

Memorandum for the  
Office of the Prosecutor  
International Criminal Tribunal for Rwanda

#11. Sentencing: An assessment of Rule 101 of the ICTR Rules of Procedure and Evidence, federal sentencing laws in England, France and other countries as well as in prisoner-receiving countries, and the Kayishema/Ruzindana judgement.

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April 2002

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### Agreements/Treaties

1. Agreement Between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, *available at* [www.ictr.org/wwwroot/ENGLISH/agreements/mali.pdf](http://www.ictr.org/wwwroot/ENGLISH/agreements/mali.pdf).

### Statutes and Rules

2. Rules of Procedure and Evidence, U.N. Doc ICTR/6/Rev., 31 May 2001.
3. Crime (Sentences) Act 1997, Ch. 43, s. 28 (Eng.).
4. 18 U.S.C. § 3624(b) (2000 & Supp. 2001).
5. 18 U.S.C. § 3582(c)(1) (2000 & Supp. 2001).
6. Criminal Code, R.S.C. 1985, ch. C-46.
7. French Code of Criminal Procedure (in relevant part) *in* THE FRENCH CODE OF CRIMINAL PROCEDURE 38-39 (Gerald L. Kock et al. trans., Rothman & Co. 1988).
8. French Penal Code of 1994 (in relevant part) *in* THE FRENCH PENAL CODE OF 1994 67 (Edward A. Tomlinson trans., Rothman & Co. 1999).
9. Statutes of Swaziland, vol.3, Criminal Procedure and Evidence Act, No. 67 of 1938, as amended in 1976.
10. MINN. ST. § 243.05 (1987).

### Cases

11. Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement.
12. R (on the application of Anderson) v. Secretary of State for the Home Department, Q.B. Div'l Ct. Feb. 27, 2001 (EWHC Admin 181).
13. U.S. v. Joe, 8 F.3d 1488 (10th Cir. 1993), *certiorari denied* 114 S.Ct. 1236, 510 U.S. 1184.
14. U.S. v. Analla, 975 F.2d 119 (4th Cir. 1992), *certiorari denied* 113 S.Ct. 1853, 507 U.S. 1033.
15. Mistretta v. U.S., 109 S.Ct. 647 (1989).
16. U.S. v. LaFleur, 971 F.2d 200 (9th Cir. 1991), *certiorari denied* 507 U.S. 924, 113 S.Ct. 1292.

17. U.S. v. Donley, 878 F.2d 735 (3d Cir. 1989).
18. S v. T, 1997 1 SACR 496 (SCA) 498g-h.
19. R. v. Luxton, 1990 Carswell Alta. 144 76 Alta.L.R. (2d) 43 79 C.R. (3d) 193 [1990].
20. Murray v. HM Advocate, High Court of Justiciary, 2000 SC (JC) 102 (1999).
21. McRae v. HM Advocate, High Court of Justiciary, 1987 SCCR 36 (1987).
22. Re Megrahi, High Court of Justiciary, 2001 SCCR 701 (2001).
23. Prosecutor v. Kambanda, Case No.: ICTR 97-23-S, Judgement.
24. Prosecutor v. Akayesu, Case No.: ICTR-96-4-T, Judgement.
25. R.v. Foy [1962] 2 All ER 246 at 247, in WORDS AND PHRASES LEGALLY DEFINED 47-48 (3rd ed. 1989).
26. State v. Walker, 306 Minn. 105, 111, 235 N.W.2d 810, 814-15 (1975), *cert. denied*, 426 U.S.950 96 S.Ct. 3172, 49 L.Ed.2d 1187 (1976).

#### **UN Documents**

27. S.C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994).

#### **Books**

28. COMPARATIVE AND INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY AND CORRECTIONS (Obi N. Ignatius Ebbe, ed. Butterworth-Heinemann 1996).
29. WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW (1995).
30. THE FRENCH CODE OF CRIMINAL PROCEDURE (Gerald L. Kock et al. trans., Rothman & Co. 1988).
31. THE FRENCH PENAL CODE OF 1994 (Edward A. Tomlinson trans., Rothman & Co. 1999).
32. HALSBURY'S LAWS OF ENGLAND (4th ed. Butterworths 1990).
33. RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY (3rd ed. Anderson Publishing 1997).
34. SS TERBLANCHE, THE GUIDE TO SENTENCING IN SOUTH AFRICA (Butterworths 1999).
35. INTERNATIONAL ENCYCLOPEDIA OF LAWS, vol. 4 (Prof. Dr. L. DuPont et al. eds., Kluwer 1994).

36. ALLAN MANSON, *THE LAW OF SENTENCING* (Irwin Law 2001).
37. DANIEL KELLY, *CRIMINAL SENTENCES* (1993).
38. BLACK'S LAW DICTIONARY (7th ed. 1999).
39. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986).
40. WORDS AND PHRASES LEGALLY DEFINED (3rd ed. 1989).
41. CLAYTON C. RUBY, *SENTENCING* (Butterworths 1999).
42. GORDON NICHOLSON, *SENTENCING LAW AND PRACTICE IN SCOTLAND* (Sweet and Maxwell 1993).

### **Treatises**

43. Federal Sentencing Guidelines Manual (United States Sentencing Commission, 2001 ed.).
44. Practice Under the Federal Sentencing Guidelines (Phylis Skloot Bamberger, et al. eds. 2002-1 Supplement).
45. HUTCHINSON, YELLEN, ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* (2002 ed. West Group).

### **Newspapers/Articles**

46. Richard D. Lyons, *U.N. Approves Tribunal on Rwandan Atrocities*, THE NEW YORK TIMES, Nov. 9, 1994.
47. Bianca A. Poindexter, Note, *The War on Crime Increases the Time: Sentencing Policies in the United States and South Africa*, 22 LOY. L.A. INT'L & COMP. L. REV. 375, 378 (2000).
48. William A. Schabas, *Sentencing By International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997).

### **Press Releases**

49. Press Release: Former Prime Minister and Five Other Convicts Sent to Prison in Mali, *available at* <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/2001/296.htm>.

### **Miscellaneous Reports**

50. U.S. Department of State, Country Report, Benin 2001, *available at* [www.state.gov/g/drl/rls/hrrpt/2002/af/8252.htm](http://www.state.gov/g/drl/rls/hrrpt/2002/af/8252.htm) (last visited April 30, 2002).

51. U.S. Department of State, Country Report, Swaziland 2001, *available at* [www.state.gov/g/drl/rls/hrrpt/2001/af/8406.htm](http://www.state.gov/g/drl/rls/hrrpt/2001/af/8406.htm) (last visited April 30, 2002).
52. Amnesty International, Country Reports, Mali 2000, *available at* [www.web.amnesty.org/web/ar2000web.nsf/countries/e0ed19fe91f9dfd0802568f200552949?OpenDocument](http://www.web.amnesty.org/web/ar2000web.nsf/countries/e0ed19fe91f9dfd0802568f200552949?OpenDocument) (last visited April 30, 2002)



## Discussion

### I. Introduction and summary of conclusions.

In the Security Council vote, Rwanda voted against the creation of the International Criminal Tribunal for Rwanda (ICTR). Rwanda was in favor of meting out local justice to the worst criminals of the genocide.<sup>1</sup> Local justice would have included the death penalty.<sup>2</sup> If it meant a prison sentence, there may have been facilities that were worse than death. However, the international community prevailed; the tribunal is in Tanzania, and the sentences accord United Nations standards.

The ICTR has a duty, therefore, to the people of Rwanda to mete out international justice and make it appropriate for those aggrieved by the genocide. This includes not only punishing the worst of the genocide criminals, but also preventing these same individuals from committing more atrocities. The world cannot tolerate Clément Kayishema returning to Rwanda after having committed such atrocities as cutting a young, living girl's breast off with a machete while making her watch it before he cut her stomach open.<sup>3</sup>

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<sup>1</sup> See Richard D. Lyons, *U.N. Approves Tribunal on Rwandan Atrocities*, THE NEW YORK TIMES, Nov. 9, 1994. [Reproduced in the accompanying notebook at 46.] The Rwandan delegate voted against the Tribunal because it lacked the death penalty and it only covered crimes committed in 1994. See *id.* The Security Council resolution to establish the Tribunal for Rwanda was adopted on November 8, 1994. See S.C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994). [Reproduced in the accompanying notebook at 27.]

<sup>2</sup> Despite the fact that Rwanda is considered a de facto non-death penalty country. See William A. Schabas, *Sentencing By International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 479 (1997). [Reproduced in the accompanying notebook at 48.] Rwanda appeared on the U.N. list of "abolitionist States" because the death penalty had not been imposed for ten years. See *id.*

<sup>3</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 18. [Reproduced in the accompanying notebook at 11.]

To give but one example, this Chamber recalls the vicious nature of the murder of a sixteen-year old girl named Beatrice. Ruzindana ripped off her clothes and slowly cut off one of her breasts with a machete. When he finished, he cut off her other breast while

In Kayishema’s sentence judgement, the court was careful to distinguish the severity of Kayishema’s life sentence from a sentence of twenty-five years for Ruzindana. In fact, the court made it clear that Kayishema was not to serve a simple life sentence as found in most other nations, but was sentenced to serve four remainder-of-his-life terms. The court ordered that “remainder of his life” be read in its plain meaning. A little fearfully, the question must be expected: Will Kayishema return from a remainder-of-his-life sentence to live among the free by legal means under the ICTR?

**A. Issues**

Rule 101 of the ICTR Rules of Procedure and Evidence provides for a sentence of “up to and including the remainder of his life.” The English phrase “remainder of his life” is not consistently interpreted, if even used in various national jurisdictions. The same problem occurs with the French phrase “l’emprisonnement à vie.” The more common term “life imprisonment,” or something similar, is likewise not consistently interpreted in federal jurisdictions. Discrepancies between the phrase and its use exist.

An assessment of the federal laws of several countries regarding sentences of life imprisonment raise interesting comparisons and legitimate guides to Kayishema’s sentence and to all the other judgements and sentences under the ICTR. In order to determine the scope of the discrepancies in the use of life imprisonment in various jurisdictions, there is a need to examine statutes concerning sentencing and moreover, statutes and cases concerning early release of prisoners. Early release may be based on good behavior, parole, or automatically. The discrepancies give a broad scope to “life

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mockingly telling her to look at the first one as it lay on the ground, and finally he tore open her stomach.

*See id.*

imprisonment” and make it difficult to determine how a sentence like Kayishema’s would shake out in any country. There is an added dimension to this discussion given that the ICTR sends its prisoners to Mali, Benin and Swaziland to serve their sentences.

This memo will compare and assess the federal laws of England, France, USA, South Africa, Canada, Scotland and Belgium regarding sentencing for life imprisonment. The analysis will focus on the discrepancy between “remainder of his life” language in the ICTR Rules of Procedure and Evidence and the English term and the French term. Next, the judgement of Kayishema/Ruzindana will be compared to other ICTR sentences, and then compared to sentences of the various national jurisdictions discussed in the prior section. Finally, there will be a brief reflection on the Agreement that prisoner-receiving countries have made with the United Nations, and the local laws, to the extent available, of those countries.

## ***B. Conclusions***

Rule 101 allows for a sentence of “remainder of his life.” Kayishema’s sentence is within the power of the court. However, where “life sentences” are rarely fulfilled by the remainder of a criminal’s natural life, the court’s clarification of meaning is useful and essential. National jurisdictions vary from requiring between fifteen years to life be served for a life sentence. A remainder-of-his-life sentence, however, is different. Its plain meaning indicates that this sentence mandates a prisoner only leave the prison in a coffin.<sup>4</sup> In Kayishema’s Judgement, the court’s decision made it clear that Kayishema should spend all the remaining days of his life in prison.

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<sup>4</sup> In some nations, such as Nigeria, life imprisonment means that a person will only leave prison in a coffin. There is no parole system in Nigeria. *See* COMPARATIVE AND INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY AND CORRECTIONS 119 (Obi N. Ignatius Ebbe, ed. Butterworth-

The Enforcement of Sentences Agreement is crucial to the fulfillment of Kayishema's, and possibly other convict's, sentences. The prisoner-receiving countries should not circumvent the judge's unambiguous sentence of Kayishema by applying national laws. Furthermore, in the event that the Tribunal no longer operates, there should be a duty placed on the Security Council to have mechanisms in place to monitor and maintain the sentence of Kayishema, and other prisoners, to fulfill the sentence completely.

## **II. Factual Background**

### ***A. Rule 101 and the Kayishema/Ruzindana Judgement***

The International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rule 101 states:

#### *Penalties*

- (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.
- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as:
  - (i) any aggravating circumstances;
  - (ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction;
  - (iii) the general practice regarding prison sentences in the courts of Rwanda;
  - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute.
- (C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
- (D) The sentence shall be pronounced in public and in the presence of the convicted person, subject to Rule 102(B).

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Heinemann 1996). [Reproduced in the accompanying notebook at 28.] *See also infra* notes 5, 11 and accompanying text.

(E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

Especially important is possibility of imprisonment for up to the “remainder of his life,” in subpart (A).

The Webster’s dictionary defines “remainder” as: “a remaining group, part, or trace ... the number left after subtraction or deduction ... not taken, used, or gone: leftover.”<sup>5</sup> When there is a remainder of a life, then it would, by definition, be everything left over in the person’s life.

In the sentencing of Clément Kayishema and Obed Ruzindana, the court found different levels of penalties appropriate because of their levels of authority.<sup>6</sup> Although the court made these distinctions between Kayishema and Ruzindana, the court stated that the twenty-five year sentence was in a practical sense only slightly less than imprisonment for the remainder of his life.<sup>7</sup> Kayishema was sentenced to imprisonment for the remainder of his life on four separate counts.<sup>8</sup> Ruzindana was sentenced to twenty-five years imprisonment.<sup>9</sup> In discussing the “Enforcement of Sentences” in this judgement, the court explained more fully the intended interpretation of “remainder of his life.”<sup>10</sup> The court stated: “This Chamber, in imposing four concurrent remainder-of-his-

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<sup>5</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1919 (1986). [Reproduced in the accompanying notebook at 39.]

<sup>6</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 26. [Reproduced in the accompanying notebook at 11.]

<sup>7</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 26. The point of this statement was not to diminish Kayishema’s sentence, but to highlight the fact that they are not being lenient on Ruzindana, because in all practicality, Ruzindana’s twenty-five year sentence is not far from being sentenced to imprisonment for the remainder of his life.

<sup>8</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 27.

<sup>9</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 28.

<sup>10</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 31.

life sentences for Kayishema, finds that the ‘remainder of his life’ sentence is distinct from a ‘life sentence’ under the laws of most national jurisdictions. This Chamber gives the phrase ‘remainder of his life’ under Rule 101(A) its plain meaning.”<sup>11</sup>

### ***B. Agreement between Mali and the United Nations***

Rule 103 of the ICTR Rules of Procedure and Evidence states that:

“Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons.”<sup>12</sup> The Government of the Republic of Mali and the United Nations, through the International Criminal Tribunal for Rwanda, signed an Agreement as to the enforcement of sentences imposed by the Tribunal. Article 3, section 1 of the Agreement states: “In enforcing the sentence pronounced by the Tribunal, the competent national authorities of the requested State shall be bound by the duration of the sentence so pronounced.”<sup>13</sup> The prisoner-

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<sup>11</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 31. *See supra* note 5 and accompanying text. In a U.S. legal dictionary, a “life sentence” is defined as: “A sentence that imprisons the convicted criminal for life – though in some jurisdictions the prisoner may become eligible for release on good behavior, rehabilitation, or the like.” BLACK’S LAW DICTIONARY 1368 (7th ed. 1999). [Reproduced in the accompanying notebook at 38.] In an English legal dictionary, “life imprisonment” is defined from case law. “Life imprisonment is 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 sentence of life imprisonment remains on them until they die.” *See R.v. Foy* [1962] 2 All ER 246 at 247, in WORDS AND PHRASES LEGALLY DEFINED 47-48 (3rd ed. 1989). [Reproduced in the accompanying notebook at 25.]

<sup>12</sup> *See* Rules of Procedure and Evidence, U.N. Doc ICTR/6/Rev., 31 May 2001, *available at* <http://www.ictr.org> (last visited April 7, 2002) (in relevant part only). [Reproduced in the accompanying notebook at 2.] The incentive for receiving prisoners is that the ICTR will put in special recommendations for aid from donors to those prisoner-receiving countries. *See infra* note 13, art. 11, para. 2.

<sup>13</sup> Agreement Between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, art. 3, § 1, *available at* [www.ictr.org/wwwroot/ENGLISH/agreements/mali.pdf](http://www.ictr.org/wwwroot/ENGLISH/agreements/mali.pdf) [hereinafter “Enforcement of Sentences Agreement”]. [Reproduced in the accompanying notebook at 1.] This is the same or similar agreement between Swaziland, Benin, and the ICTR. *See* Press Release: Former Prime Minister and Five Other Convicts Sent to Prison in Mali, *available at* <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/2001/296.htm> (last visited April 7, 2002). [Reproduced in the accompanying notebook at 49.] By the agreement, Mali “undertook to provide prison facilities for the service of sentences of persons convicted by the Tribunal. Other countries that have signed similar agreements with the Tribunal are Benin and Swaziland.” *Id.*

receiving country must notify the Registrar of the Tribunal two months prior to the prisoner's completion of service. Article 8 indicates that a convicted person may be eligible for commutation of sentence, pardon or early release according to the national law of the prisoner-receiving country. However, the national authorities must notify the ICTR Registrar beforehand, and the President of the Tribunal and the Judges must determine if the early release is appropriate.<sup>14</sup> The prisoner-receiving country must act in accord with this determination. The Tribunal may transfer a prisoner as it sees fit.<sup>15</sup>

In likelihood, the Tribunal will be adjourned in the next ten years, and the only provision for this eventuality is Article 12 of the Agreement. It states: "In the event that the Tribunal is to be wound up, the Registrar will inform the Security Council of any sentences whose enforcement remains to be completed pursuant to this Agreement."<sup>16</sup>

### **III. Legal Analysis**

#### ***A. Comparing and assessing federal laws of sentencing for life imprisonment and the scope of such sentences.***

##### *1. France – Life sentences must be served for no less than fifteen years*

France is considered to have a "flexible system of penalties" requiring courts to consider the circumstances of the offence, the personality of the offender and the offender's resources and expenses.<sup>17</sup> The court can reduce (but not increase) a penalty on

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<sup>14</sup> See Enforcement of Sentences Agreement, *supra* note 13.

<sup>15</sup> See Enforcement of Sentences Agreement, *supra* note 13, art. 9, para.2.

<sup>16</sup> See Enforcement of Sentences Agreement, *supra* note 13, art. 12.

<sup>17</sup> See WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 156 (1995). [Reproduced in the accompanying notebook at 29.]

their own initiative, but where an offence is punishable by life imprisonment, the reduction cannot fall below two years.<sup>18</sup>

Subject to good behavior, an offender can be released prior to the end of the sentence. For a life sentence this “conditional release” (reductions of up to three months per year served) can only apply after serving fifteen years.<sup>19</sup>

Courts must impose a “security period” on offenders sentenced to more than ten years imprisonment.<sup>20</sup> During the security period, the convicted person may not benefit from parole.<sup>21</sup> Normally, the security period exists for one-half of the penalty, but for a sentence of felony imprisonment for life, the security period is eighteen years.<sup>22</sup> The felony court may lower these periods, or raise them, by special decision.<sup>23</sup> A security period on a sentence of felony imprisonment for life can be raised to up to twenty-two years.<sup>24</sup> The felony court can extend the length of the security period to thirty years for a sentence of life imprisonment if certain aggravating circumstances exist.<sup>25</sup> These

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<sup>18</sup> *See id.* at 157. The French criminal law; the Penal Code and the Code of Criminal Procedure, was “comprehensively overhauled and replaced” by codes that went into effect in 1994. *See id.* at 145.

<sup>19</sup> *See id.* at 159; French Code of Criminal Procedure, Arts. 729 – 733-1, in THE FRENCH CODE OF CRIMINAL PROCEDURE 38-39 (Gerald L. Kock et al. trans., Rothman & Co. 1988). [Reproduced in the accompanying notebook at 7.]

<sup>20</sup> *See id.* at 34, 327 (Art. 720-2 is found on page 327).

<sup>21</sup> *See* French Penal Code, Art. 132-23, in THE FRENCH PENAL CODE OF 1994 67 (Edward A. Tomlinson trans., Rothman & Co. 1999). [Reproduced in the accompanying notebook at 8.]

<sup>22</sup> *See id.* The French Code of Criminal Procedure used to order that a security period for life sentences was fifteen years. Also, the distinction between a felony imprisonment for life and other imprisonment for life is simply the crime. Life sentences can be imposed on recidivists, for example, that have not committed a single felony punishable by a life sentence.

<sup>23</sup> *See id.* The felony court has jurisdiction to sentence for life imprisonment.

<sup>24</sup> *See id.*

<sup>25</sup> *See* THE FRENCH CODE OF CRIMINAL PROCEDURE 328 (Gerald L. Kock et al. trans., Rothman & Co. 1988). [Reproduced in the accompanying notebook at 30.]

circumstances include: murder accompanied by torture; murder of a minor, infirm, or an agent of the court system; felony-murder; and, murder accompanied by hijacking.<sup>26</sup>

2. *England* – “The sentence of Life Imprisonment does not mean that the convicted offender will be imprisoned for the rest of his or her natural life.”

The trial judge has wide discretion in determining sentences, although for murder, the court must pass a sentence of imprisonment for life.<sup>27</sup> Life imprisonment is also imposed by discretion for other crimes. English law usually only states the maximum penalty that may be imposed.<sup>28</sup> The judge is supposed to weigh the seriousness of the offense when determining the sentence.<sup>29</sup>

A sentence of life imprisonment in England is better described as “an indeterminate sentence.”<sup>30</sup> “The sentence of Life Imprisonment does not mean that the convicted offender will be imprisoned for the rest of his or her natural life.”<sup>31</sup> The Life Sentence Review Tribunal has the power to release mandatory life prisoners, although they are released “on licence” and remain under supervision for the rest of their life.<sup>32</sup>

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<sup>26</sup> *See id.* The French Penal Code has its own Genocide and Other Felonies Against Humanity provisions. *See* The French Penal Code, *supra* note 21, at 91, arts. 211-1, 212-1. These crimes are punishable by felony imprisonment for life. *See id.*

<sup>27</sup> *See* HALSBURY’S LAWS OF ENGLAND 994 (4th ed. Butterworths 1990). [Reproduced in the accompanying notebook at 32.] This is termed a mandatory life sentence and is applied to murder. “Discretionary life sentences” can be given for crimes of manslaughter, attempted murder, rape, buggery, and others. *See* INTERNATIONAL ENCYCLOPEDIA OF LAWS 150-51 (Prof. Dr. L. DuPont et al. eds., Kluwer 1993). [Reproduced in the accompanying notebook at 35.]

<sup>28</sup> *See* INTERNATIONAL ENCYCLOPEDIA OF LAWS 151 (Prof. Dr. L. DuPont et al. eds., Kluwer 1993). [Reproduced in the accompanying notebook at 35.]

<sup>29</sup> *See* RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY 67 (3rd ed. Anderson Publishing 1997). [Reproduced in the accompanying notebook at 33.]

<sup>30</sup> INTERNATIONAL ENCYCLOPEDIA OF LAWS 151 (Prof. Dr. L. DuPont et al. eds., Kluwer 1993). [Reproduced in the accompanying notebook at 35.]

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* The parole system allows discretionary life prisoners to be released on licence by a decision of the Parole Board and approval by the Home Secretary. *See id.* at 215. The statutes require a discretionary life prisoner to have served “a relevant part of his sentence” before the Parole Board can review whether to

For mandatory life prisoners, case law reveals that the trial judge sets a “tariff” on the life imprisonment, thus creating the minimum a life prisoner must serve before release.<sup>33</sup>

Furthermore, it is within the powers of the Home Secretary to determine whether that number is appropriate and change it. In *R (on the application of Anderson) and another v. Secretary of State for the Home Department*, two separate convictions; one for kicking and beating a feeble theft victim to death, the other for strangulation of a person after severe beating, the court found a tariff of 22 years and 20 years fully appropriate. The Home Secretary in each of these instances had increased the trial judge’s recommended tariff.<sup>34</sup>

### 3. USA – Life is life

In the United States<sup>35</sup>, in the absence of capital punishment, a person can be sentenced to life imprisonment for committing a premeditated killing (first degree murder), or when death results from a commission of certain felonies.<sup>36</sup> Second degree murder warrants, as its maximum sentence, life imprisonment.<sup>37</sup>

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release him on licence. *See* Crimes (Sentences) Act 1997, Ch. 43, s. 28 (Eng.). [Reproduced in the accompanying notebook at 3.]

<sup>33</sup> *R (on the application of Anderson) and another v. Secretary of State for the Home Department*, Q.B. Div’l Ct. Feb. 27, 2001 (EWHC Admin 181). [Reproduced in the accompanying notebook at 12.]

<sup>34</sup> *See id.*

<sup>35</sup> Each state in the United States of America has its own sentencing laws distinct and apart from the federal laws. In Minnesota, for example, even though a mandatory life sentence is imposed for Murder in the First Degree, there is a possibility of parole. *See* MINN. ST. § 243.05 (1987); *State v. Walker*, 306 Minn. 105, 111, 235 N.W.2d 810, 814-15 (1975), *cert. denied*, 426 U.S.950 96 S.Ct. 3172, 49 L.Ed.2d 1187 (1976). [Reproduced in the accompanying notebook at 10 and 26 respectively.] The Parole Board can determine that a convict has served a required number of years and fulfilled other conditions, and thus, release him. *See* MINN. ST. § 243.05 (1987).

<sup>36</sup> *See* Federal Sentencing Guidelines Manual 40 (United States Sentencing Commission, 2001 ed.). [Reproduced in the accompanying notebook at 43.]

<sup>37</sup> *See id.* at 40-41.

The Federal Sentencing Guidelines in the United States have taken most of the discretion away from judges and have attempted to make sentencing more uniform.<sup>38</sup>

Thus, minimum and maximum sentences must follow the Sentencing Table.<sup>39</sup>

As a partner to the sentencing reform, parole was abolished in the United States federal system in 1987.<sup>40</sup> Persons sentenced to imprisonment are not eligible for parole. However, they are entitled to “good time credit” under the Guidelines of 54 days per year, although this is not available to persons serving life sentences.<sup>41</sup>

The only possibility of receiving a lesser sentence than life for a person convicted of first degree murder is by reading the statutes broadly where they state that imprisonment for first degree murder (as considered a class A felony) is “the duration of the defendant’s life or any period of time.”<sup>42</sup> The U.S. Supreme Court has concluded that 18 U.S.C. § 1111 mandates life imprisonment for first degree murder.<sup>43</sup> However, a

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<sup>38</sup> See Bianca A. Poindexter, Note, *The War on Crime Increases the Time: Sentencing Policies in the United States and South Africa*, 22 LOY. L.A. INT’L & COMP. L. REV. 375, 378 (2000). [Reproduced in the accompanying notebook at 47.]

<sup>39</sup> See Federal Sentencing Guidelines Manual 335 (United States Sentencing Commission, 2001 ed.) (Sentencing Table). [Reproduced in the accompanying notebook at 43.]

<sup>40</sup> Subject to some post-facto remainder of old parole laws. See Practice Under the Federal Sentencing Guidelines 6-20 (Phylis Skloot Bamberger, et al. eds. 2002-1 Supplement). [Reproduced in the accompanying notebook at 44.]

<sup>41</sup> See 18 U.S.C. § 3624(b) (2000 & Supp. 2001). [Reproduced in the accompanying notebook at 4.] Sentences for life imprisonment without parole have been consistently upheld in court. See *U.S. v. Joe*, 8 F.3d 1488 (10th Cir. 1993), *certiorari denied* 114 S.Ct. 1236, 510 U.S. 1184 (allowing that for murder of wife and another woman, mandatory minimum sentence is life imprisonment); *U.S. v. Analla*, 975 F.2d 119 (4th Cir. 1992), *certiorari denied* 113 S.Ct. 1853, 507 U.S. 1033 (stating in more detail than *Joe*, the court finds parole was “clearly” abolished for life sentences). [Reproduced in the accompanying notebook at 13 and 14 respectively.]

<sup>42</sup> HUTCHINSON, YELLEN, ET AL., FEDERAL SENTENCING LAW AND PRACTICE 163, (2002 ed. West Group) (reading the following statutes: 18 U.S.C. § 1111; 18 U.S.C. § 3559(a)(1)(A); and, 18 U.S.C. § 3581(b)(1)). [Reproduced in the accompanying notebook at 45.]

<sup>43</sup> *Mistretta v. U.S.*, 109 S.Ct. 647 (1989) (holding that the Sentencing Commission and Sentencing Guidelines are constitutional); *U.S. v. LaFleur*, 971 F.2d 200 (9th Cir. 1991), *certiorari denied* 507 U.S. 924, 113 S.Ct. 1292 (finding that life in prison is mandatory minimum where court is not given discretion to impose a lesser sentence); *U.S. v. Donley*, 878 F.2d 735 (3d Cir. 1989) (finding that life imprisonment

court may modify a term of imprisonment for mandatory life under extraordinary and compelling reasons, or if the defendant is at least 70 years old and has served 30 years in prison.<sup>44</sup>

#### 4. *South Africa – Life is at most twenty-five years*

In South Africa, the death penalty has been abolished, therefore, life imprisonment sentences have been increasing since 1992. Moreover, sentences that used to not exceed 25 years are, since 1992, becoming longer, for example 40 years, and even in a very serious case 75 years. Sentencing is within the full discretion of the judge.<sup>45</sup> In a case called *S. v. T.*,<sup>46</sup> the court made clear that life imprisonment should be imposed to signify the courts wish the offender to remain in prison for the rest of his life. It should not be imposed to manipulate parole policies.<sup>47</sup> In fact, the court cannot order that an accused not be considered for parole, although they can fix a “non-parole period.”<sup>48</sup>

For imprisonment of two years and more, the court may fix a “non-parole period.” The court is encouraged to do this only when there is “good reason,” for example, the court has ordered the imprisonment to specifically protect society against the offender.<sup>49</sup> A “non-parole period” may not exceed two-thirds of the term of imprisonment or 25

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was correct sentence and no possibility of parole – “this may seem like a harsh penalty, but that is the law as it now stands”). [Reproduced in the accompanying notebook at 15, 16 and 17 respectively.]

<sup>44</sup> See 18 U.S.C. § 3582(c)(1). [Reproduced in the accompanying notebook at 5.]

<sup>45</sup> See SS TERBLANCHE, *THE GUIDE TO SENTENCING IN SOUTH AFRICA* 252-55, (Butterworths 1999). [Reproduced in the accompanying notebook at 34.]

<sup>46</sup> See *id.* at 255 (*S v. T.*, 1997 1 SACR 496 (SCA) 498g-h).

<sup>47</sup> See *id.* at 255.

<sup>48</sup> See *id.* at 257, 259.

<sup>49</sup> See *id.* at 260.

years, whichever is greater.<sup>50</sup> In regular circumstances, parole is available after one-half a sentence has been served.

Only the High Court has the authority to sentence a person to life imprisonment.<sup>51</sup> Life imprisonment serves society if the offender has very little hope of rehabilitation, or when the crimes were so heinous as to entreat a strong expression of abhorrence.<sup>52</sup> Again, the court is not allowed to use a sentence to avoid an earlier parole. Furthermore, there is a relatively complicated release process for life prisoners. The Minister of Correctional Services and the Institutional Committee both have to agree on the release of a prisoner before it can occur.<sup>53</sup>

*5. Canada – Life is usually twenty-five years, although there is a “faint hope” of release after fifteen years*

For high treason or first degree murder convictions, where the sentence is imprisonment for life, the prisoner is not eligible for parole until the person has served 25 years of the sentence.<sup>54</sup> Section 745 et seq distinguishes the different parole eligibility for “imprisonment for life without eligibility for parole.”<sup>55</sup> This is called the parole ineligibility period. These 25 years, however, are subject to the possibility of a review

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<sup>50</sup> See SS TERBLANCHE, THE GUIDE TO SENTENCING IN SOUTH AFRICA 260, (Butterworths 1999). [Reproduced in the accompanying notebook at 34.]

<sup>51</sup> See *id.* at 264.

<sup>52</sup> See *id.* at 266.

<sup>53</sup> See INTERNATIONAL ENCYCLOPEDIA OF LAWS 249 (Prof. Dr. L. DuPont et al. eds., Kluwer 1994). [Reproduced in the accompanying notebook at 35.]

<sup>54</sup> See CLAYTON C. RUBY, SENTENCING 402-03 (Butterworths 1999). [Reproduced in the accompanying notebook at 41.] For a case which stands for this general proposition, see *R. v. Luxton*, 1990 Carswell Alta. 144 76 Alta.L.R. (2d) 43 79 C.R. (3d) 193 [1990]. [Reproduced in the accompanying notebook at 19.]

<sup>55</sup> Criminal Code, R.S.C. 1985, ch. C-46, § 745. [Reproduced in the accompanying notebook at 6.] Although this seems to be a mistake, it is not. There is a parole eligibility for sentences of “imprisonment for life without eligibility for parole.” *Id.*

after 15 years.<sup>56</sup> There is also “parole by exception” which can be granted where mental or physical health may seriously deteriorate if the prisoner is kept in prison.<sup>57</sup> This type of parole is “rarely granted.”<sup>58</sup>

#### 6. Scotland – *Life is life subject to periodic review*

Imprisonment for life is the mandatory sentence for a murder conviction.<sup>59</sup> A judge may recommend a minimum period before the prisoner can be reviewed for release on licence by the Secretary of State. The judge must state the reasons for recommending that period.<sup>60</sup> A sentence to life imprisonment is “never extinguished or spent,” just capable of being reviewed and the risk to society assessed.<sup>61</sup> An early release “on licence” must be granted by the Secretary of State on the recommendation of the Parole Board in consultation with the Lord Justice-General and the trial judge if still available.<sup>62</sup>

Although the sources presented here may be partly out-dated, a current case sheds light on current practices.<sup>63</sup> In *Re Megrahi*, Megrahi, the man convicted of murder of 270

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<sup>56</sup> See Criminal Code, R.S.C. 1985, ch. C-46, § 745.6. This provision is called the “faint hope clause.” ALLAN MANSON, *THE LAW OF SENTENCING* 303 (Irwin Law 2001). This provision is not available for second-time murderers. *Id.* Furthermore, this provision simply opens up the possibility for the convict to apply for parole from the Parole Board. *Id.* [Reproduced in the accompanying notebook at 6.]

<sup>57</sup> See SENTENCING, *supra* note 53, at 456-57.

<sup>58</sup> *Id.*

<sup>59</sup> See DANIEL KELLY, *CRIMINAL SENTENCES* 153 (1993). [Reproduced in the accompanying notebook at 37.]

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* at 40.; *Murray v. HM Advocate*, High Court of Justiciary, 2000 SC (JC) 102 (1999) [Reproduced in the accompanying notebook at 20.]; *McRae v. HM Advocate*, High Court of Justiciary, 1987 SCCR 36 (1987). [Reproduced in the accompanying notebook at 21.]

<sup>62</sup> See GORDON NICHOLSON, *SENTENCING LAW AND PRACTICE IN SCOTLAND* 62 (Sweet & Maxwell 1992) at 2-24. [Reproduced in the accompanying notebook at 42.]

<sup>63</sup> See *id.* at 62 (2-25).

people in the Lockerbie Air Disaster, was sentenced to life imprisonment.<sup>64</sup> The judge recommended that Megrahi serve a minimum of 20 years of his sentence before being released on licence.<sup>65</sup>

### 7. *Belgium – “Life-long detention”*

The Belgian Penal Code does permit “life-long or fixed term hard labour” and “life-long or fixed term detention,” for crimes, as distinguished from misdemeanors and contraventions.<sup>66</sup> Life-long detention for committing a political crime is also possible. The judge has to follow the principle of legality when sentencing.<sup>67</sup> The legislature provides all sentences, but the judge has limited discretion regarding aggravating and mitigating factors and where sentences are set in minimum and maximum allowable penalties.<sup>68</sup> In fact, within statutory boundaries, judges significantly shape the sentencing policy.<sup>69</sup>

### ***B. The discrepancy between Rule 101 ICTR Rules of Procedure and Evidence and the English term “remainder of his life” and the French term “l’emprisonnement a vie.”***

As discovered by thorough analysis of the laws of sentencing and parole in England and France, as well as other countries, there is a discrepancy between the English term “remainder of his life” and the French term “l’emprisonnement a vie.” In fact,

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<sup>64</sup> Re Megrahi, High Court of Justiciary, 2001 SCCR 701 (2001). [Reproduced in the accompanying notebook at 22.] The court followed international law for substantive matters, but the Criminal Procedure (Scotland) Act 1995 was followed on procedural matters for appeal. *See id.* (using European Convention on Human Rights, art. 6(1); Human Rights Act 1998, s.3; and, Criminal Procedure (Scotland) Act 1995, s. 110(1)(a)).

<sup>65</sup> *See id.*

<sup>66</sup> *See* INTERNATIONAL ENCYCLOPEDIA OF LAWS 113 (Prof. Dr. L. DuPont, et al. eds. Kluwer 1993). [Reproduced in the accompanying notebook at 35.]

<sup>67</sup> “[P]enalties may be imposed only if they have been provided for by statute prior to the commission of the offence.” *Id.*

<sup>68</sup> *See id.* at 125.

<sup>69</sup> *See id.*

“remainder of his life” is very seldom used in England or in English-speaking countries, in favor of phrases like “life imprisonment,” “life,” “life-long detention,” “duration of his life,” and “imprisonment for life.”<sup>70</sup> This causes a difficulty in interpretation, and certainly no dictionary distinguishes the phrases and their meanings to each country. Only a thorough statutory and case analysis can do that.

In France, life imprisonment is flexible. A prisoner can plan on spending at least fifteen years in prison for a life sentence and most probably eighteen years, but not necessarily any longer. On the other hand, a prisoner in England can depend on serving an indeterminate sentence imposed by the trial judge, and will further depend on the Home Secretary’s discretion to either raise or lower the sentence. In one case, murder by kicking and beating in the process of robbing an already feeble person, a twenty-two year minimum period (tariff period) was appropriate. The United States deepens the discrepancy because of the strict U.S. policy of maintaining Federal Sentencing Guidelines and allowing no possibility of parole in life sentences.

This analysis shows that there is at least a discrepancy between the sentencing in France and England. In comparison to the ICTR Rules of Procedure and Evidence, there are further discrepancies where the language does track any particular country exactly. Certainly, the most common ground that all these jurisdictions can meet on is the plea for a sentence to match a crime. Most countries determine sentencing policy based on a variety of theories; punishment, protection of society, deterrence, and rehabilitation. Furthermore, they allow a certain amount of discretion be placed in the judge’s hands and allow the judge to explain the reasons for any sentencing decision.

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<sup>70</sup> A survey of case law from England, USA and Canada reveal “remainder of his life” is used in a descriptive sense but not as a term of art. The survey was made through electronic legal searches. None of these countries were found to use “remainder of his life” as a term of art.

### ***C. Sentence judgement of Kayishema/Ruzindana***

#### *1. Kayishema/Ruzindana sentence judgement compared to Jean Kambanda*

Jean Kambanda was the Prime Minister of the Interim Government of Rwanda at the time the mass killings took place in Rwanda. He had power over many parts of the government and failed to protect any person from the mass killings. Instead, he supported the mass killings, incited mass killing and ordered the elimination of Tutsis. Kambanda, however, made a guilty plea and cooperated with the Prosecutor to great advantage to the Prosecutor. These mitigating factors were discussed in the sentence and judgement of Kambanda and termed “major.”<sup>71</sup> Nonetheless, the court sentenced Kambanda to life imprisonment.

The Kayishema/Ruzindana judgement and sentence can be distinguished from Kambanda’s sentence because Kambanda’s sentence simply ordered life imprisonment. The Kayishema/Ruzindana sentence included an explanatory and descriptive measure regarding the length of the sentence, and made it clear that it was not simply a sentence to life imprisonment, but: “Imprisonment for the remainder of his life.”<sup>72</sup>

#### *2. Kayishema/Ruzindana sentence judgement compared to Jean-Paul Akayesu*

Jean-Paul Akayesu was much smaller in official degree than Kambanda. He was the Taba commune’s elected burgonmaster, otherwise a teacher. He was the highest ranking government official in his area. Akayesu maintained his innocence throughout the trial and referred to his innocence while he publicly regretted the misfortune of the

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<sup>71</sup> Prosecutor v. Kambanda, Case No.: ICTR 97-23-S, Judgement, para. 52. [Reproduced in the accompanying notebook at 23.]

<sup>72</sup> Prosecutor v. Kayishema and Ruzindana, Case No.: ICTR-95-1-T, Judgement, para. 27. Moreover, the sentence was the same for four counts. [Reproduced in the accompanying notebook at 11.]

killings. As a mitigating factor, Akayesu prevented mass killings from happening in Taba for a while. The mass killings would have started earlier in his area if he had not acted in this way. Nonetheless, Akayesu chose to participate later in mass killings, inciting mass killings and raping women under his watch.

Akayesu was sentenced on three counts to life imprisonment. He was also sentenced on six counts to various terms of years.<sup>73</sup> Again, like Kambanda, Akayesu's judgement was straightforward, if not simple. He was ultimately sentenced to serve all his sentences concurrently, therefore, life imprisonment. The judge did not further describe the sentence or explain the court's intention. The comparison again makes it clear that the Kayishema/Ruzindana sentence was intentionally made to refer to the strongest penalty available to the ICTR, which is to spend the remainder of one's life in prison.<sup>74</sup>

### *3. Kayishema/Ruzindana sentence judgement compared to various national jurisdictions*

When a judge is given the ability to sentence a convicted person to a maximum penalty, then the judge's discretion is ultimate.<sup>75</sup> In the Kayishema/Ruzindana sentence, the judge had the sentencing scope of "imprisonment for a term up to and including the remainder of his life."<sup>76</sup> Compared to France, Kayishema's remainder-of-his-life sentence is most like the judge's ability to set a "security period" where the convicted

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<sup>73</sup> Prosecutor v. Akayesu, Case No.: ICTR-96-4-T, Judgement. [Reproduced in the accompanying notebook at 24.]

<sup>74</sup> The fact that the sentence of Kayishema/Ruzindana was very clearly for the remainder of Kayishema's life, I do not believe that would necessarily preclude the other sentences that are simply "Life Imprisonment" from being exactly as severe. However, the comparison makes Kayishema's sentence unambiguous.

<sup>75</sup> See *supra* notes 17-18 and accompanying text (France); *supra* notes 27-29 and accompanying text (England); *supra* notes 38-39 and accompanying text (USA, "discretion" must fall within the sentencing guidelines); and *supra* notes 45-48 and accompanying text (South Africa).

<sup>76</sup> See ICTR Rules of Procedure and Evidence, Rule 101, UN Doc ICTR/6/Rev. 31 May 2001.

person cannot benefit from parole.<sup>77</sup> Similarly, in England, this is called the “tariff period” and is set by the judge, but is subject to review by the Home Secretary.<sup>78</sup> The difference is that in France and England there is always a possibility of less than the remainder of one’s life being served under a life sentence. They allow parole or review at some point in a life sentence. The Kayishema/Ruzindana sentence is more similar to a U.S. sentence of imprisonment for life where there is no eligibility for parole, nor the possibility of “good time credit.”<sup>79</sup>

One of the greatest discrepancies between the ICTR’s sentences and other national jurisdictions’ sentences is that ICTR does not have a system in place for reviewal of on-going sentences and the possibility of rehabilitation. Again, the ICTR mirrors U.S. federal policy in this respect. By depending on the Tribunal’s continued existence when early release issues actually come up, and the prisoner-receiving countries’ national laws, much of the sentence judgements might be left up to chance, and worse, might subject prisoners to unfair/unequal treatment.<sup>80</sup>

***D. Mali, Benin and Swaziland are ICTR prisoner-receiving countries and must follow the Agreement on the Enforcement of Sentences***

*1. Rule 103 and the Enforcement of Sentences Agreement*

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<sup>77</sup> The security period can be increased to up to thirty years where there are aggravating circumstances, such as murder accompanied by torture. *See supra* note 25-26 and accompanying text.

<sup>78</sup> *See supra* notes 32-34 and accompanying text.

<sup>79</sup> *See supra* notes 40-41 and accompanying text.

<sup>80</sup> *See* William A. Schabas, *Sentencing By International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT’L L. 461, 510 (1997) (concluding that human rights considerations would mandate a right of release in appropriate cases). [Reproduced in the accompanying notebook at 48.]

The ICTR allows for imprisonment to take place outside of Rwanda or Tanzania.<sup>81</sup> According to the Agreement between Mali and the ICTR, found on the ICTR website, Mali must follow ICTR prison sentences, and if local law differs from the ICTR sentence, or early release is expected, Mali must notify the ICTR.<sup>82</sup> This is most likely the same as the agreements with Benin and Swaziland.<sup>83</sup>

## 2. *Local laws*

In Swaziland, according to the Criminal Procedure and Evidence Act, found as amended in 1976,<sup>84</sup> the court may impose sentences consistent with the law. A person who is sentenced to imprisonment for life may be imprisoned for any shorter period.<sup>85</sup> Under the Constitution, His Majesty retains full power to pardon and commute sentences at any time.<sup>86</sup> This release may be conditional. In June of 2001, King Mswati III decreed his absolute authority.<sup>87</sup> However, in July of the same year, his decree was repealed after pressure from domestic groups and international governments.<sup>88</sup> The King did, most

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<sup>81</sup> See Rules of Procedure and Evidence, Rule 103, UN Doc ICTR/6/Rev. 31 May 2001.

<sup>82</sup> See *supra* notes 12-16 and accompanying text for background on the scope of the Agreement.

<sup>83</sup> Currently, no prisoners have been transferred to any country except to Mali for the service of their sentence. See International Criminal Tribunal for Rwanda website, New Documents: Status of Detainees, April 16, 2002. Six prisoners were transferred to Mali in December 2001. Those prisoners included Kambanda, Akayesu, Ruzindana and Kayishema. See *id.*

<sup>84</sup> Statutes of Swaziland, vol.3, Criminal Procedure and Evidence Act, No. 67 of 1938, as amended in 1976. [Reproduced in the accompanying notebook at 9.] Please note that this was the most up to date statutes on Swaziland available, however, I could not verify what any more recent statutes or amendments might say, or if there are any more recent ones.

<sup>85</sup> See Swaziland, Criminal Procedure and Evidence Act, s.301. [Reproduced in the accompanying notebook at 9.]

<sup>86</sup> See Swaziland, Criminal Procedure and Evidence Act, s.329. [Reproduced in the accompanying notebook at 9.]

<sup>87</sup> See U.S. Department of State, Country Report, Swaziland 2001, *available at* [www.state.gov/g/drl/rls/hrrpt/2001/af/8406.htm](http://www.state.gov/g/drl/rls/hrrpt/2001/af/8406.htm) (last visited April 30, 2002). [Reproduced in the accompanying notebook at 51.]

<sup>88</sup> See *id.*

notably, retain a “nonbailable offense” provision and prisons are said to be very overcrowded.<sup>89</sup>

Laws in Mali and Benin remain even more difficult to attain. Through the U.S. Department of State Country Reports, some information can be gleaned as to these countries’ policies. The death penalty is still imposed in Benin.<sup>90</sup> In Mali, President Konaré commuted all death sentences passed in 1998 and 1999.<sup>91</sup> Although these facts do not represent much of the substantive law of these countries, the least that can be said is that the Presidents and the King retain a lot of power over the release of prisoners.

Arguendo, each country that receives prisoners from the ICTR has at least a life sentence available. Most likely, however, they each have some type of parole, pardon or early release available, either for good behavior or just as a rule. For example, Swaziland has an allowance for “any shorter period” to be imposed if a person is by law supposed to be sentenced to life imprisonment. In Mali, President Konaré has just recently used his power to reduce sentences.

The Enforcement of Sentences Agreement with these countries will play a crucial role in preventing Kayishema from returning in 15 years, at the age of 63,<sup>92</sup> (or possibly any other amount of time and subsequent age) to continue his life and genocide in Rwanda.

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<sup>89</sup> *See id.*

<sup>90</sup> *See* U.S. Department of State, Country Report, Benin 2001, *available at* [www.state.gov/g/drl/rls/hrrpt/2002/af/8252.htm](http://www.state.gov/g/drl/rls/hrrpt/2002/af/8252.htm) (last visited April 30, 2002). [Reproduced in the accompanying notebook at 50.]

<sup>91</sup> *See* Amnesty International, Country Reports, Mali 2000, *available at* [www.web.amnesty.org/web/ar2000web.nsf/countries/e0ed19fe91f9dfd0802568f200552949?OpenDocument](http://www.web.amnesty.org/web/ar2000web.nsf/countries/e0ed19fe91f9dfd0802568f200552949?OpenDocument) (last visited April 30, 2002). [Reproduced in the accompanying notebook at 52.]

<sup>92</sup> *See* Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, Judgement, para.11 (Kayishema was born in 1954).