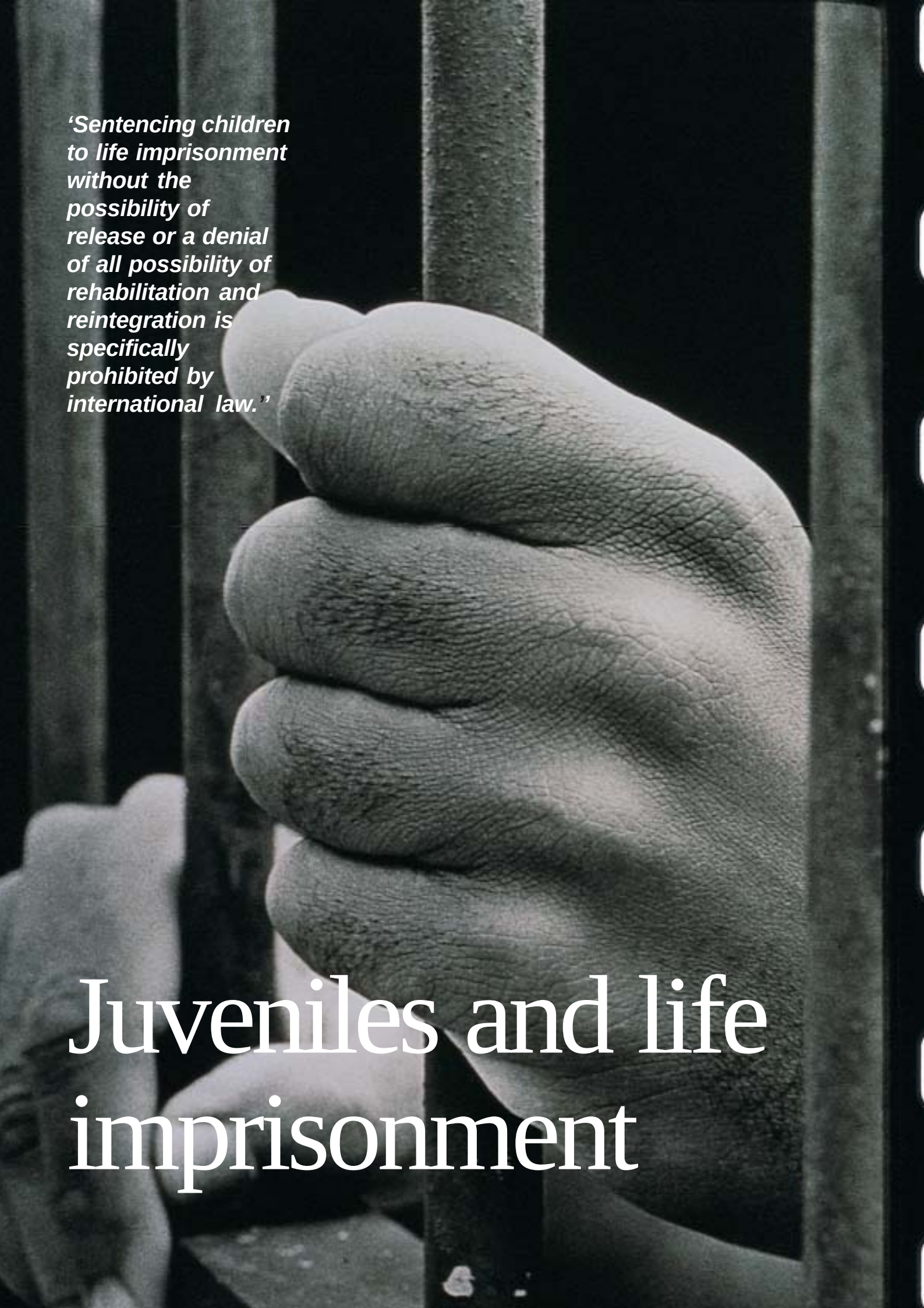


'Sentencing children to life imprisonment without the possibility of release or a denial of all possibility of rehabilitation and reintegration is specifically prohibited by international law.''

Juveniles and life imprisonment

Patricia Goliath examines the imposition of life imprisonment on juveniles in South Africa, the USA, England and Wales.

Article 40 of the United Nations Convention on the Rights of the Child emphasises that the primary aim of juvenile justice is the rehabilitation and reintegration of the child into society. This establishes the right of a child to be treated in a manner consistent with the child's age. Sentencing children to life imprisonment without the possibility of release or a denial of all possibility of rehabilitation and reintegration is specifically prohibited by international law.

There are various international instruments adopted by the United Nations which influenced policy making on juvenile justice worldwide. The United Nations Convention on the Rights of the Child was adopted on 20 November 1989 in New York. It is the first international human rights instrument to adopt a common ethical and legal framework for the treatment of juveniles deprived of their liberty. Article 37(a) provides:

'Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.'

Article 37(b) of the Convention states that

'detention or imprisonment must be used as a last resort and for the shortest appropriate period'.

Any sentence imposed must be proportionate to both the circumstances and the offence (art 40). This approach is strengthened by a 3 which declares that in dealing with children, courts should have the best interest of the child as the primary consideration.

This Convention must be considered in conjunction with other instruments focusing on the protection of juveniles in confinement. Article 14(4) of the International Covenant on Civil and Political Rights stipulates that '[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation'. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules) state that the aims of a juvenile justice system are to

'emphasize the well-being of the juvenile and to ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence' (r 5(1)).

Rule17.1 (b) further states that 'restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum'.

The United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 (The Riyadh Guidelines) provide that

'deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases'.

The length of the sanction should be determined by the court without precluding the possibility of his early release. The United Nations Minimum Rules for the Protection of Juveniles Deprived of their Liberty, 1990 contain similar principles and provisions and promotes the reintegration of the juvenile into his family and community.

Life imprisonment as a sanction for the commission of a criminal offence is one of the most drastic penal sanctions that can be imposed on convicted offenders. Although life imprisonment is an indeterminate sentence, it does not usually mean that prisoners remain in prison for life. In the field of juvenile justice, life imprisonment as a sanction for juveniles has raised many concerns from a human rights perspective. It is against the background of these international instruments that this article investigates the imposition of life imprisonment in respect of juveniles in South Africa, USA, England and Wales.

South Africa

The Convention on the Rights of the Child was ratified by South Africa on 16 June 1995. Section 28(1)(g) of the Constitution provides that every child 'has the right not to be detained except as a measure of last resort ... and only for the shortest period of time'. The Criminal Law Amendment Act 105 of 1997 makes provision for mandatory prison terms ranging from five years to life imprisonment in respect of the commission of certain specified offences. Section 51(1) provides that a High Court is obliged to sentence a person convicted of serious offences, such as murder and rape committed in certain circumstances, for life (see Part 1 of Schedule 2 of the Act). If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than any sentence prescribed, it must enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence (s 51(3)(a)).

Section 51(3)(b) states:

'If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.'

Section 51(6) provides that

'[t]he provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question'.

In *S v Mofokeng and Another* 1999 (1) SACR 502 (W) at 520 the court interpreted the relevant statute to exclude juvenile offenders under 16 years from the mandatory sentencing regime. Stegmann J was, with respect, correctly of the view that in respect of children aged 16 and 17 years at the time of the commission of the offence, the court has a sentencing discretion according to ordinary criteria usually applicable in determining an appropriate sentence (see also *S v Blaauw (C)* (case SS159/00 unreported, 2-5-2001 and *S v S* (C) (case SS 181/00 unreported, 7-5-2001).

Although the case did not deal with juveniles, the Supreme Court of Appeal in *S v Malgas* 2001 (1) SACR 469 (SCA) summarised the proper scope of s 51, confirming the exclusion of juveniles who

were under 16 years at the time of the commission of the offence. The court held that the sentencing court is entitled to impose a lesser sentence where, on consideration of all the circumstances, it is satisfied that the prescribed sentence would be unjust in that it would be disproportional to the crime, the criminal and the needs of society.

More recently the position of juvenile offenders was considered in *S v Nkosi* 2002 (1) SACR 135 (W). The appellant, who was 16 years at the time of the commission of the offences, appealed against a life sentence that was imposed on him. The court laid down certain guiding principles to be considered when sentencing juvenile offenders. At 137d–e one of the principles is stated as follows:

'The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his/her rehabilitation'.

The court confirmed the interpretation that the provisions of this Act are not applicable to juveniles who were under the age of 16 years at the time of the commission of the offence (s 51(6)). However, a court may impose mandatory life imprisonment on juveniles 16 years or older, but under 18 years at the time of commission of the offence, but the court must furnish reasons for this decision (s 51(3)(b)). In setting aside the life term the court held that

'with respect to child offenders the best interest principle is now a crucial element in the proportionality enquiry. The well-being and the needs of the juvenile are therefore important considerations in the determination of an appropriate sentence for a child offender'.

In *S v Kwalase* 2000 (2) SACR 135 (C) Van Heerden J summarised the influence and importance of considering South African constitutional provisions and the principles contained in international instruments when sentencing juveniles. Thus the court held at 139 g–i that

'[t]he judicial approach towards the sentencing of juvenile offenders therefore had to be reappraised and developed in order to promote an individualised response which was not only in proportion to the nature and gravity of the offence and the needs of society, but which was also appropriate to the nature and interest of the juvenile offender. If at all possible, the sentencing judicial officer had to structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community'.

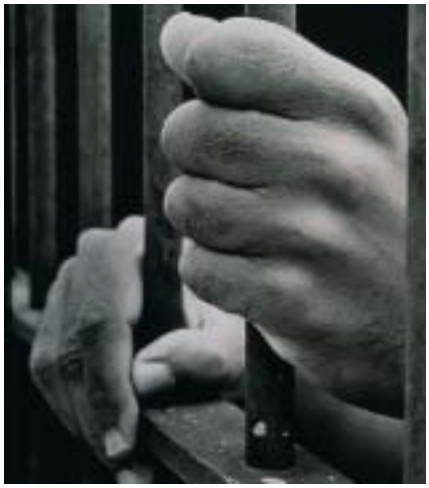
In line with international conventions the South African Law Commission has proposed changes to the current principles governing imprisonment of juveniles. More importantly, it is proposed that life imprisonment for any child under 18 years be prohibited in terms of the new Child Justice Bill which was introduced in Parliament in August last year (s 72). The Bill places emphasis on diversion, non-custodial measures and restorative justice. It also entrenches the constitutional injunction that imprisonment should be imposed as a last resort.

However, juveniles of 14 years or older convicted of serious and violent offences may still be sentenced to imprisonment if substantial and compelling reasons exists (s 69).

United States

To date the United States has not ratified the Convention of the Rights of the Child. American law has a harsh sentencing regime for juveniles and life imprisonment is regarded as an acceptable sentence for juveniles.

However, it is not the most drastic measure. In *Thompson v Oklahoma* 487 U.S. 815 (1988) the United States Supreme Court held that the minimum age for the imposition of the death penalty is 16 years at the time of the commission of the offence. This view was confirmed in *Stanford v Kentucky* 492 US 361 (1989). The Eighth Amendment of the United States Constitution prohibits punishment that is cruel and unusual. The Supreme Court has interpreted this prohibition to mean that punishment must be proportional to the crime for which it is imposed. In *Weems v United States* 217 US 349 (1910) the court held that 'it is a precept of justice that a punishment for crime should be graduated and proportioned to the offence'.



'It is therefore an extremely difficult task to sentence young offenders who commit serious offences. It involves balancing the interest of the victim, the community and the offender. International law prescribes a coordinated and comprehensive response to juvenile offenders. When custody is inevitable, the main focus of the sentencing regime should be rehabilitation.'

In *Solem v Helm* 463 US 277 (1983) the Supreme Court articulated a tripartite test which must be considered when analysing proportionality. The first factor is the gravity of the offence and the harshness of the penalty. Secondly, sentences imposed on other criminals (for more or less serious offences) in the same jurisdiction should be considered and thirdly, sentences imposed (for the same offence) in other jurisdictions.

In *Penny v Lynaugh* 492 US 302 (1989) the Supreme Court held that life imprisonment for murder in the first degree, even where the convicted person is barely into his teens, is neither cruel nor unusual.

Most federal courts adopted a restrictive view when comparing the crime committed and the sentence imposed (first factor of the *Solem* test), focusing almost exclusively on offence gravity without considering offender culpability and individual mitigating circumstances.

In *Harmelin v Michigan* 501 US 957 (1991) the Supreme Court

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upheld the constitutionality of life imprisonment without parole in the case of an adult convicted drug offender. The court held that the sentence was not cruel and unusual in terms of the Eighth Amendment. In the earlier decision of *Rummel v Estelle* 445 US 263 (1980) the Supreme Court upheld the constitutionality of a mandatory life sentence imposed with possibility of parole in respect of an adult offender. The imposition of life imprisonment without parole on a juvenile was challenged in *Harris v Wright* 93 F 3d 581 (9th Cir 1996). The court held that 'youth has no bearing on this problem ... life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. The court was of the view that these sentences are consistent with evolving standards of decency and not rejected by US culture and laws. This was in line with the majority judgment in the *Harmelin* case at 585 which held that for non-death penalty cases a proportionality test did not require individualisation. This meant that only the nature of the offence must be considered and youth could thus not be taken in account. Currently over 20 states in the United States allow mandatory life sentences without parole for juvenile offenders who are 15 years old.

State courts, however, have been more flexible in considering individual factors affecting an offender's culpability than federal courts. In *Workmen v Kentucky* 429 SW 2d 374, 377 (Ky Ct App 1968) the Kentucky Supreme Court upheld the Kentucky law mandating life without parole for those convicted of rape as applied to adults, but held that 'a different situation prevails when punishment of this stringent nature is applied to a juvenile'. The court held that life imprisonment without parole for two 14 year olds 'shocks the general conscience of society today and is intolerable to fundamental fairness'.

The Nevada Supreme Court in *Naovarath v State* 779 P 2d 944 (Nev 1989) adopted a similar approach. The case involved the constitutionality of a life sentence imposed on a 13 year old convicted of murder. In finding that the sentence was cruel and unusual, the court at 946–47 held that 'children are and should be judged by different standards from those imposed on mature adults'. Contrary to this the Washington State Court of Appeals in *State v Massey* 803 P 2d 340, 348 (Wash Ct App 1990) confirmed a life sentence for a 13-year-old convicted of murder, holding that proportionality analysis should not include consideration of the defendant's age, but include only 'a balance between the crime and the sentence imposed'.

There has been a nationwide trend gradually to eliminate the juvenile justice system in the United States. Many states enacted legislation excluding young offenders from the juvenile system and youths are automatically transferred to adult courts for the prosecution of violent crimes and drug offences. Being tried as an adult makes a juvenile eligible for a life sentence and in some states, the death penalty. The United States continues to use life imprisonment without the possibility of parole for juveniles who were under the age of 18 at the time of the commission of the offence, in violation of international law (see *State of Florida v Lionel Tate* case no: 99-144-1CF 10A).

England and Wales

In England and Wales the imposition of life imprisonment is mandatory for murder (s 1(1) of the Murder (Abolition of the Death Penalty) Act 1965). Section 109 of the Powers of Criminal Courts (Sentencing Act 2000) provides that a life sentence must be imposed for a second serious sexual or violent offence unless there are exceptional circumstances. Juveniles between the ages of 10 and 18 years convicted under these circumstances face 'detention during her Majesty's pleasure', an effective life sentence (s 90 of the Powers of Criminal Courts (Sentencing) Act 2000). The effect of a sentence of life imprisonment is that the life sentence transfers the sentencing function from the judiciary to the executive. The Home Secretary ultimately determines the period of incarceration to be served to satisfy the requirements of retribution and deterrence before a prisoner can be considered for release. After expiry of the tariff period, release is determined by taking into account factors such as risk of reoffending and public safety, and release may be followed by recall (see *Hussain v United Kingdom* (1996) 22 EHRR 1).

The authority of the Home Secretary to control the release of juveniles serving indeterminate terms for murder was disputed in the case *of R v Secretary of State for Home Department, Ex parte Venables and Thompson* (1998) AC 407 (HL). In this matter the accused, who were ten years old at the time of the offence, were

convicted of murdering two-year-old James Bulger. The trial judge recommended a punitive period of eight years and the Lord Chief Justice ten years. The Home Secretary eventually fixed the punitive tariff period at 15 years. This decision was quashed in judicial review proceedings by the House of Lords on 12 June 1997. The court at 499–500 emphasised that the Home Secretary must take into account the welfare of the child and the desirability of reintegrating the child into society when considering the release of juveniles sentenced to indeterminate prison terms. The court set aside the punitive period of 15 years as determined by the Home Secretary and ordered him to reconsider. In the interim, the accused petitioned the European Court of Human Rights in *V v United Kingdom* (2000) 30 EHRR 121. The European Court of Human Rights held that the indefinite life sentence imposed violated aa 5 and 6 of the European Convention of Human Rights.

In response to this decision the Lord Chief Justice issued a practice direction describing the principles and practice to be followed in determining tariffs for juveniles (Practice Note [2000] 4 All ER 831). The application of these principles resulted in the immediate release of Thompson and Venables *(Re Thompson and Another (tariff recommendations*) [2001] 1 All ER 737 (CA)) Following these decisions, the current practice is that judges, and not the Home Secretary, are required to make orders determining tariffs for juveniles detained during her Majesty's pleasure. The judge recommends as to the minimum period which should elapse before the person convicted is released on licence under s 1 of the Murder (Abolition of the Death Penalty) Act 1965. The length of the minimum period and rationale is announced in open court, and is subject to appeal.

Following the expiry of the minimum period, offenders must be released, unless, in the view of the Parole Board, they represent a danger to the public. After the offenders are released as a result of the recommendation of the Parole Board, they are liable for the rest of their lives to be recalled if they do not comply with the terms of the licence (see *Practice Statement (Juveniles: Murder Tariff* [2000] 1 WLR 1655) which was replaced by *Practice Statement as to Life Sentences* 31 May 2002). The sentence of 'detention during her Majesty's pleasure' is one which lasts for life even though a large part is served in the community. Human rights experts are concerned that this sentence may permit the indiscriminate sentencing of children for indeterminate periods. Critics argue that while the sentence was aimed at differentiating between adults and juveniles, by implication, children who commit murder are dealt with in exactly the same way as their adult counterparts.

Conclusion

The Convention on the Rights of the Child is the most widely and rapidly ratified human rights treaty in history. Currently 191 out of 193 countries have ratified or accepted the Convention, the exceptions being Somalia and the United States. The Convention takes a holistic approach to juvenile justice and does not distinguish on the grounds of the gravity of offences. It is therefore an extremely difficult task to sentence young offenders who commit serious offences. It involves balancing the interest of the victim, the community and the offender. International law prescribes a coordinated and comprehensive response to juvenile offenders. When custody is inevitable, the main focus of the sentencing regime should be rehabilitation.

The trend in international law is for sentences of imprisonment to be imposed for the shortest possible period. In England and the United States the response to juvenile crime has been the introduction of increasingly punitive measures for juveniles and a lowering of the age of criminal responsibility.

The debate over life imprisonment centres around the prohibition of cruel, unusual, degrading or inhuman forms of punishment and conflicting views on the principles of proportionality and individualisation. These issues are more pronounced in a juvenile justice context. Michael Tonry refers to these conflicting views and observes

'that we can learn things about crime and punishment by looking across national boundaries. For despite many important similarities in how Western Nations respond to crime, and in the values that underlie those responses, sentencing and punishment policies vary greatly'.

Tonry concludes that

'Existing international covenants, conventions and declarations contain few enforceable provisions that relate to the nature and amount of criminal punishments (the most notable exception being the European Convention on Human Rights' prohibition of capital punishments), but they should and someday they will'.

Bibliography

(1) Dirk van Zyl Smit; *Taking Life Imprisonment Seriously in National and International Law, (2)* Kluwer Law International The Hague/London/New York Marthinus Nijhoff Publishers 2002 (3) (Tonry M and Frase R (eds) *Sentencing and Sanctions in Western Countries*, Oxford University Press 2001)

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