-old girl and sentenced to life imprisonment, that

⁷³ It has been observed that '[i]t must be recognised that the many decisions taken by the prison authorities at every step in this process [of ensuring that prisoners serving life sentences are released] may have a bearing on when the prisoner is eventually released. For example, an administrative decision not to transfer a prisoner to an open facility may lead to a parole board deciding not to release the life conditionally.' See Van Zyl Smit (n 3 above) 415.

⁷⁴ Van Zyl Smit & Dünkel (n 4 above) 846.

⁷⁵ See Prisons in Cameroon: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Report to the Government of the Republic of Cameroon on the Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 2-15 September 2002) ACHPR/37/OS/11/437, where, under General Recommendations, the Special Rapporteur recommends that '[m]easures such as parole, judicial control, reductions of sentences, community service, diversion, mediation and permission to go out should also be developed'.

⁷⁶ *S v Sikhapha* 2006 2 SACR 439.

'[t]he sentence of life imprisonment required by the legislature is the most serious that can be imposed. *It effectively denies the appellant the possibility of rehabilitation.*'⁷⁷ The Court reduced the sentence to 20 years' imprisonment. The German Federal Constitutional Court held that '[t]he prison institutions also have a duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialisation [read rehabilitation], to preserve their ability to cope with life and to counteract the negative effects of incarceration'.⁷⁸ Should the Supreme Court go ahead and confirm that life imprisonment means 'whole-life', it would mean that such prisoners will most probably not be rehabilitated.⁷⁹ This will not only make sections 5(b) and (c) redundant as far as this category of prisoners is concerned, but it would also fly into the face of Uganda's international obligation under article 10(3) of CCPR, which is to the effect that the essential aims of the prison system is to reform and rehabilitate prisoners.⁸⁰ It would also mean that our society would effectively have treated such prisoners as those sentenced to death – people that will never come back and make any contribution to the development of the country. As it has rightly been observed, 'to lock up a prisoner and take away all hope of release is to resort to another form of death sentence'.⁸¹ In addition, Wright has observed that prisoners sentenced to 'whole-life' "'vehemently disapprove of their sentences"' and would prefer to be executed rather than kept alive behind bars for the rest of their lives'.⁸² The African Commission has also emphasised the importance of rehabilitating prisoners, which would not be achieved if prisoners are sentenced to 'whole-life' life sentences.⁸³

⁷⁷ Para 19 (my emphasis).

⁷⁸ BVertGE 45, 187, 238, as cited in Van Zyl Smit (n 3 above) 408.

⁷⁹ In their joint partly dissenting opinion in the case of *Kafkaris v Cyprus* (n 2 above), Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens observed, in relation to the parliamentary debates surrounding the abolition of the death penalty in the United Kingdom in 1964, that 'as a general rule "experience shows that nine years, ten years, or thereabouts is the maximum period of confinement that normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and become useful citizens"' (para 5).

⁸⁰ See D van Zyl Smit 'Punishment and human rights in international criminal justice' (2002) 2:1 *Human Rights Law Review* 5.

⁸¹ Appleton & Grover (n 5 above) 606.

⁸² J Wright 'Life without parole: The view from death row' (1991) 27 *Criminal Law Bulletin* 334-57 346, as cited in Appleton & Grover (n 5 above) 607.

⁸³ See Report on the Visit to Prisons in Zimbabwe by Prof EVO Dankwa, Special Rapporteur on Prisons and Conditions of Detention, 10th Annual Activity Report of the African Commission on Human and Peoples' Rights 1996/97, Annex VII, in which the Special Rapporteur recommended that '[t]he prison service should help orient public attitude to accepting that rehabilitation does occur in the prisons of Zimbabwe by employing ex-convicts whenever there is the opportunity to do so' (Recommendation 7).

5.3 Disciplining prisoners serving ‘whole life’ sentences

Under section 68 of the Uganda Prisons Act, ‘[e]very prisoner shall be subject to prison discipline and to all laws, orders and directions relating to prisons and prisoners during the whole time of imprisonment’. Many prison officials will tell you that one of the most difficult tasks is that of keeping prisoners orderly. Another challenge is disciplining prisoners who breach prison rules and laws without subjecting them to cruel, inhuman and degrading punishment. Parole has always acted as an incentive to ensure that prisoners obey prison rules and regulations because the more a prisoner follows the rules, the higher are the chances that he or she may be released on parole at the earliest available opportunity.

However, in cases of prisoners serving ‘whole-life’ sentences, ‘the “carrot” of parole cannot be used as an incentive to ensure the compliance and co-operation of those who have neither hope of release nor anything to lose’.⁸⁴ Research has indicated that ‘imposing [whole-life] sentences on violent offenders could result in a new class of “super-inmates” ... uncontrollable in prison because they have nothing else to lose’.⁸⁵ They are aware that even if they broke prison rules, any sentence of imprisonment imposed will run concurrently with the sentence they are already serving and in effect they would not have been punished for disobeying prison rules.⁸⁶ As Lord Parker observed in *R v Foy*, in which a lower court imposed a sentence of imprisonment consecutive to life imprisonment,⁸⁷

[I]f life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on licence, and the sentences of life imprisonment remains on them until they die. Accordingly, if the court makes any period of years consecutive to life, the court is passing a sentence which is no sentence at all, in that it cannot operate until the prisoner dies.

Had corporal punishment not been declared a cruel, inhuman and degrading punishment in the well-known case of *Simon Kyamanya v*

⁸⁴ Appleton & Grover (n 5 above) 604.

⁸⁵ Appleton & Grover (n 5 above) 604. ‘In her report ... in 2004, the Ombudswoman criticised the Cypriot authorities’ interpretation of life sentence as imprisonment for the rest of the convicted person’s life ... The Deputy Director of the Central Prison spoke of the difficulties in dealing with those currently serving life sentence ... both in terms of the prisoners’ morale, and security issues. The usual incentives for encouraging good behaviour in prisoners were inevitably of no use in relation to those serving life sentences, and this posed security problems both for the warders and for the other prisoners.’ See Follow-up Report on Cyprus (2003-2005) ‘Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights’ Doc Comm DH (2006) 12, cited in *Kafkaris v Cyprus* (n 2 above) para 73.

⁸⁶ See generally S Rahman ‘Addressing anomalies created by the fiction of life imprisonment’ (2000) 8 *Waikato Law Review* 87.

⁸⁷ *R v Foy* [1962] 2 All ER 246 247.

Uganda,⁸⁸ one could have argued that such prisoners could be subjected to corporal punishment. It appears under the Prisons Act that the only serious punishment that could be imposed on a prisoner serving a 'whole-life' would be punishment by close confinement under section 94. But even then, before this punishment is imposed, the medical officer must first examine such a prisoner and certify in writing that he or she is fit to undergo such punishment. The medical officer is also required to advise the officer in charge to terminate such a confinement if he or she considers it necessary on the ground of physical or mental health. It is also unlikely that a prisoner can be denied his rights, such as the right to food and/or to exercise, as a form of punishment because these are rights under sections 69 and 70 of the Prisons Act but not privileges. Any punishment imposed must also comply with rules 27 to 32 of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners.⁸⁹ What this discussion has attempted to illustrate is that, for proper discipline among prisoners, it is essential that they should expect to be released. The Supreme Court should therefore put that into consideration before it confirms the Constitutional Court's ruling that life should mean 'whole-life'.

6 Does 'whole-life' have support in international criminal law?

Under contemporary international criminal law, one would have to look at three international courts to ascertain whether the 'whole-life' approach has any support at that level.⁹⁰ These courts are the Interna-

⁸⁸ *Simon Kyamanya v Uganda* Constitutional Reference 10 of 2000.

⁸⁹ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁹⁰ It should also be recalled that both the International Military Tribunal at Nuremberg (Nuremberg Tribunal) and the International Military Tribunal for the Far East (Tokyo Tribunal) sentenced some war criminals to life imprisonment. The Nuremberg Tribunal sentenced three defendants to life imprisonment (Rudolf Hess, Walter Funk and Erich Raeder); see *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany Part 22 (22-31 August 1946 and 30 September-1 October 1946)* (1950) 529. Funk and Raeder were released after serving a considerable amount of years because their health had deteriorated. Even though his life had also deteriorated, Hess's release was vetoed by the Russians until he committed suicide in prison. See C Kress & G Sluiter 'Imprisonment' in A Cassese (ed) *The Rome Statute of the International Criminal Court: A commentary* (2002) 1762. It should be remembered that the Spandau Prison in Germany, where the prisoners were serving their sentences, 'was administered and guarded jointly by the four Allied Powers: the Soviet Union, France, the United Kingdom and the United States' and therefore all the representatives of all the Allied Powers had to consent for any prisoner to be released. See D Kamchibekova 'State responsibility for extra-territorial human rights violations' (2007) 13 *Buffalo Human Rights Law Review* 87 124. The reason why Hess was not released could be attributed to the fact that the

tional Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone. Of the three courts, emphasis will be put on the ICTR, because it is the only one that has sentenced and actually has prisoners serving life sentences.

6.1 The International Criminal Tribunal for Rwanda

Of all civil wars that have taken place in the world and in Africa in particular, with all their unspeakable human rights and international humanitarian law violations, the Rwandan genocide of 1994 that claimed close to one million lives was clearly in a class of its own. Tens of thousand of innocent men, women and children were massacred because of their ethnicity. These atrocities could not go unpunished and hence the establishment of the ICTR. The Statute of the ICTR empowers the Tribunal to⁹¹

prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.

Hence the ICTR has jurisdictions over the offences of genocide,⁹² crimes

Soviet judge at the Tribunal, Major General IT Nikitchenko, wrote a dissenting judgment holding that Hess should have been sentenced to death by hanging instead of life imprisonment. After indicating clearly the role Hess had played in the Nazi government, Major General Nikitchenko held that '[t]aking into consideration that among the political leaders of Hitlerite Germany Hess was third in significance and played a decisive role in the crimes of the Nazi regime, I consider the only justified sentence in his case can be death'. See Dissenting Opinion of the Soviet Member of the International Military Tribunal in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany Part 22 (22-31 August 1946 and 30 September-1 October 1946) (1950) 541*. On the other hand, the Tokyo Tribunal sentenced the following accused to imprisonment for life: Araki Sadao, Hashimoto Kingoro, Hata Shunroku, Hiranuma Kiichiro, Hoshino Naoki, Kido Koichi, Koiso Kuniaki, Minimi Jiro, Oka Takasumi, Oshima Hiroshi, Sato Kenryo, Shimada Shigetaro, Suzuki Teiichi, Kaya, Shiratori and Umezue. See BVA Röling & CF Rüter *The Tokyo judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946-12 November 1948 (1977) 465-466*. It has been observed in relation to prisoners sentenced to life imprisonment by the Tokyo Tribunal that '[n]ot a single Tokyo defendant ... actually served his life sentence "unless he died of natural causes within a very few years. They were all paroled and pardoned by 1958."' See MM Penrose 'Spandau revisited: The question of detention for international war crimes' (2000) 16 *New York Law School Journal of Human Rights* 553-564-565. It should also be recalled that, unlike the life sentences imposed by the Nuremberg Tribunal where there was no law specifically stipulating the minimum number of years to be served before a prisoner could be released for parole, with regard to the sentences by the Tokyo Tribunal, '[t]he Supreme Commander General did lay down criteria for early release :... offenders sentenced to life imprisonment were to be considered for parole after they had served 15 years'. See D van Zyl Smit 'International imprisonment' (2005) 54 *International and Comparative Law Quarterly* 357-385 359.

⁹¹ Art 1.

⁹² Art 2.

against humanity⁹³ and violations of article 3 Common to the Geneva Conventions and of Additional Protocol II.⁹⁴ Under article 23 the Tribunal has jurisdiction to impose the following sentences:

- (1) The penalty imposed by the Trial Chambers shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
- (2) In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
- (3) In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Another important feature to note with regard to the punishments that can be imposed by the ICTR is article 27, which provides as follows:⁹⁵

If, pursuant to the applicable law of the state in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the state concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

As of 2 March 2008, the ICTR had completed 35 cases in some of which the accused were found guilty of committing acts of genocide. Whereas the ICTR has sentenced some offenders to short prison terms ranging from six to 15 years,⁹⁶ long prison sentences ranging from 25 to 45

⁹³ Art 3.

⁹⁴ Art 4.

⁹⁵ Van Zyl Smit points out that '[t]he major difficulty [with a provision such as this one] is that the trigger lies in the national law of the states, which may vary greatly. This results in the same sentence being implemented for different for different periods depending on where it is served.' See Van Zyl Smit (n 80 above) 9. See also Rules 124-126 of the Tribunal's Rules of Procedure and Evidence.

⁹⁶ See *Prosecutor v Paul Bisengimana* Case ICTR-00-60 (the offender was sentenced to 15 years' imprisonment); *Prosecutor v Samuel Imanishimwe* Case ICTR-99-46 (the offender was sentenced to 12 years' imprisonment); *Prosecutor v Elizaph Ntakirutimana* Case ICTR-96-10 and ICTR-96-17 (the offender was sentenced to 10 years' imprisonment); *Prosecutor v Joseph Nzabirinda* Case ICTR-01-77 (the offender was sentenced to seven years' imprisonment); *Prosecutor v Georges Ruggiu* Case ICTR-97-32 (the offender was sentenced to 12 years' imprisonment); *Prosecutor v Joseph Serugendo* Case ICTR-2005-84 (the offender was sentenced to six years' imprisonment); *Prosecutor v Omar Serushago* Case ICTR-98-39 (the offender was sentenced to 15 years' imprisonment); *Prosecutor v Tharcisse Muvunyi* Case ICTR-2000-55 (the offender was sentenced to 12 years' imprisonment); and *Prosecutor v Athanase Seromba* Case ICTR-2001-66.

years,⁹⁷ life imprisonment,⁹⁸ and ‘imprisonment for the remainder of the offender’s life’,⁹⁹ the statistics show that the ICTR has sentenced more people to be in prison for the remainder of their lives than to life imprisonment. Under article 23, the Tribunal is given the powers to impose the penalty of ‘imprisonment’ among other penalties. The Statute does not stipulate the maximum or minimum numbers of years to which the Tribunal can sentence a person to imprisonment.¹⁰⁰ However, the Tribunal’s Rules of Procedure and Evidence provide under rule 101(A) that ‘[a] person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life’.¹⁰¹ One could argue that, even in cases where the Tribunal has pronounced that the offenders should be in prison for the rest of their lives; this may not mean exactly that. If such offenders were imprisoned in countries such as South Africa or Namibia, where courts have held that a prison term that would make it impossible for a prisoner to benefit from release after serving some time in prison amounts to a cruel, inhuman and degrading treatment or punishment, it is more likely that article 27 would be invoked and such people considered for release without spending their natural lives in prison. Therefore, the ‘whole-life’ approach has little support, if any, under the jurisprudence of the ICTR.

6.2 The International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court

The Special Court for Sierra Leone (SCSL) is a hybrid court that was established by agreement between the UN and the government of Sierra Leone pursuant UN Security Council Resolution 1315 (2000) of

⁹⁷ *Prosecutor v Juvenal Kajelijeli* Case ICTR-98-44 (the offender was sentenced to 45 years’ imprisonment); *Prosecutor v Gerald Ntakirutimana* Case ICTR-96-10 and ICTR-96-17 (the offender was sentenced to 25 years’ imprisonment); *Prosecutor v Obed Ruzindana* Case ICTR-95-1 (the offender was sentenced to 25 years’ imprisonment); *Prosecutor v Laurent Semanza* Case ICTR-97-20 (the offender was sentenced to 35 years’ imprisonment); and *Prosecutor v Jean Bosco Barayigwiza* Case ICTR-97-19 (the offender was sentenced to 35 years’ imprisonment).

⁹⁸ *Prosecutor v Jean Paul Akayesu* Case ICTR-96-4; *Prosecutor v Jean Kambanda* Case ICTR-97-23; *Prosecutor v Alfred Musema* Case ICTR-96-13; and *Prosecutor v Georges Rutaganda* Case ICTR-96-3.

⁹⁹ *Prosecutor v Sylvester Gacumbifsi* Case ICTR-2001-64; *Prosecutor v Jean de Dieu Kamuhanda* Case ICTR-99-54; *Prosecutor v Clement Kayishema* Case ICTR-95-1; *Prosecutor v Mikaeli Muhima* Case ICTR-95-1; *Prosecutor v Emmanuel Nindabahizi* Case ICTR-2001-71; *Prosecutor v Eliezer Niyitegeka* Case ICTR-96-14; *Prosecutor v Ferdinand Nahimana* Case ICTR-96-11; and *Prosecutor v Hassan Ngeze* Case ICTR-99-52.

¹⁰⁰ Van Zyl Smit (n 1 above) 186.

¹⁰¹ Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (as amended on 15 June 2007).

14 August 2000.¹⁰² At the time of writing, the SCSL had handed down two judgments, in one of which, the case of *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, it sentenced the three accused as follows: two to 50 years and one to 45 years of imprisonment.¹⁰³ As Schabas rightly observes, the SCSL does not have the jurisdiction to impose life sentences because its Statute and Rules of Procedure do not authorise it to do so.¹⁰⁴ As with the ICTR, prisoners sentenced by the SCSL may be released before completing the determinate sentences imposed by the Court, but the President of the SCSL, in consultation with the judges, has to decide whether such prisoners should be released 'on the basis of the interests of justice and the general principles of law'.¹⁰⁵ This means that, whereas the Court imposed excessive sentences on the offenders, there is a possibility that they may be pardoned depending on the laws in countries where they will serve their sentences, should the President of the SCSL agree to such.

At the time of writing, the ICTY did not have any case in which the accused had been sentenced to and serving a life sentence. In one case of *Prosecutor v Milomir Stakic*,¹⁰⁶ the offender had been sentenced to life imprisonment by the Trial Chamber, but on appeal the sentence was reduced to 'a global sentence of 40 years' imprisonment, subject to credit being given under rule 101(C) of the Rules for the period the appellant has already spent in detention'.¹⁰⁷ At the time of writing, the

¹⁰² *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* Case SCSL-04-16-T, para 2. For a detailed discussion of this judgment, see JD Mujuzi 'The Special Court for Sierra Leone and its justification of punishment in cases of serious violations of international humanitarian law and human rights law: Reflecting on *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* in the light of the philosophical arguments on punishment' (2007) *African Yearbook on International Humanitarian Law* 105-137.

¹⁰³ See also *Prosecutor v Moinina Fofana and Allieu Kondewa* Case SCSL-04-14-T (sentence of 9 October 2007) in which the accused were sentenced to six and eight years respectively.

¹⁰⁴ See WA Schabas *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006) 549.

¹⁰⁵ Art 23 Statute of the SCSL.

¹⁰⁶ *Prosecutor v Milomir Staki* Case IT-97-24-A (judgment of 22 March 2006).

¹⁰⁷ See XII Disposition. The 'reluctance' of the ICTY to impose life sentences could be attributed to the fact that its Statute does not expressly allow it to impose life sentences. As one scholar observes, '[t]he argument is not that life sentence is necessarily an inappropriate ultimate penalty for the Yugoslavia Tribunal to impose. But if the Security Council had wanted to allow the Tribunal to impose sentences of more than 20 years with life imprisonment as its ultimate penalty, it should, in the interest of legal certainty, have made this explicit in the Statute of the Tribunal rather than requiring the Tribunal to have recourse to "the general practice regarding prison sentences in the courts of the former Yugoslavia"'. See Van Zyl Smit (n 80 above) 8 (footnotes omitted). Schabas observes that '[i]n Jelisi, the ICTY Appeals Chamber stated that "it falls within the Trial Chamber's discretion to impose life imprisonment". Perhaps this was a message to the Trial Chambers, as none of them had previously seen fit to pronounce such a sentence.' See Schabas (n 104 above) 550 (footnote omitted).

International Criminal Court (ICC) had not convicted any criminal, but what is vital to note is that under articles 77(1)(b), 78(3) and 101(3) of the Rome Statute, a person sentenced to life imprisonment by the ICC shall have his or her sentence reviewed by the ICC to determine whether such a sentence should be reduced when such a person has served 25 years' imprisonment. This clearly demonstrates that the Constitutional Court of Uganda's ruling that life should mean 'whole-life' does not have support under international criminal jurisprudence.¹⁰⁸

7 Conclusion

The Constitutional Court of Uganda held in the *Kigula* case that life imprisonment should not mean merely 20 years, as provided for under the Prisons Act, but rather that it should mean 'whole-life'. At the time of writing, the case was still pending appeal before the Supreme Court and the purpose of this article has been to demonstrate the likely consequences of a life sentence which means 'whole-life'. It has been illustrated that such a sentence would amount to cruel, inhuman and degrading punishment because it would deny the prisoners an opportunity to be considered for parole; it would make it difficult for the prison authorities to rehabilitate such offenders; it would make it difficult for the prison authorities to discipline such offenders; and that the jurisprudence of the *ad hoc* international criminal tribunals also supports the view that offenders should have a prospect of being released.

The author is alive to the fact that some people are of the view that, when the mandatory death penalty is abolished in Uganda, courts should be left with the discretion to determine the length of life imprisonment and, by implication, the executive should have no say in sentencing. The author relies on the South African Constitutional Court's jurisprudence to argue against that view and to maintain his stand that the executive should be left with the discretion, through legislation and remissions or commutations of sentences, to determine the meaning of the length of a prison sentence imposed by the courts in practice. This is because it is the executive, through the Uganda Prisons Service, that is to build prisons, feed prisoners, offer them medical care, rehabilitate them and ensure that they are detained in humane

¹⁰⁸ As early as 1990, the International Law Commission failed to support 'whole-life' sentences. It has been observed that during that time, '... the Commissioners ... considered whether life imprisonment as an alternative ultimate penalty [to the death sentence] would satisfy human rights norms. Of particular concern was the notion that no system of punishment that recognised human dignity of offenders could impose a penalty that excluded them permanently from society. Not only was the death penalty fundamentally unacceptable from this perspective, but life sentence prisoners would also have the prospect of release.' See Van Zyl Smit (n 80 above) 6 (footnotes omitted).

conditions. To deny the executive a say in sentencing would not only be unreasonable, but also impractical. The Constitutional Court of South Africa rightly held in *S v Dodo* that '[w]hen the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so' and that the executive has 'a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment'.¹⁰⁹ Thus, by stipulating that life imprisonment should mean 20 years, the executive is not in any way interfering with the independence of the judiciary. If courts were left with an unrestricted discretion to determine the meaning of life imprisonment, one should expect inconsistencies and discrepancies in sentences for the same offences but by different judges or the same judge. A person's ethnic group, for example, may influence the judge to impose a longer prison sentence.

¹⁰⁹ *S v Dodo* 2001 5 BCLR 423 (CC) paras 22-23 (footnotes omitted).