

Calling for the punishment to fit the crime

Genocide, war crimes and crimes against humanity in South Africa

JAMIL DDAMULIRA MUJUZI*

djmujuzi@gmail.com

A person found guilty of genocide, war crimes or crimes against humanity is liable to be sentenced to life imprisonment. However, in terms of the Criminal Law Amendment Act, a person guilty of murder or rape in certain circumstances has to be sentenced to life imprisonment unless there are substantial and compelling circumstances in which case the court has to impose a lesser sentence. This article argues, inter alia, that there is a need to amend South Africa's Implementation of the Rome Statute Act so that courts are obliged to impose life imprisonment on a person found guilty of genocide, war crimes and crimes against humanity unless there are strong reasons to impose a lesser sentence. This would show South Africa's commitment to punish severely those convicted of such international crimes.

South Africa ratified the Rome Statute of the International Criminal Court on 27 November 2000. In order to fully comply with its obligations under the Rome Statute, South Africa enacted the Implementation of the Rome Statute of the International Criminal Court Act in 2002.¹ Two of the five objectives of the Implementation of the Rome Statute Act are 'to create a framework to ensure that the Statute is effectively implemented in the Republic' and 'to provide for the crime of genocide, crimes against humanity and war crimes.'² Section 4(1) of the same Act provides that a person found guilty of genocide, a crime or crimes against humanity, and a war crime or crimes, '...is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment.'

However, a person found guilty of murder or rape committed in terms of Part 1 of Schedule 2 of the Criminal Law Amendment Act³ must be sentenced to life imprisonment unless there are substantial and compelling circumstances. In this article the author argues that genocide, war crimes and crimes against humanity are serious crimes that should have attracted life imprisonment as a minimum sentence.

DISCRETIONARY LIFE IMPRISONMENT

One of the striking things about life imprisonment in South Africa is that for serious and international offences like war crimes, crimes against humanity and genocide, the court, while

playing its complementary role to the International Criminal Court (ICC)⁴ under the Implementation of the Rome Statute Act, has wide discretion to determine whether to sentence the offender to life imprisonment or not. But in cases of murder or rape under certain circumstances, the court is required to sentence the offender to life imprisonment unless there are substantial and compelling circumstances. This means that a person could be convicted of acts of genocide, war crimes or crimes against humanity which could have resulted in the death of several people, for example, and not be sentenced to life imprisonment. It should be recalled that the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda⁵ and the Special Court for Sierra Leone⁶ shows that not all people convicted of genocide, war crimes or crimes against humanity are sentenced to lengthy prison terms like life imprisonment. On the other hand, a person convicted of, for example, the murder of one person (in a South African court) in certain circumstances has to be sentenced to life imprisonment unless there are substantial and compelling circumstances.

The Implementation of the Rome Statute Act gives wide discretion to courts to determine whether life imprisonment should be imposed or not. This could be attributed to the fact that Article 77(2) of the Rome Statute does not require that life imprisonment should be a mandatory or minimum sentence for offenders found guilty of offences that fall under the jurisdiction of the ICC. This is an outcome of the Rome Statute's drafting history, which was characterised by, amongst other things, disagreements on the issue of penalties.⁷ Article 77(2) provides that '...the Court may impose ... [a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.' It has been argued that '[g]iven the severity of the crimes under the ICC's jurisdiction, the requirement of "extreme gravity" for a life sentence seems to be superfluous.'⁸

Countries that have enacted legislation implementing the Rome Statute have provided for

different penalties for genocide, war crimes and crimes against humanity. In Australia, for example, life imprisonment is a mandatory sentence for genocide, war crimes and crimes against humanity committed in the most heinous manner.⁹ In Canada, life imprisonment is mandatory for genocide, war crimes and crimes against humanity if 'an intentional killing forms the basis of the offence';¹⁰ and in Germany, a person found guilty of genocide, war crimes and crimes against humanity 'shall be imprisoned for life' where death, amongst other things, resulted from the commission of such crimes.¹¹ The Criminal Code of Bosnia and Herzegovina provides that a person found guilty of genocide, war crimes or crimes against humanity 'shall be punished by imprisonment for a term not less than ten years or longer-term imprisonment.'¹²

CONCLUSION

Legislation from the above four countries indicates that the legislatures have ensured that the court's discretion is limited in cases where the offender has been found guilty of genocide, war crimes or crimes against humanity. However, it should be noted that the laws in the abovementioned countries are very nuanced – they make a distinction between the more serious acts of genocide in instances that directly result in death, or are brutal, and less serious conduct such as conspiracy, aiding and abetting (these may differ depending on national laws). It could be argued that the former class of conduct deserves a stiffer (read mandatory life) sentence.

Courts in the first three countries – Australia, Canada and Germany – have no discretion but to impose a sentence of life imprisonment in the abovementioned circumstances. In Bosnia and Herzegovina, on the other hand, the minimum sentence is ten years' imprisonment, although courts have the discretion to impose a longer prison term.

Genocide, war crimes and crimes against humanity are serious crimes that should attract serious sentences. It is recommended that the

Implementation of the Rome Statute Act should be amended so that life imprisonment is the minimum sentence for genocide, war crimes and crimes against humanity. Alternatively, the amendment should provide for the minimum number of years of imprisonment to which the offender found guilty of such offences should be sentenced, with life imprisonment being the maximum sentence. This would ensure that the sentence to be imposed on people found guilty of genocide, war crimes or crimes against humanity is not left entirely to the discretion of the court, which could impose lighter sentences failing to reflect the grave nature of the offences.

However, should the legislature not amend the Implementation of the Rome Statute Act before an accused appears before a South African court, there is still a possible way out for South Africa to ensure that those found guilty of genocide, war crimes and crimes against humanity are not handed down lenient sentences. While section 4(1) of the Implementation of the Rome Statute Act seems to follow the permissive language of Article 77 of the Rome Statute, it is argued that it could be read in such a way to not preclude the application of minimum sentences. A judge could start from the position that genocide, no matter what act of genocide an individual is convicted of, or no matter how heinous or brutal that act was, a life sentence should apply. Alternatively, a judge could consider the character of the act – whether it qualifies as heinous or merely facilitates genocide, and impose a stiffer or more lenient sentence depending on circumstances. This nuanced view yields the same results as in Australia, Canada, German and Bosnia Herzegovina, where minimum sentencing applies.



To comment on this article visit
<http://www.issafrica.org/sacq.php>

NOTES

- * Doctoral Researcher, Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape. OSF-SA and Ford Foundation's funding to CSPRI and CLC is acknowledged.
- 1 Act 27 of 2002. It came into force on 16 August 2002.
 - 2 Section 3 (a) and (c).

- 3 Act 105 of 1997.
- 4 Article 1 of the ICC Statute provides that the Court '...shall be complementary to national criminal jurisdictions.' For a discussion of the complementary role of the national courts under the ICC Statute see W Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, *Harvard International Law Journal* 49, 2008, 53-108; L Yang, On the Principle of Complementarity in the Rome Statute of the International Criminal Court, *Chinese Journal of International Law* 4, 2004, 121-132; and J Kleffner and G Kor (eds), *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court*, Amsterdam 25/26 June 2004, 2006, The Hague, TMC Asset Press.
- 5 W Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge, Cambridge University Press, 2006, 545-584.
- 6 For example, in *Prosecutor v Moinina Fofana and Allieu Kondewa*, Case No.SCSL-04-14-A (Judgment of 28 May 2008) the Appeals Chamber sentenced both the appellants to 20 years' imprisonment for crimes against humanity and war crimes (see para 565). In justifying the sentence of 20 years imprisonment, the Appeals Chamber held that '[w]hat should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime; or the lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes.' Para 564.
- 7 It has been observed that given the contentious issue of punishment, 'it should hardly be surprising that the negotiations on the penalties proved both difficult and time consuming.' See R Fife, Penalties, in R Lee, (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, The Hague: Kluwer Law International, 322. It has been demonstrated that '[d]uring the negotiations for the adoption of the Rome Statute of the International Criminal Court, a small but determined group of states, mainly from Arabic and Islamic countries and the Commonwealth Caribbean, argued that the new institution should impose capital punishment. Perhaps surprisingly, the United States voiced opposition to capital punishment ...and argued that if the International Court, if empowered to impose the death penalty, would fail because a large number of states would simply refuse to transfer criminals to the Court.' See W Schabas, Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice, *Loyola of Los Angeles International and Comparative Law Review* 25, 2003, 581.
- 8 S Glickman, Victim's Justice: Legitimizing the Sentencing Regime of the International Criminal Court, *Columbia Journal of Transitional Justice* 43, 2004, 229, 259.
- 9 See International Criminal Code (Consequential Amendments) Act, Act No. 42 of 2002, sections 268.3-

268.9(1), 268.24(1), 268.35,268.37(1), 268.38, 268.39, 268.41-268.44, 268.47, 268.48(1), 268.49, 268.50, 268.66(1), 268.70, 268.71(1), 268.76(2), 268.77, 268.78(1), 268.79(1), 268.90, 268.91, 268.92, 268.93(1), 268.97 and 268.98. Although under the Act, penalties ranging from 5 to 25 years' imprisonment could be imposed for various offences not serious enough to attract life imprisonment.

- 10 See Crimes against Humanity and War Crimes Act (2000, c.24), sections 4(2)(a) and 6(2)(a).
- 11 Code of Crimes against International Law, 2002, sections 6, 7.
- 12 Criminal Code of Bosnia and Herzegovina (Adopted by the Bosnia and Herzegovina Parliamentary Assembly and published in the Official Gazette of Bosnia and Herzegovina 37/03) Articles 171 – 176(1).