

# TABLE OF CONTENTS

<b>TABLE OF CONTENTS .....</b>	<b>1</b>
<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. BACKGROUND .....</b>	<b>3</b>
<b>III. ARBITRARY ARRESTS AND UNLAWFUL DETENTIONS .....</b>	<b>5</b>
III(1). THE LEGALIZATION OF ARBITRARY ARRESTS AND UNLAWFUL DETENTIONS.....	6
III(2). PRISON CONDITIONS .....	8
<b>IV. GENOCIDE TRIALS .....</b>	<b>8</b>
IV(1). THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA.....	8
IV(1)(a). <i>The ICTR and Rwanda</i> .....	10
IV(2). FOREIGN PROSECUTION OF GÉNOCIDAIRES.....	11
IV(3). GENOCIDE TRIALS WITHIN RWANDA .....	12
IV(3)(a). <i>The Genocide Law of the Republic of Rwanda</i> .....	13
IV(3)(b). <i>The work of the special genocide chambers</i> .....	14
IV(3)(c). <i>Judicial results to date</i> .....	16
<b>V ATTEMPTS AT ADMINISTERING PROMPT JUSTICE.....</b>	<b>18</b>
V(1). CONFESSION AND GUILTY-PLEA PROCEDURES .....	18
V(2). THE EXPEDITION OF JUDICIAL INVESTIGATIONS.....	19
V(2)(a). <i>Commissions de triage</i> .....	19
V(2)(b). <i>Groupes mobiles</i> .....	19
V(3). RELEASES.....	20
<b>VI. GACACA.....</b>	<b>20</b>
VI(1). GACACA PREPARATIONS.....	22
VI(1)(a). <i>Sensitization of the population</i> .....	22
VI(1)(b). <i>Entraide judiciaire (Judicial cooperation)</i> .....	22
VI(1)(c). <i>Elections of gacaca personnel</i> .....	26
VI(1)(d). <i>The training of gacaca judges</i> .....	26
VI(2). THE INAUGURATION OF THE GACACA TRIBUNALS .....	26
<b>VII. LEGAL ISSUES .....</b>	<b>28</b>
VII(1). GACACA LEGISLATION .....	28
VII(2). MINIMUM FAIR TRIAL STANDARDS.....	30
VII(2)(a). <i>Minimum fair trial standards and the Gacaca Jurisdictions</i> .....	34
VII(3). REPARATIONS.....	40
<b>VIII. CONCLUSION.....</b>	<b>41</b>
<b>IX. RECOMMENDATIONS .....</b>	<b>44</b>
IX(1). RECOMMENDATIONS TO THE RWANDESE GOVERNMENT .....	44
IX(2). RECOMMENDATIONS TO CIVIL SOCIETY .....	48
IX(3). RECOMMENDATIONS TO THE INTERNATIONAL COMMUNITY.....	49

# RWANDA

## Gacaca: A question of justice

### I. INTRODUCTION

The Rwandese government on 18 June 2002 launched a new court system, that it calls *gacaca*.<sup>1</sup> This new court system is named after and draws upon a customary system of community hearings used to resolve local disputes. The new *gacaca* tribunals, however, merge customary practice with a Western, formal court structure. The *gacaca* tribunals are legally established judicial bodies. *Gacaca* judges can impose sentences as high as life imprisonment. The Rwandese government re-invented and transformed the existing mode of conflict resolution, *gacaca*, in order to try the more than 100,000 genocide suspects who overfill the country's prisons.

Since coming to power, the current Rwandese government decided on a policy of maximal accountability for the crime of genocide and crimes against humanity committed from the onset of armed conflict, 1 October 1990 through 31 December 1994. Arrests and detentions for these offences have, until relatively recently, outstripped releases and trials. There are currently approximately 112,000 Rwandese in the country's overcrowded detention facilities, in conditions that constitute cruel, inhuman and degrading treatment. Most of these detainees have not been tried in a court of law. There has been little or no judicial investigation of the accusations made against many of them. There is little likelihood that most of them will have their cases heard by the country's existing, over-burdened ordinary jurisdictions,<sup>2</sup> which hear on average 1,500 genocide cases a year, in the foreseeable future.

Eight years after the genocide, neither the International Criminal Tribunal for Rwanda (ICTR) established in Arusha, Tanzania nor the 12 specialized genocide chambers established within Rwanda's Courts of First Instance (*Cours de première instance*) have promptly implemented the Rwandese government's expressed commitment to achieve maximal accountability for the crime of genocide and crimes against humanity. The ICTR has tried nine individuals in seven and a half years of operation, the Rwandese specialized genocide chambers slightly more than 7,000 in five and a half years. The Rwandese government expects the creation of more than 10,000 *gacaca* tribunals to address the current judicial backlog of more than 100,000 pre-trial detainees within a three to five year time frame.

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<sup>1</sup> *Gacaca* is Kinyarwanda for "lawn" or "lawn-justice," named after the place where the local community traditionally gathered to settle disputes between members of a family, between members of different families or between inhabitants of the same hill.

<sup>2</sup> The ordinary, or regular, jurisdictions refer to the canton courts, courts of first instance, courts of appeal and the Supreme Court that hear civil and criminal cases.

The new *gacaca* court system further represents an ambitious, groundbreaking attempt to restore the Rwandese social fabric torn by armed conflict and genocide by locating the trial of those alleged to have participated in the genocide within the communities in which the offences were committed. Neighborhoods selected the *gacaca* judges who will hear the genocide cases. Local residents will initially aid the *gacaca* benches and general assemblies at the cell level<sup>3</sup> in the listing of genocide victims and suspected perpetrators within their community. Later, community members will provide information about the genocide offences during the *gacaca* hearings. The government proposes that community hearings in which community members themselves serve as witness, judge and party will more effectively ventilate the evidence, establish the truth and bring about reconciliation than what has been achieved thus far by either the specialized genocide chambers or the ICTR.

Post-conflict situations, particularly ones involving the heinous crime of genocide, demand a resolution of the conditions that led to them in the first place. If this is not done, the foundation for further conflict remains in place. Peace is the most desired commodity in post-conflict situations. Peace, however, depends not only on the absence of war but also on the existence of both justice and truth, with both justice and truth dependent on the other. Without justice and truth, the deep rifts in the Rwandese social fabric will not be healed and peace will not be achieved.

Despite the promise of *gacaca*, the legislation establishing the *Gacaca* Jurisdictions fails to guarantee minimum fair trial standards that are guaranteed in international treaties ratified by the Rwandese government. As it has in the past, Amnesty International welcomes efforts made by the Rwandese government to bring to trial those suspected of genocide offences. Amnesty International believes, however, that *gacaca* trials need to conform to international standards of fairness so that the government's efforts to end impunity, and the trials themselves, are effective. If justice is not seen to be done, public confidence in the judiciary will not be restored and the government will have lost an opportunity to show its determination to respect human rights. More importantly, those actually guilty of genocide and the other crimes against humanity may escape being punished and instead, some innocent people may suffer. The laudable objectives of ending impunity and restoring the social fabric cannot be achieved without respecting human rights.

The promise of *gacaca* is also dependent on an environment wherein human rights are respected. Amnesty International believes that many Rwandese will not be inclined or afforded the opportunity to present their open, full and frank testimony in the prevailing human rights environment. Existing problems with arbitrary arrest and unlawful detention, the independence and impartiality of the Rwandese courts and the overall poor human rights record of the Rwandese government undermine public confidence in the fairness of the Rwandese judiciary and may negatively affect public participation in *gacaca*. The same effects can result from the government's persistent focus on the prosecution of individuals

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<sup>3</sup> Cells are the lowest administrative unit in Rwanda. The number of individuals within each cell varies from 200 to 1,000.

who participated in the former government's genocidal campaign against the Tutsi, while ignoring the human rights abuses committed by its own forces during the armed conflict and genocide. Since community members both provide the information regarding genocide offences and judge the suspected perpetrators, anything outside of their active and honest participation nullifies the fairness of the *gacaca* tribunals.

This report briefly examines the history behind the current judicial impasse resulting from the Rwandese government's attempts to bring suspected *génocidaires* to justice. Its focus is on the *Gacaca* Jurisdictions: the legislation establishing them, their organization and the various phases of their implementation. *Gacaca* will be examined on legal grounds -- minimum fair trial standards -- and in relationship to the Rwandese human rights environment in which it will operate. The report suggests recommendations aimed at ensuring the human rights of all those involved in the *Gacaca* Jurisdictions.

## II. BACKGROUND

For one hundred days, between April and July 1994, as many as one million Rwandese (out of a population of between seven and eight million) were killed by their fellow Rwandese, in many cases by their own neighbours. These killings, of mostly unarmed civilians, were accompanied by numerous acts of torture, including rape. Most of the killers were members of the majority Hutu community; their victims were principally, though not exclusively, members of the minority Tutsi community. Information received by Amnesty International indicates that the mass killings were planned and orchestrated by the then Hutu-dominated Rwandese government. The individuals who were suspected to have incited or ordered the killings apparently sought to prevent the implementation of the Arusha Peace Accords that were designed to achieve a multi-party system, power-sharing between the main opposition groups, an independent judiciary with respect for human rights, integration of the Rwandese Patriotic Front (RPF), a Tutsi-dominated armed political movement, into the national army, and an abolition of the extremist paramilitary forces associated with the ruling political party and its extremist political ally.

These massive killings occurred within the context of an on going, albeit intermittent, armed conflict (October 1990 to July 1994) between the RPF and Rwandese government forces. Both sides violated international human rights and humanitarian standards during this conflict. Following the RPF invasion, and preceding the killings that occurred between April and July 1994, local authorities -- with government connivance -- launched 17 large-scale attacks against Tutsi in 12 communities, killing an estimated 2,000 individuals. The Organization of African Unity's report of the Rwandese genocide provides estimates of RPF human rights

violations during the armed conflict and ensuing months that range from the tens of thousands to 100,000 civilian casualties.<sup>4</sup>

Issues of accountability and impunity have a history in Rwanda that precedes the 1990 to 1994 war and genocide. From the beginning, obedience and violence characterized the political culture of the independent Rwandese state. At independence, political authorities ordered or condoned the persecution and killing of Tutsi and the destruction of their property. They legitimated these actions as necessary to end Tutsi domination and the restoration of majoritarian rule, a majoritarian rule they defined racially as Hutu rule. The rights of minority groups were disregarded. Approximately 10,000 Tutsi were killed and 170,000 driven into exile between 1959 and 1961 when a Hutu counter-elite supported by the Belgians deposed the Tutsi monarchy. Between 1961 and 1966, there were 10 attempts by armed Rwandese Tutsi from neighbouring countries to overthrow the Rwandese government. Each attempt resulted in the massacre of Tutsi living within the country, some 20,000 in total, and the flight of another 300,000 into exile. Local authorities organized most of these reprisals with the backing of the national government. Tension between mainly Hutu factions in 1972-1973 led again to the scapegoating of Tutsi. Committees were established to insure that ethnic quotas were being honoured in schools, the civil service and private businesses. A wave of anti-Tutsi pogroms erupted in the countryside. The number killed was relatively small but the general atmosphere of terror and intimidation led to yet another exodus of thousands of Tutsi. In 1973, Major-General Juvenal Habyarimana overthrew the civilian government. Following the massive killings of 1994, the new Rwandese government faced a seemingly intractable human rights crisis: how to efficiently combat an ingrained culture of impunity and foster reconciliation between two communities whose mutual distrust and political rivalry has caused so much death and suffering over a prolonged period of time.

The new RPF-led government had considerable political discretion in deciding how it was going to deal with the genocide: public inquiries, coupled with limited judicial intervention; truth commission; and the circumscribed prosecution and punishment of key instigators of the violence. With the support of most of the international community, including Amnesty International, the Rwandese government opted for extensive prosecution, arguing that it wanted to end the impunity that characterized Rwandese political culture. Justice, the new government deemed, was the necessary and indispensable premise to national reconciliation. Thus, the Rwandese government set in motion two processes aimed at ensuring individual criminal responsibility for all perpetrators. It played a crucial role in the establishment of the ICTR. The government also passed special domestic legislation: Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, establishing specialized genocide chambers in the Courts of First Instance to prosecute individuals suspected of genocidal acts and crimes against humanity, and Organic Law No 40/2000 of 26 January 2001 on the Establishment of “*Gacaca* Jurisdictions” and the Organization of

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<sup>4</sup> The Organization of African Unity established a high-level investigative panel that examined the 1994 Rwandese genocide. Their report, “Rwanda: The Preventable Genocide,” was issued on 7 July 2000.

Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994. The international community supported Rwandese government policy and contributed heavily to the establishment and the continued operation of both the ICTR and the Rwandese judiciary.

Amnesty International has continually sought justice and fairness for the victims of genocide and other crimes of humanity in Rwanda.<sup>5</sup> It has continually made recommendations to ensure that justice and the rule of law prevail in Rwanda. While supporting the Rwandese government's objective of accountability for human rights abuses, it has consistently emphasized that justice and national reconciliation can only be achieved if the government ensures that fair trial safeguards are strictly adhered to in their trial of suspected *génocidaires*. Neither justice nor reconciliation can be achieved without strict adherence to international human rights standards in the arrest, detention and trial of suspected *génocidaires*. There is no way forward if justice is neither done nor perceived to be done by the Rwandese people.

### III. ARBITRARY ARRESTS AND UNLAWFUL DETENTIONS

Arbitrary arrests and unlawful detentions in Rwanda have followed a circuitous route over the last eight years with several surges, linked to heightened political tension or internal security problems, and seeming closures, for example a short-lived government declared moratorium on the arbitrary arrests in November 1996.

Massive arrests combined with a non-functioning judicial system characterized the first two years of the Government of National Unity. In the months immediately following the installation of the new government in July 1994, primarily soldiers, but also local authorities (sometimes issued blank warrants by their public prosecutor's offices), unlawfully detained thousands of individuals on the basis of uninvestigated oral accusations. There were few arrest warrants, individuals were detained for longer than the lawful period of police custody and persons released by judicial authorities for lack of evidence were frequently rearrested by soldiers. Soldiers repeatedly interfered with the work of judicial officials. The case files of most detainees either did not exist or did not contain *prima facie* evidence regarding their alleged offence(s).

The Rwandese government justified these arbitrary arrests and unlawful detentions, arguing that it needed to eradicate the existent culture of impunity. Individuals suspected of involvement in the genocide had to be detained even though the state lacked the resources to investigate the validity of the accusations made against them or try their cases in a court of law. This contravened an individual's right to be presumed innocent, and treated as innocent, until and unless she or he is convicted according to law in proceedings which at least meet the minimum prescribed requirements of fairness. The government further justified the arbitrary

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<sup>5</sup> See Amnesty International's Report "*Rwanda: Crying out for justice*," April 1995 (AI Index: AFR 47/05/95).

arrests and unlawful detentions of suspects by arguing that detention protected genocide suspects from reprisals. The government took few steps, however, to sensitize Rwandese regarding the necessity of instituting a system of justice that ensured accountability for crimes committed without violating an individual's human rights.

Rwandese administrative structures and the Rwandese judiciary became operational during the latter half of 1996. Human rights observers noted some progress in the respect for legal procedures governing arrest and detention in the ensuing years but not full compliance. Arbitrary arrests by Rwandese security forces and the unlawful detention of individuals continued, including those released by the courts. Amnesty International has received numerous reports over the years of allegedly false genocide accusations. The government frequently levied the charge of genocide in order to stifle dissent or dissatisfaction with its rule and policies. Following suit, Rwandese found it relatively easy to denounce individuals for a variety of personally motivated reasons and have an individual indefinitely detained with little or no investigation as to the validity of the accusation. Groups of individuals formed syndicates of denunciation, hiring themselves out to make accusations of genocide. These groups received a higher price if the accused was detained. The summary arrests and prolonged detentions without trial facilitated the rise and functioning of these syndicates. By the third quarter of 1999, an estimated 40,000 detainees had no case files and had never appeared before a judge.

### **III(1). The legalization of arbitrary arrests and unlawful detentions**

The Constitutional Court in July 1995 censured an act voted by the Transitional National Assembly the previous month, suspending fundamental safeguards guaranteeing the pre-trial rights of individuals contained in the Code of Criminal Procedure (CCP). The Court ruled that the abrogation of the procedural rules relating to remand in custody and release on bail was incompatible with the principle of the presumption of innocence; that the duration of the four-year suspension was incompatible with an individual's right to a fair hearing within a reasonable period of time; and that the act undermined the independence of the judiciary.

The government then amended The Constitution,<sup>6</sup> enacting measures that suspended provisions (Articles 4, 38 and 41) in the CCP in September 1996. Derogations in the time periods prescribed for issuing an arrest record, a provisional arrest warrant, appearance before a judge and the duration of preventative detention orders endeavored to legalize the practice of arbitrary arrests and unlawful detentions. The law was made retroactive to 6 April 1994, derogating the principle of non-retroactivity, and gave the prosecutorial and judicial systems 18 months to regularize the drawing up of an arrest report, the issuing of an arrest warrant and the issuing of a pre-trial detention order for currently held detainees. For new arrests, a Judicial Police Officer (OPJ), *Officier de police judiciaire*, had one month to issue an arrest record, as opposed to 48 hours in the CCP, and the Public Prosecutor's Office (OMP), *parquet*, had four months to issue an arrest warrant. A pre-trial detention order had to be

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<sup>6</sup> Constitutional Amendment of 18 January 1996.

issued by the President of the Court of First Instance (*Cour de première instance*) within three months following the arrest order, as opposed to five days in the CCP. Pre-trial detentions were extended from one month to six months. The legislation also suspended the right to appeal one's detention.

When the December 1997 deadline to regularize the arrest and detention of detainees could not be met, a new deadline was set for December 1999. This gave the Rwandese legal system another two years to regularize their arrest records, warrants and pre-trial detention orders.<sup>7</sup> The government extended the derogations for a third time in December 1999 through 16 July 2001. The Rwandese government did not extend the derogations in the Code of Criminal Procedure for a fourth time in anticipation of the operation of the *Gacaca* Jurisdictions.

The Rwandese government initially invoked article 4 of the International Covenant on Civil and Political Rights (ICCPR) to establish a legal basis for these emergency measures. Legal experts noted that the Rwandese judicial system was unable to cope with the number of arrests and detentions immediately after coming to power but that by early 1995 it was possible for the Rwandese government to respect human rights safeguards contained within the CCP.

The Rwandese government's suspension of legal provisions in the CCP did not absolve it from international human obligations that the government had undertaken in good faith through its ratification of international human rights treaties. Domestic law cannot override and must be compliant with international obligations. Regardless of the Rwandese government's capability to meet the standards laid out in its CCP or its derogation of some of the legal obligations contained therein, it remained legally bound to international human rights obligations relating to the enforcement of criminal law. The principle of *pacta sunt servanda* requires that contracting states to a treaty, like the human rights treaties of the United Nations or the African Charter of the Organization of African Unity (now the African Union), are responsible for performing treaty obligations and ensuring their required effects, including the adoption or amendment of indispensable legislation to that end.<sup>8</sup>

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<sup>7</sup> For those arrested between January 1998 and December 1999, the OPJ had five days to issue an arrest record, the OMP had one month to issue an arrest record and a judge had one month to issue a pre-trial detention order. The length of pre-trial detention was increased to two years for those already detained and to two months for those detained after the law's enactment. Again, there were no rights of appeal against unlawful detention. This new law reduced the time frames within which the Rwandese legal system had to act with respect to the arrest and detention of suspects but retained derogations that surpassed the legal safeguards contained in the Code of Criminal Procedure.

<sup>8</sup> More specifically, it was reaffirmed unequivocally in the third paragraph of the preamble to the Vienna Convention on the Law of Treaties (1969) that the principles of free consent and of good faith and the *pacta sunt servanda* are universally recognized, "every treaty is binding upon the parties to it and must be performed in good faith" (Article 25 of the Vienna Convention of the Law of Treaties).



### **III(2).      Prison conditions**

Prior to 1994, the capacity of Rwandese prisons was 18,000. Between mid-1994 and mid-1996, the population in Rwandese detention facilities quintupled to slightly more than 90,000. By mid-1997 new prisons and extensions to the existing prisons had raised the capacity to 49,400. Nonetheless, the number of detainees continued to outstrip prison capacity. New facilities were overfilled as soon as they were constructed. The prison population levelled out at around 124,000 during 1997 and 1998. There have been annual, albeit slight, declines in the prison population since then. Rwanda today has a prison population of around 112,000.

The severe overcrowding and unsanitary conditions within Rwandese prisons amounts to cruel, inhuman and degrading treatment. Preventable diseases, malnutrition and the debilitating effects of overcrowding have resulted in a reported 11,000 deaths between the end of 1994 and end of 2001. There have also been reports of deaths in custody resulting from the physical abuse of detainees by prison officials. At the end of 1999, 17 out of 19 prison directors were dismissed, 15 of them were jailed for corruption and maltreatment of prisoners.

Tens of thousands of detainees were also housed in district detention centres (*cachots*). These rudimentary structures were originally constructed to temporarily hold detainees for up to 48 hours before their transfer to prison. Because they are temporary, local districts have no budget allocated to them to keep prisoners. Detainees are primarily dependent on their families for their maintenance. Physical conditions are far worse than those in the prisons. Detainees suffer from extreme overcrowding, unhygienic conditions and the lack of food. Physical abuse, even torture, is more prevalent than it is in the prisons.

## **IV.      GENOCIDE TRIALS**

### **IV(1).      The International Criminal Tribunal for Rwanda**

The Government of National Unity established after the victory of the RPF in July 1994 immediately requested the international community to internationalize the prosecution of those who had perpetrated the genocide and crimes against humanity. Two months later, it formally asked the United Nations to establish an International Criminal Tribunal for Rwanda, apparently to allay suspicions in the international community of vengeance and summary justice on their part, to lay hands on genocide suspects who had found refuge abroad and to gain support for the reconstruction of its own criminal justice system.

The United Nations Security Council established the ICTR two months later with the mandate to judge persons who “planned, instigated, ordered, committed or otherwise aided and abetted” genocidal crimes within their jurisdiction between 1 January 1994 and 31 December 1994. The Rwandese government voted against resolution 955, which instituted the Tribunal, arguing that the genocidal acts committed in 1994 had not occurred spontaneously but had been preceded by “pilot projects for extermination” dating from the beginning of the armed

conflict in October 1990, that the structure of the ICTR and its financing were inadequate, that the Tribunal and the imprisonment of those convicted were not located in Rwanda and finally that the Tribunal precludes the imposition of the death penalty.

It took two years to establish ICTR offices in The Hague, Arusha and Kigali and another year to resolve management and funding problems. Innate structural problems arising from the geographic split in the Office of the Prosecutor, disagreements between the Registrar and the President, administrative mismanagement and staff incompetence have slowed down the effective realization of the Tribunal's work. In April 1996, a team of investigators and auditors from the United Nations Office of Internal Oversight (OIOS) documented charges of mismanagement. It also found considerable evidence that administrative support functions did not operate or operated poorly. Over the last two years, several senior attorneys were dismissed, accused of "professional incompetence." In February 2001, OIOS found a number of abuses, foremost among them a fee-splitting arrangement between the poorly managed defence lawyers and their clients. There have also been problems with the recruitment and incompetence of judicial investigators. Two defence team investigators were indicted for genocide related crimes, in May and December 2001, and the contracts of three were terminated in July and August of the same year for suspected involvement in the 1994 genocide. Accusations of incompetence and inadequate training have also been levelled against investigators in the Office of the Prosecution.<sup>9</sup> This has undermined the efficiency, quality and integrity of the Tribunal's proceedings.

Amnesty International in its 1998 report focused on the poor management of aspects of the Tribunal's judicial process, noting "a court created by the UN must be expected to abide strictly by all the highest standards laid down by the UN itself."<sup>10</sup> Instead, the Tribunal broke its own Rules of Procedure and violated international human rights standards regarding the fair trial rights of defendants. The report noted defendants were not brought to trial within a reasonable time and there were inexcusable delays in a defendant's initial appearance before a judge and the hearing of their motions.<sup>11</sup>

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<sup>9</sup> The poor preparation and handling of the Ignace Bagilishema and Alfred Musema cases and more significantly in the cases of the "Media Trial" defendants Jean-Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze have significantly delayed Tribunal proceedings.

<sup>10</sup> See Amnesty International's Report *"International Criminal Tribunal for Rwanda: Trials and Tribulations,"* April 1998 (AI Index: IOR 42/03/98).

<sup>11</sup> Jean-Bosco Barayagwiza, for example, was arrested on 27 March 1996 (but held on the basis of an ICTR order from 3 March 1997). He was not indicted until 23 October 1997 and did not appear before a judge until 23 February 1998. His trial did not begin until 23 October 2000. On 29 September 1997, his lawyer filed a writ of habeas corpus challenging the legality of his arrest and detention. By the time it was heard, it was a moot point as Jean-Bosco Barayagwiza had been indicted and transferred to Arusha.

**IV(1)(a). The ICTR and Rwanda**

The Tribunal is dependent on the cooperation of the Rwandese state. The Rwandese government expressed its intention to support the ICTR and cooperate with its work despite its vote against the Tribunal's establishment. Nonetheless, relations between the ICTR and the Rwandese government have been strained. The Rwandese government was aggravated by the initial slowness with which the Tribunal was established and its apparent lack of determination to pursue the main architects of the 1994 genocide. The continued slowness of Tribunal proceedings, the discovery of alleged genocide suspects among the defence investigators and the alleged poor treatment and security concerns of prosecution witnesses have continued to negatively affect the working relationship between the ICTR and the Rwandese government.

Hostile relations on the part of the Rwandese government affect the work of the ICTR since it controls access to both witnesses and crime sites within Rwanda. The Rwandese government has at times denied access to Rwanda by the Tribunal's investigative teams, sometimes by refusing to guarantee their security. It has at times similarly blocked the prosecution's access to witnesses during trials. In January 2002 Rwandese genocide survivor groups, IBUKA and AVEGA refused to cooperate with the Tribunal, stating that their members would not testify before "people who ridicule us and treat our suffering as a banality." The Rwandese authorities then established new guidelines regarding the issuance of travel documents for witnesses residing in Rwanda. This has had a negative impact on the availability of witnesses scheduled to appear before the Tribunal.<sup>12</sup>

Another contentious issue between the Rwandese government and the ICTR arises out of the concurrent jurisdiction that both exercise over offences committed during the 1994 genocide. Both the ICTR and the Rwandese government have sought custody over the same suspects. Relations deteriorated badly in 1996 when the ICTR gained custody of several suspected key leaders of the genocide that had been detained in the Cameroon and for whom the Rwandese government had issued arrest warrants.<sup>13</sup>

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<sup>12</sup> The prosecutor in the "Butare Trial" of Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Ntezirayo, Joseph Kanyabashi and Elie Ndayambaje was forced to file a motion for delay in March because 11 prosecution witnesses were not being allowed to travel to the Tribunal. The defence attorneys of the "Butare Trial" defendants requested that these witnesses be struck from the list. On 19 June 2002, the judges of Trial Chambers I (the "Media Trial") and II (the "Butare Trial") stated that the persistent delays in trial proceedings caused by the unavailability of prosecution witnesses could not be sustained. The Registry of the ICTR was asked by the judges to inform the Rwandese government that "The Statute of this Tribunal is binding upon all states."

<sup>13</sup> These included a number of major figures such as André Ntagerura, Anatole Nsengiyumva, Théoneste Bagosora, Jean-Bosco Barayagwiza, Ferdinand Nahimana and Laurent Semanza. To make matters worse, the Chief Prosecutor of the ICTR initially decided not to indict Jean-Bosco Barayagwiza or Laurent Semanza, later changed its mind, rearrested them and then because of the indeterminable delays in Jean-Bosco Barayagwiza's case was ordered by the Appeals chamber in The Hague to release him on 3 September 1999. The impartiality of the Tribunal was then called into question when, following the negative response of the Rwandan government, the Chief Prosecutor asked the Chamber

The Tribunal's reputation has also been tarnished by accusations of partiality. The fact that the Tribunal has only issued indictments against and tried crimes committed by individuals operating under the auspices of the former Rwandese government confirms such suspicions. The Tribunal has investigated and received testimonies regarding RPF offences but has taken no action. Since the Chief Prosecutor of the Tribunal has announced that all criminal investigations will be completed by 2004, it is doubtful whether the Tribunal will be able to effectively demonstrate its impartiality.

By 30 September 2002, the ICTR had detained 61 individuals, tried nine individuals, rendering eight convictions and one acquittal. Six of those convicted are serving their sentences in Mali, one of them is awaiting transfer and another one's appeal is pending. There are eight on-going trials involving 22 defendants. Thirty-one detainees await trial. The Chief Prosecutor of the Tribunal has stated that it will have completed investigations of its targeted 136 suspects by the end of 2004. All trials are to be completed by 2008. The cost of the Tribunal has risen steadily from nearly US\$36.5 million in 1996 to a projected US\$204.4 million in 2002-2003.

#### **IV(2). Foreign prosecution of génocidaires**

Rwandese implicated in the genocide began turning up in Europe and elsewhere soon after the genocide started. Judicial authorities abroad exhibited little desire to prosecute them. In the ensuing years, foreign states have begun to try Rwandese genocide suspects under their national jurisdictions. A Swiss military court arrested a genocide suspect in 1996 and tried him between July 1998 and April 1999 when he received a sentence of life imprisonment. In May 2000 an appeals court found him guilty of war crimes but not murder, reducing his sentence to a 14-year prison term. A Swiss military court of final appeal confirmed this sentence in April 2001. In Belgium, four individuals suspected of war crimes and human rights violations were tried from April to June 2001 under a 1993 law providing for universal jurisdiction for certain international crimes.<sup>14</sup> They were convicted by a Belgian Crown Court (*Cour d'Assises*) and sentenced to prison terms of between 12 and 20 years. Three of the individuals filed an appeal in Belgium for a retrial but Belgium's Court of Cassation rejected their appeals in January 2002. Two of the individuals lodged a further appeal on 9 July 2002 at the European Court of Human Rights. The Canadian government arrested an alleged Rwandese war criminal in 1996. Two federal immigration tribunals ordered him deported in 1996 and again in 1998. A federal court judge halted the deportation proceedings in April 2001, stating that the alleged suspect may have incited genocide through his speech but there was no proof linking his remarks to actual killings.

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to reverse its ruling, offering "new evidence." Five months later, the court revised its ruling enabling the Tribunal to try Jean-Bosco Barayagwiza.

<sup>14</sup> The 1993 law covers grave breaches of the Geneva Conventions and Additional Protocols I and II (Belgium is a party to the Geneva Conventions and both protocols) and gives Belgian courts jurisdiction over such offenses regardless of where they were committed, by whom or against whom.

### **IV(3). Genocide trials within Rwanda**

The pre-genocide Rwandese judicial system was weak, possessing limited resources, insufficiently trained personnel and a lack of judicial independence. This flawed judicial system was destroyed during the genocide: court buildings were ruined and the few qualified professionals were either killed, had participated in the genocide or had fled the country.

The Rwandese government took a two-pronged approach to rebuilding the judiciary. During the first half of 1996, it implemented a number of provisions contained in the Arusha Peace Agreement<sup>15</sup> dealing with the re-organization of the judiciary. The Supreme Council of Magistrates was established through Organic Law 3/96 of 29 March 1996 that delineated its organization, work and competence. It became operational the following month with the appointment of 20 jurists who rule on the appointment, dismissal and functions of judicial personnel. The creation of the Council separated executive from judicial powers, increasing the independence of the judiciary. It appointed 372 judges during 1996. The Supreme Court, suppressed since 1978, was re-established on 6 January 1996 through Organic Law N° 07/96 that set out its organization, work and competence.

The Rwandese government, with considerable assistance from various United Nations agencies, foreign governments and nongovernmental organizations (NGO's) sought to materially reconstruct the judicial system's infrastructures and train the requisite judicial personnel. Approximately 324 magistrates, 100 deputy prosecutors and 298 OPJs and judicial police inspectors (IPJs), *inspecteurs de police judiciaire*, were trained prior to the re-opening of the country's courts. Nonetheless, by the end of 1995, only 50 of the country's 147 Canton Courts (*Tribunaux de Canton*) were functional, 6 of the country's 12 Courts of First Instance and none of the four Courts of Appeal (*Cours d'appel*). One trial involving 7 defendants started in April 1995 and was adjourned the same day because the prosecution documents were incomplete. By September 1996, approximately 127 Canton Courts, 11 Courts of First Instance and all the Courts of Appeal were functioning. Trials began for non-genocide criminal and civil cases.

Despite the accelerated recruitment and training of judicial personnel, the numbers fell far short of what was needed. The Ministry of Justice estimated that it needed a minimum of 694 magistrates to get the judicial system running. This was still less than the number of magistrates that existed prior to the genocide when there were far fewer than 90,000 individuals in detention facilities awaiting trial. Few of the magistrates were jurists, less than a quarter had adequate legal training. Some of the people trained never took up judicial positions, preferring the better salaries and safer working conditions in the private sector. There were also a number of government-induced problems. Despite an initial agreement with the Rwandese government in early 1995 to enable the recruitment, on a temporary basis,

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<sup>15</sup> The Arusha Peace Agreement, a collection of 7 documents, was adopted on 4 April 1993 following lengthy negotiations between the Rwandese government and the RPF. These documents, among other things, provide the framework for Rwandese state institutions.

of foreign judges, the Transitional National Assembly rejected draft legislation that would have enabled this.

During the reconstruction period, several incidents of human rights violations demonstrated the judicial system's lack of independence. Several judges and prosecutors were suspended (Claudien Gatera in February 1996 and Fidèle Makombe in May 1996) reportedly for failing to obey political orders or for taking decisions not to the government's liking. Some prosecutors and assistant prosecutors, including Celestin Kayibanda in May 1996 and Silas Munyagishali in February 1996, were arrested on charges that they had participated in the genocide. Reports linked their persecution to their release of detainees. A judge, Vincent Nkezabaganwa, and assistant prosecutor, Floribert Habinshuti, were murdered in July 1996.

The removal of Hutu judicial personnel combined with the recruitment and training of predominantly Tutsi to replace them convinced many Rwandese that the re-established judiciary was discriminatory. In some cases, existing judicial personnel may have committed offences during the Rwandese genocide. Government employment practices in the re-establishment of the judiciary, however, exacerbated a problem that it claims it wants to resolve and undermines public confidence in the new judiciary. It also lost an important opportunity to prove to the nation that the re-established system of justice was neither discriminatory nor an instrument of revenge.

#### **IV(3)(a). The Genocide Law of the Republic of Rwanda**

The Rwandese government opted for a specific constitutional law to deal with the trial of genocide suspects. This legislation was designed and drafted over the course of several months during 1995 and 1996. On 1 September 1996, the "Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990" came into force.

This law creates four categories of genocide and crimes against humanity offences. The categories indicate the degree of individual responsibility and the respective penalties. The first category includes leaders and organizers of the genocide, persons who abused positions of authority, notorious killers who distinguished themselves by their ferocity or excessive cruelty and perpetrators of sexual torture. Category 2 includes the perpetrators of or accomplices to intentional homicides or serious assaults against individuals that led to their death. Category 3 contains persons guilty of other serious assaults against individuals while category 4 covers persons who committed property crimes.

The Organic Law admits the right of defendants to defence counsel but not at government expense (Article 36), even though the majority of defendants could not afford legal counsel and that some of them faced the death penalty. The genocide law also established a confession procedure. Perpetrators of Category 2, 3 and 4 crimes are entitled to reduced sentences in return for accurate and complete confessions, a plea of guilty to the crimes committed and an apology to the victims. With or without a confession, the sentences in the Organic Law were significantly lower than they would have been under the existing Penal

Code (PC), *Code pénal*. Judges could reduce the automatic death penalty for Category 1 offenders under mitigating circumstances and replace the death penalty with life imprisonment for those in Category 2. Property offences in Category 4 resulted in civil damages. Individuals convicted under the genocide law have the right of appeal on the questions of law or flagrant errors of fact and only within a 15-day period of the verdict.

The Organic Law further stated that Category 1 offenders are jointly and individually liable for all genocide damages and Category 2, 3 and 4 offenders are liable for the damages caused by their criminal actions (Article 30). This legislation further stipulated that prior to the adoption of a law creating a victims' compensation fund, the damages awarded to victims would be deposited in a National Bank of Rwanda account (Article 32).

Amnesty International's concerns with Organic Law No 08/96 of 30 August 1996 focused on the failure of the state to ensure state-funded legal counsel, the limited basis on which appeals could be filed and the automatic death penalty for Category 1 offenders.<sup>16</sup> Amnesty International is unconditionally opposed to the use of the death penalty, in all countries and in all circumstances, because it is a state-sanctioned violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment.

#### **IV(3)(b). The work of the special genocide chambers**

Rwandese genocide trials began in December 1996. While the start of the trials marked a significant step in the attainment of justice and an end to the culture of impunity, a number of human rights organizations, including Amnesty International, other NGO's, international bodies and legal experts expressed grave doubts regarding the fairness of these trials. Their concerns were aggravated by the arbitrary nature of arrests, a significant number of which Rwandese officials themselves acknowledged were not legitimate.<sup>17</sup>

Amnesty International's concerns focused on four issues: the lack of defence counsel and witnesses for the vast majority of defendants; the lack of time and adequate facilities for defendants to prepare their defence; the competence, impartiality and independence of government and judicial officials, and the environment within the courtroom.<sup>18</sup> International human rights instruments state that *pro bono* legal assistance is required "where the interests of justice so require" and all accused have the right "to enough time and [the] necessary facilities to prepare their defence."<sup>19</sup> The Rwandese government duly noted that Rwandese law recognizes the right to a fair trial and that the government took seriously its obligations as signatory to the ICCPR. However, its interpretation of Article 14 (3)(d) is that legal assistance is required only where the death penalty was a possible punishment. The

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<sup>16</sup> See Amnesty International's Report "*Rwanda Unfair trials: Justice denied*," April 1997 (AI Index AFR 47/008/1997).

<sup>17</sup> In May 1998, for example, the Public Prosecutor for Ruhengeri province estimated that 15 percent of the detainees were innocent.

<sup>18</sup> *ibid.*

<sup>19</sup> See International Covenant of Civil and Political Rights (ICCPR, Article 14 (3)(d).

government has repeatedly maintained that the obligation to provide legal assistance was not absolute and could be derogated with respect to genocide.

The first cases in Kibungo, Kigali and Byumba in which defendants without counsel were sentenced to death led to considerable international criticism. Perhaps as a result, the Rwandese government rescinded its earlier decision and allowed foreign lawyers to represent genocide suspects. *Avocats sans frontières* (ASF), Lawyers Without Borders, began to represent defendants. Their small number and mandate to only work in secure areas meant the majority of defendants, virtually all defendants in the northern and western provinces, were not represented in the first years of their operation.

The Rwandese Bar Association was established in mid 1997 with 44 lawyers. Almost all refused to defend genocide suspects apparently because they did not consider genocide suspects worthy of legal representation or because of the danger involved. One of the three lawyers who agreed to represent those suspected of genocide, Innocent Murengezi, “disappeared” on 30 January 1997. André Bimenyimana, who similarly agreed to provide legal assistance for genocide suspects, was accused of participating in the genocide, arrested and taken to Kigali Central Prison on 23 September 1997.<sup>20</sup>

The law establishing the Rwandese Bar Association also provided for the creation of a lower-ranking category of independent legal professional, known as a judicial defender (*défenseur judiciaire*). After receiving six months of legal training, judicial defenders were able to represent individuals before the Tribunals of First Instance. The Danish Centre for Human Rights launched a program in the beginning of 1998 whose objective was to train and deploy 102 judicial defenders.

The number and competence of judicial personnel continued to improve from 1998 through to the present albeit personnel and material constraints continued to limit the judicial system’s performance. Trials generally adhered more closely to international standards though this varied considerably between the country’s 12 Courts of First Instance. Presently, around 40 percent of the accused have legal representation.

Observers noted a striking contrast in the fairness of trials where defendants had counsel. There was a markedly greater respect for proper procedures and a more adequate presentation of the defence. When defence counsel was present, the courts were more likely to grant adjournments, giving defendants sufficient time to prepare their cases.

Although, the overall quality of trials has improved, the complexity and gravity of the offences, the severity of the sentences and the political environment in which the courts were operating continue to cause problems. Numerous reports call into question the competence, impartiality and independence of judicial personnel. Court proceedings continue to reflect the

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<sup>20</sup> Amnesty International delegates visited the detained Bimenyimana in 1999. Bimenyimana and four co-defendants were judged in late August 2002. Bimenyimana was sentenced to death and has appealed the court’s decision. The four co-defendants were acquitted.



hostile socio-political environment existing outside of the courtroom. This climate of fear affects judicial personnel, defendants and witnesses. Defence counsel and witnesses are intimidated causing the former to withdraw from trials and the latter to refuse to testify. Some defense witnesses have been accused of complicity or involvement in the crimes committed by the defendant. Conviction sometimes rests more on public acclaim than on the incontrovertible evidence of guilt.

There have been continued reports of corruption, inefficiency and government interference in the judiciary. Several cases illustrate the risk of delivering justice in Rwanda at this time. In January 1998, the Gisenyi prosecutor disappeared. In March 1998, the president of the Court of Cassation, and vice-president of the Supreme Court, was suspended following a disagreement with the President of the Supreme Court over the executive branch's interference in judicial matters. He was later forced to resign. Five other leading magistrates or counsellors attached to the highest courts were later suspended or otherwise removed. Three of them were arrested and charged with genocide, one of them for the second time and a fourth was suspended in November 1999 after having been previously arrested and released for lack of evidence. These individuals were among the highest-ranking magistrates in place before the genocide and their removal or suspension left the judiciary largely in the hands of Tutsi, many of whom were old caseload returnees<sup>21</sup>. The President of the Kigali Court of First Instance, a genocide survivor, chose exile in Canada after facing severe intimidation and harassment.

#### **IV(3)(c). Judicial results to date**

The specialized-genocide chambers began operation in December 1996. Until last year, the courts made steady progress in the number of individuals tried. The recent decline can be attributed to a temporary reduction in donor funding and government intervention in their operation.<sup>22</sup> By the end of 2001, the specialized-genocide chambers had tried less than six percent of those detained for genocide and crimes against humanity. Legal experts stress that the Rwandese judiciary, despite its numerous flaws, has not failed. At the same time, they readily acknowledge that the existent judicial system cannot manage significantly more cases than they are currently handling. There has been a significant decline in the number of death sentences and a rise in acquittals since 1996. Nonetheless, over 650 individuals have received

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<sup>21</sup> Refugees who left Rwanda prior to the 1990-1994 armed conflict and genocide.

<sup>22</sup> The Public Prosecutor's Office in Butare, for example, refused to release eight people acquitted in December 2000, including Zacharie Banyagiriki, a former parliamentarian, on the grounds that "new facts" had come to light. The State Prosecutor ignored protests by the district Appeals Court and the Supreme Court of Rwanda. Magistrates involved in the acquittals were transferred to other posts. As a result, no judgments in genocide cases occurred in Butare during the first quarter of 2001. Zacharie Banyagiriki died in prison in November 2001. The other seven individuals who were acquitted remain in prison. The courts refused to rehear their case on 19 June 2002 because the initial court decision had not been respected. The seven individuals were released five days later but were re-arrested by the police as they left the prison. They are still in prison.

death sentences in Rwanda's specialized genocide chambers. Twenty-three of these individuals were executed on 24 April 1998.<sup>23</sup>

Year	No. of persons judged	% capital punishment	% life imprisonment	% prison terms	% acquittals
1997	379	30.8	32.4	27.7	8.9
1998	895	12.8	31.9	32.6	21.7
1999	1,306	11.0	30.6	35.3	20.9
2000	2,458	6.6	25.0	46.0	15.4
2001	1,416	8.4	26.1	40.7	22.0
2002 <sup>24</sup>	727	3.4	20.5	47.2	24.8
Total	7,181	9.5	27.1	40.5	19.1

*Source: Liprodhor*

From 1994 to date, the Rwandese government has consistently demanded accountability for crimes committed under the auspices of the former government during the 1990 to 1994 armed conflict and genocide and just as regularly acknowledged that its judiciary lacked the financial resources, trained personnel, facilities and equipment to try those arrested. Senior Ministry of Justice officials initially declared that the detention of genocide suspects had to take place whether or not there was a functioning system of justice and later that trials could not be delayed due to the lack of defence lawyers. Their words and actions presume the guilt of individuals who have not only not been tried but, in many cases, have not even had the accusations against them investigated. Amnesty International is opposed to impunity and always encourages governments to investigate human rights abuses and to bring the suspects to justice. However, the problem of impunity will not be resolved by violating the rights of those suspected of carrying out human rights abuses. The Rwandese people need justice, not vengeance. Justice requires that those accused of genocide receive a fair trial, in accordance with international human rights standards – obligations that the Rwandese government voluntarily undertook in good faith through its ratification of international treaties.

Like the ICTR, the Rwandese judiciary has consistently focused on human rights violations committed under the auspices of the former government during the 1990 to 1994 armed conflict and genocide. It has undertaken no systematic impartial investigation of RPF human rights abuses during this period despite credible information that they occurred on a large scale. Moreover, RPF/Rwanda Patriotic Army (RPA) abuses have continued since the RFP's coming to power. Amnesty International reports have repeatedly documented these abuses despite the government's deliberate attempts to obstruct independent investigations and

<sup>23</sup> See the Amnesty International press release "Major step back for human rights as Rwanda stages 22 public executions," 24 April 1998 (AI Index AFR 47/14/98) for more information regarding these executions and Amnesty International's concerns regarding their unfair trials.

<sup>24</sup> These are results for the first six months of 2002.

obscure the truth.<sup>25</sup> During the 1997-1998 Northwest Insurgency, for example, the government attributed the majority of human rights abuses to “infiltrators” (*infiltrés*), members of armed opposition groups operating from the DRC, even though testimonies received by Amnesty International delegates confirm that the majority of killings of unarmed civilians were carried out by the RPA.<sup>26</sup> Amnesty International delegates have repeatedly met with senior government officials and members of the security forces regarding these abuses. While the government frequently point to cases where judicial action was taken against members of the security forces, available information indicates that such judicial action was rare. Tackling impunity requires that justice not be one-sided. All individuals responsible for human rights abuses must be brought to trial in accordance with international fair trial standards and without recourse to the death penalty.

## **V ATTEMPTS AT ADMINISTERING PROMPT JUSTICE**

### **V(1). Confession and guilty-plea procedures**

The confession and guilty-plea procedure for individuals guilty of Category 2, 3 and 4 offences was one of the cornerstones of the 1996 Organic Law establishing the special genocide chambers. Political authorities hoped that the confession and guilty-plea procedure would relieve the congestion in the public prosecution offices and courts by expediting both the judicial investigations and the trials of genocide suspects. Defendants receive a major reduction in their sentences for a complete confession, which comprised a detailed description of all their offences, the names of all their accomplices and apologies to all of their victims. Depending on whether or not confessions are made before or after the beginning of trial, convicted persons in Category 2 have a sentence of life imprisonment respectively reduced to between seven to 11 years and between 12 to 15 years. Similarly, those in Category 3 receive respectively one-half and one-third of the normal sentence. If Category 1 offenders confess before their names appeared on the Category 1 list, they are placed in Category 2.

There were 500 confessions in 1997 and approximately 9,000 by the end of 1998. Over 2,000 confessions were received in the weeks following the execution on 24 April 1998 of 22 defendants found guilty of genocide. About 15,000 detainees had confessed by 1999 and approximately 20,000 detainees by early 2000. The slow and cumbersome hearing and review process, and lack of personnel, insured that at any given time only one-fourth of the confessions were verified by the Public Prosecution Department. To make matters worse, the 18,000 or so detainees who confessed to genocide-related crimes are housed in the same facilities as detainees who could resent their confessions. Their safety or protection from reprisals is questionable.

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<sup>25</sup> See Amnesty International's Reports “*Rwanda: Alarming resurgence of killings*,” August 1996 (AI Index AFR 47/13/96), “*Rwanda: Ending the Silence*,” September 1997 (AI Index AFR 47/32/97), “*Rwanda: Civilians trapped in armed conflict*,” December 1997 (AI Index AFR 47/43/97) and “*Rwanda: The hidden violence*,” June 1998 (AI Index AFR 47/23/98).

<sup>26</sup> See Amnesty International's Report “*Rwanda: The hidden violence*” cited above.

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**V(2). The expedition of judicial investigations****V(2)(a). *Commissions de triage***

Apparently cognizant of the prison overcrowding and the judicial backlog, the Rwandese government in late 1994 established committees to screen detainees and release those with insufficient evidence to warrant their detention. The committees focused on high profile cases and met in only a few prefectures. The Kigali commission began its work on 10 January 1995 and, at its first meeting, ordered five releases out of the 12 case files it considered. In mid-February, 50 detainees would have been released on its orders had it not been for the opposition of the military. The committees closed down in March 1995 having released six detainees.

In mid-1995 these committees were given a new charter as *Commissions de triage spécialisées* with United Nations Development Program funding. This screening took place at the prefecture (now province) level and by the end of 1995 at the commune (now district) level. The committees separated the case files of ordinary offenders from genocide offenders and completed genocide related case files from incomplete ones. They focused on the cases files of the elderly, women and minors (vulnerable categories). Throughout their three-year existence, these committees processed few case files and released few detainees.

The composition of the *Commissions de triage* was a major cause of their ineffectiveness. The committees included members of the gendarmerie, army, intelligence services and a representative from the public prosecution offices. Meetings frequently did not occur or their decisions were invalidated by the lack of a quorum due to the absence of security force members. In addition, representatives from the public prosecution offices found it difficult to oppose security force members who habitually argued against the release of detainees regardless of the information contained in their case files.

**V(2)(b). *Groupes mobiles***

The Rwandese government established the *Groupes mobiles* in March 1997 due to international criticism surrounding the *Commissions de triage*. Foreign governments provided the funding. The *Groupes mobiles*, consisting of OPJs and IPGs, were deployed by the Ministry of Justice to open case files for detainees who did not have them and carry out preliminary judicial investigations. Their work led to the provisional release of individuals against whom there was insufficient evidence or who fell into one of the “vulnerable” categories. The *Groupes mobiles* review of 60,000 cases through 1998 led to the release of 1,000 detainees (10,000 had been promised by the government). Their work was hampered by the lack of transport, communication facilities and personnel. There were isolated reports regarding their competence and abuse of power. The *Groupes mobiles* were disbanded in 1999.

### **V(3). Releases**

Government hardliners and members of the security forces consistently opposed the release of pre-trial detainees even though *prima facie* cases could not be established against them. In November 1996, the Rwandese government announced it would release detainees whose case files did not meet strict standards regarding their potential guilt. Of the approximately 3,000 detainees that were released the following year, some were re-arrested while others fell victim to “revenge” killings. A number of individuals in the vulnerable categories were released on humanitarian grounds from 1998 onwards. In October 1998, the Government announced plans to release 10,000 detainees with no case files. Government hardliners and genocide survivor lobbying groups protested and the projected release was reduced to 3,365 detainees over a 10-month period.

The Rwandese government consistently argued that released detainees faced reprisals in their home communities. Studies by local human rights groups indicated that this was not necessarily the case. The government itself was partially responsible for the hostility against detainees through statements and actions that presumed the guilt of detainees. It also did little to sensitize the public about the legal rights of individuals accused but not tried for genocide or crimes against humanity.

## **VI. GACACA**

*Gacaca* refers to a “traditional” Rwandese method of conflict resolution. When social norms were broken or disputes arose –land rights, property damage, marital disputes, inheritance rights, etc., meetings were convened between the aggrieved parties. *Gacaca* sessions were informal, non-permanent and *ad hoc*. They were presided over by community elders (*inyangamugayo*). The primary goal was to restore social order, after sanctioning the violation of shared values, through the re-integration of offender(s) into the community. During the colonial period, a western judicial system was introduced but *gacaca* remained an integral part of customary practice. With independence, *gacaca* became more institutionalized with local authorities sometimes assuming the role of *inyangamugayo* and *gacaca* sessions considering local administrative matters.

The idea of using *gacaca* repeatedly surfaced following the genocide as the Rwandese government sought ways of assisting the public prosecutor’s offices and the courts to deal with the large number of detainees. “Saturday talks” initiated and led by former President of the Republic, Pasteur Bizimungu, and involving representatives from sectors of government and civil society, including genocide survivors, led to the creation of a commission on 17 October 1998 mandated to study the applicability of *gacaca* to the trial of genocide suspects. Organic Law N°40/2000 of 26 January 2001 establishing *gacaca* jurisdictions for the

prosecution of genocide offences and crimes against humanity committed between 1 October 1990 and 31 December 1994 came into effect on 15 March 2001.<sup>27</sup>

Officials in the Rwandese government emphasize that the *Gacaca* Jurisdictions are not intended to duplicate customary *gacaca* procedures though they anticipate the same results. While the contemporary *gacaca* jurisdictions retain certain characteristics of the customary system –notably their location in the local community and the participation of community members, there are significant differences. Customary *gacaca* proceedings dealt with interfamily or intercommunity disputes. Offenders voluntarily appeared before *inyangamugayo*. Their appearance before community elders demonstrated their desire to be re-integrated into the community whose mores they had violated. Community elders, acting as judicial arbiters, were similarly free to determine sanctions that best served the interests of the community. Decisions were consensual and represented a compromise between collective and individual interests. Sanctions were enforced through social pressure applied by community members. The focus throughout was on the restoration of social harmony.

Contemporary *Gacaca* Jurisdictions deal, not with local disputes, but with a genocide organized and implemented by state authorities in which hundreds of thousands of individuals lost their lives. The new jurisdictions are state creations. Their operation and sentencing are dictated by national legislation. A commission established by presidential decree to prepare and organize the *gacaca* elections, assisted by the National Election Commission, organized and oversaw elections of the *gacaca* judges and assemblies, dictated by presidential decree. The overall supervision of the *Gacaca* Jurisdictions and their coordination is under the control of the Department of *Gacaca* Jurisdictions, within the Supreme Court, and the Ministry of Justice. State authority – not local consensus – is the *modus operandi* of the new *gacaca* jurisdictions. International human rights standards dictate that tribunals, exercising judicial functions, must be legally established and determine matters within their competence on the basis of rules of law and in accordance with proceedings being conducted in a prescribed manner. These standards dramatically affect, however, the customary workings of *gacaca* sessions. The significant differences existing between customary and contemporary forms of *gacaca* force the question of whether these differences negate the anticipated results: justice, the uncovering of truth and national reconciliation. If reconciliation is an essentially personal interaction between victim and perpetrator, one can see how *gacaca*, as previously practiced, would promote it. It is less clear that the state-mandated *Gacaca* Jurisdictions whose focus remains on retributive justice will achieve the same end.

Another complication is that the Rwandese armed conflict and genocide have dramatically changed both the composition and interrelationships of Rwandese communities. As many as one million Rwandese were killed by their fellow Rwandese during the genocide. Tens of thousands were also killed immediately after the RPF took control of the country, in the bloody forced closure of camps for displaced Rwandese and during the two-year insurgency in the northwestern provinces. At war's end, there were nearly 400,000 internally displaced

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<sup>27</sup> This organic law was modified and finalized by Organic Law N°33/2001 of 22 June 2001.

persons in camps and 1.8 million Rwandese refugees in the countries bordering Rwanda. In the following year and one-half, nearly 750,000 old caseload Tutsi refugees returned to Rwanda. In 1996, 1.2 million new caseload refugees from Burundi, Tanzania and the DRC (then Zaïre) were forced back into Rwanda, with another 200,000 the following year. The RPA and its allies in the DRC reportedly killed another 200,000 Rwandese who had taken refuge in the DRC. In the late 1990's more than one million Rwandese were moved into collective resettlements (imidugudu). Customary practices that once worked may not now be viable.

## **VI(1). Gacaca preparations**

### **VI(1)(a). Sensitization of the population**

Virtually all Rwandese have heard and know something about *gacaca*. The problem is that the sensitization campaigns, necessary to the success of *gacaca*, have been too short, top-down and focused on rallying support behind, rather than to provide information about, *gacaca*. There has not been any real effort to engage Rwandese in a frank and open discussion about *gacaca*, which takes into account their perceptions and ideas. The result is a considerable lack of information regarding both the operation and ethical rationale underlying *gacaca*. Studies of Rwandese public opinion show that while the overwhelming majority of Rwandese knows something about *gacaca* and support it, their actual knowledge of their role in the *Gacaca* Jurisdictions is extremely limited. Amnesty International delegates spoke to *gacaca* emissaries, individuals assigned to organize sensitization campaigns within each province, in mid 2001. While these individuals had received some training, they came into their provinces with virtually no resources (including offices and transport) to inform and engage local populations in the purpose and workings of the *gacaca* tribunals. Since the *gacaca* tribunals are based in local communities and are dependent on the participation of community members, their lack of knowledge is a critical flaw.

### **VI(1)(b). *Entraide judiciaire* (Judicial cooperation)**

The Public Prosecutor and the Department of *Gacaca* Jurisdictions collaborated in this effort to expedite the judicial investigation of detainees with nonexistent or incomplete case files and inform detainees about the confession and guilty-plea procedure. Unlike previous efforts to regularize the case files of detainees (*Commissions de triages*, *Groupes mobiles*), representatives of the Public Prosecutor brought detainees before the communities in which their alleged offence(s) were committed and asked community members to provide information regarding their alleged offences. These sessions were presented to the Rwandese public as a dress rehearsal for the upcoming *gacaca* tribunals. Nearly 3,500 detainees were brought before their home communities in the first year of operation.

Community members were gathered at the district level. These judicial enquiries were generally well attended albeit attendance varied considerably between the sectors contained within the district. In some cases, sector authorities had informed and ensured the presence of community members. In other cases, community members showed up with little idea as to

what was taking place. In one case, witnessed by Amnesty International delegates, Local Defence Forces (LDF), a citizen's militia created by the Rwandese government and given minimal training by the RPA, were sent out to collect community members who had either not been informed of the session or had made a decision not to attend it.

In most cases, community members and detainees were cautious and passive. There were a few reported aggressive exchanges with detainees accusing their accusers of pressing charges for personal gain and genocide survivors accusing those assembled of refusing to provide testimony against the detainees. Security forces, usually the LDF, maintained an active presence. Community members were threatened with arrest if they became disorderly. In addition to collecting individuals who had accused an assembled detainee but were not present, the LDF insured that individuals from the suspect's sector came forward to be interrogated by the OMP when the latter's request for information on a detainee was met with silence.

OMP representatives supervised these inquiries in a heavy-handed manner. In the process, they violated a number of articles contained in the Rwandese Code of Criminal Procedure. These include the right to be presumed innocent until and unless proven guilty according to law after a fair trial (Article 16) and the burden of proof obligation (Article 20) that requires evidence proving an accused person's guilt. OMP representatives made it clear throughout the exercise that their principle objective was to collect incriminating evidence against the assembled detainees. In particular, representatives from the Public Prosecutor's Office in Butare repeatedly told district sessions in Butare province that they had insufficient evidence regarding the guilt of the assembled detainees and relied on community members to provide sufficient incriminating evidence. In another case, community members were told that they had been brought together to incriminate, not release, the detainees before them. In a case witnessed by Amnesty International delegates, a suspect with no case file was brought before a district session. Although no one had any information against him (at which point he should have been released), he was brought before another district session in an apparent on-going search for incriminating evidence. In Cyangugu, individuals were immediately arrested following new and uninvestigated allegations made during these judicial inquiries though the courts later released most of them.

Amnesty International delegates witnessed two of these judicial enquiries. Their observations confirm the unfair procedures used by OMP representatives. In both sessions, OMP representatives arrived late (mid-day) and proceeded to encourage support for *gacaca* rather than explain it, as was their mandate. Each judicial inquiry took approximately ten minutes. Each of the assembled detainees was brought forward in turn. Each was allowed to identify herself or himself but was not allowed to speak further.

Assembled community members with evidence against the defendant spoke first. Their testimony was not cross-examined by the OMP representatives. If no one stepped forward, OMP representatives, assisted by the LDF, required all community members from the detainee's sector to step forward. One-by-one, they were harangued to provide evidence. In



some cases, there were no community members from the detainee's sector, including the individual(s) who had initially accused the detainee. In a number of cases, the same group of individuals repeatedly stepped forward to accuse the assembled detainees and no one else corroborated their accusations.

On the defence side, detainees were not allowed to speak on their behalf, challenge the allegations made against them or cross-examine witnesses. They were repeatedly told that only those wanting to confess could speak. Family members were generally not allowed to speak either unless they provided evidence against the detainee. Witnesses for the defence were only allowed to speak after all accusations had been made. Moreover, they were cross-examined in an intimidating manner that implied they shared in the detainee's alleged guilt. In one instance, the Public Prosecutor's Office told community members that anyone providing information for the defence would either have to name the individual responsible for the crime(s) allegedly committed by the detainee or take his or her place in prison.

A number of detainees, who had been arrested by the security forces, had no case file. Neither they nor the assembled community members had any idea why the person had been arrested and detained in the first place.

The information provided by community members during the witnessed judicial inquiries largely fell into three categories. A number of individuals came forward to accuse the suspect but gave no further information. It would seem that these individuals either had no evidence or did not think it was necessary to present it, as a mere accusation has been sufficient grounds for having someone detained. On the other hand, the public and intimidating nature of the session might have been a factor in their decision to say nothing. Article 2 of the Rwandese Code of Criminal Procedure requires confidentiality in judicial investigations. Nearly half of the evidence gleaned from community members was hearsay, "I heard that she or he did this or that." Most of the rest was circumstantial. Detainees were either known to associate with people who had committed an offence, had been seen in the vicinity of where an offence had been committed, were seen with an implement that could be used to commit an offence or were seen with an item that could have been the victim's property. Individuals making allegations or providing information regarding the detainees were neither asked to take an oath nor sign their statements (normal procedures in Rwandese judicial investigations). Note taking of the proceedings by officials from the Public Prosecutor's Office was visibly minimal.

The *Entraide judiciaire* exercises led to the release of forty percent of the 3,466 detainees brought before their communities between October 2000 and October 2001 (see a summary of the results of *Entraide judiciaire* below). The exercises are on going.

Public Prosecution Offices	Detainees presented to their communities	Detainees released	Detainees returned to prison	New arrests
Kigali <sup>28</sup>	277	49	72	
Nyamata	366	179	187	
Butare	381	329	52	
Cyangugu	615	95	520	48
Kibuye	543	256	287	
Gisenyi	409	165	244	
Gitarama	435	135	300	1
Byumba	18	11	7	
Kibungo <sup>28</sup>	266	62	110	
Gikongoro	156	54	102	
Totals	3,466	1,355	1,881	49

Source: Liprodhor

Amnesty International appreciates the Rwandese criminal justice system's recognition that tens of thousands of detainees have no case file or a grossly inadequate one and is taking steps to ensure the judicial investigation of the allegations that led to these individual's arrest and detention. Amnesty International further appreciates the fact that the judicial system recognizes that individual's who were arbitrarily arrested, unlawfully detained and against whom there is no credible evidence must be released.

Amnesty International recognizes that these sessions were judicial inquiries and not trials. Nonetheless, Amnesty International is concerned with the way in which these judicial inquiries were organized and implemented. Poor sensitisation of participating Rwandese and the overt intimidation and haranguing of defendants, defence witnesses and the local population call into question the value of the information gained during these judicial inquiries and indeed the entire process. A particular concern is the government's apparent presumption of guilt unless proven innocent for individuals most of whom were arbitrarily arrested and unlawfully detained.

The presentation of these judicial inquiries to the Rwandese public as pre-gacaca tribunals undoubtedly gave many participating Rwandese an extremely negative picture of *gacaca*. This could dramatically impinge upon the open and free flow of information crucial to the success of the actual *gacaca* hearings.

<sup>28</sup> Numbers of detainees brought before the assembled community members in Kigali and Kibungo were not known and judicial inquiry into their cases went no further. This accounts for the discrepancy between the total and constituent figures for these two locations.

**VI(1)(c). Elections of *gacaca* personnel**

The first round of elections for cell level *gacaca* personnel took place on 4 October 2001. Adults throughout the country were asked to endorse or reject candidates proposed by their representatives in *nyumba kumi* (units of ten households). This was done in public meetings where citizens were given the opportunity to step forward and criticise candidates or register their support by lining up behind the candidate of their choice. Two days later, the judges chosen by each cell met to designate their representatives to the sector level and so on up to the district and province levels. Voter turnout was high at over 90 percent. Pressure was exerted both within the community and from government authorities to attend these meetings but not to actively participate within them. As with all Rwandese elections, there were no reports of malpractice. At the same time, they could not be considered totally free as local authorities vetted candidates. This vetting of candidates could affect the independence of the tribunals.

**VI(1)(d). The training of *gacaca* judges**

Between 4 February and 14 March 2002, 781 trainers (down from a proposed 3,000), consisting primarily of magistrates and final year law students, received adult education training. Following their training, they divided into small groups to train the selected *gacaca* judges in different parts of the country. They had six weeks beginning from 6 April 2002 to train the 254,152 magistrates. Each group, containing 70 to 90 *gacaca* judges, received a few days of instruction in the basic principles of law (particularly the organic law on *gacaca*), group management (how to organize and chair meetings), conflict resolution, judicial ethics, trauma (understanding and recognizing trauma and learning how to behave with trauma victims), human resources and equipment and financial management.

Amnesty International questions the adequacy of this training for the majority of *gacaca* judges who have no legal or human rights background. Amnesty International is concerned that this training will not enable them to competently handle the cases brought before them, given the complex nature and socio-political context of the crimes committed.

**VI(2). The inauguration of the *gacaca* tribunals**

The *Gacaca* Jurisdictions were inaugurated on 18 June 2002 but became operational in only the 73 cells of the 12 sectors chosen for a pilot project. The Rwandese government accepted the advice of numerous organizations, including Amnesty International, to begin *gacaca* with this limited pilot project. The results of these trials will be studied before *gacaca* tribunals open across the country. The 12 sectors, one in each of the country's 11 provinces and the city of Kigali, were chosen because they had a high number of residents who pleaded guilty to genocide offences and have been relatively more cooperative with the Department for *Gacaca* Jurisdictions than other sectors. On 25 November 2002, *gacaca* became operational in all of the cells in one sector of each of the country's 106 districts (approximately 650 jurisdictions).

Most of the nearly 11,000 *Gacaca* Jurisdictions will not, however begin their work until the beginning of 2003.

During the first phase of operations, *gacaca* organs at the cell level are asked to complete six tasks over a two to three month period. They need to fix the day of meeting, record the names and addresses of individuals who were living in the cell on 6 April 1994, record the names of genocide victims who died within the cell between 1 October 1990 and 31 December 1994, record the names of cell residents who were genocide victims in other cells, inventory property damage and record the names of suspected perpetrators and the charges against them. General Assemblies will meet weekly during the first phase, monthly thereafter.

The government anticipated that the 73 cell-level *Gacaca* Jurisdictions, which started operations in mid-June, would complete the first phase of their work by August. The first three months of these *gacaca* organs' operation produced a variety of results. Their work frequently took twice as long as anticipated and *gacaca* organs found themselves constantly behind schedule. Many cells found it difficult to obtain the necessary quorum for the General Assembly (100 cell residents<sup>29</sup>) and or the Bench (15 members). Failure to meet the quorum inevitably led to a week's delay in the jurisdiction's work. Hearings are supposed to begin by 8h30 but the excessive tardiness of organ members meant that work did not begin until 11h or later. Some delays were attributed to the agricultural season and religious festivities.<sup>30</sup> Several judges asked to be released from their duties, claiming that they were unaware of the scale of the work to be done and did not have sufficient time to devote to it. Sometimes, the preparatory work (the preparation of lists and inventory of property damage), to be ratified by the *gacaca* organs was not done beforehand by the *nyumba kumi*. Other times, the members of the *gacaca* benches had not perused the relevant documents beforehand and were not prepared for the session's work.

Sessions were also delayed by questions, sometimes verging on interrogations, which can be attributed to the insufficient sensitisation of *gacaca* participants and the complexity of the work they are supposed to perform. A number of lengthy interventions questioned the light sentences, the possibility of forgiveness and the government's demand for community involvement without their consultation. Though good questions, these issues should have been thoroughly dealt with well before this time and place. The complexity of the work is evidenced, on the one hand, by the fact that communities do not always know the identities of individuals who were killed within their cell, the exact location of where cell residents who had fled the cell were killed or whether or not individuals who died were genocide victims. This lack of knowledge is understandable given the scale and character of violence that occurred in mid-1994. Do individuals who both sheltered and killed Tutsi, for example, qualify as genocide victims if they were killed for sheltering Tutsi? In some cases, the lack of knowledge points to larger unresolved issues. Identifying where an individual died, for

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<sup>29</sup> The quorum for the General Assemblies of all other *Gacaca* Jurisdictions is two-thirds of the total number selected to constitute them.

<sup>30</sup> Rwandese harvest their sorghum and beans during the months of June and July. Religious rites of passage also tend to occur during this time, as food is plentiful.

example, may implicate individuals whom one might want to protect or whom one does not wish to make one's enemy. Many *gacaca* participants expressed dissatisfaction that RPF abuses during the genocide do not fall within the competence of the *Gacaca* Jurisdictions. This reason alone led to a significant drop in the attendance and participation of community members in the pilot project cells' *gacaca* sessions.

During the second phase of operation, cell benches will review the case files of community members forwarded to them by the Public Prosecutor. The case files of individuals on the Category 1 list will be included, even though these individuals will be tried in the Courts of First Instance. If necessary, the *gacaca* organs will complete the judicial investigations of the alleged offences of detainees. The relevant cell bench will then classify genocide suspects within the categories established in Rwanda's 1996 Organic Law governing the prosecution of genocide and crimes against humanity. After classification, benches will forward the case files to the appropriate *Gacaca* Jurisdiction. Cell benches try Category 4 offences, sector benches try Category 3 offences and district benches try Category 2 offences. Government officials predict that this phase will take two months to complete.

The 73 cells in the pilot project began this phase of their work in mid-September.

The third phase involves the trial of alleged genocide suspects.

## **VII. LEGAL ISSUES**

### **VII(1). *Gacaca* legislation**

The *gacaca* legislation deals with the establishment, organization and competence of the *Gacaca* Jurisdictions. *Gacaca* Jurisdictions are established in each of the country's administrative units: province, district, sector and cell.<sup>31</sup> Adults in each cell chose 24 adults of integrity, honesty and good conduct who are "free from the spirit of sectarianism and discrimination," 19 individuals who will constitute the cell *gacaca* bench and five individuals who will constitute the cell's delegates to the sector's general assembly. Bench members chose a five member coordinating committee. The sector, district and provincial general assemblies comprise at least 50 individuals delegated from the immediately lower *Gacaca* Jurisdiction. Each general assembly (above the cell general assembly) selects 24 individuals from their ranks: a 19-person bench and five delegates to the next highest *gacaca* jurisdiction. In total, there will be 10,662 tribunals and 254,152 *gacaca* judges.

The *gacaca* jurisdictions have the competence to try genocide suspects in Categories 2 through 4, as defined in the 1996 Organic Law on genocide. Category 1 suspects will be tried by ordinary jurisdictions unless a category 1 offender confesses before being placed on the

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<sup>31</sup> Rwanda is administratively divided into 11 provinces and the city of Kigali, 106 districts, 1,545 sectors and 9001 cells.

Category 1 list established by the General Prosecutor to the Supreme Court. *Gacaca* benches are empowered to summon individuals to appear and testify before the tribunal, to issue search warrants, to impose criminal sanctions and to confiscate property. Individuals who refuse to testify or omit relevant testimony are subject to a sentence of from one to three years (Article 32). Individuals who make false accusations are subject to the same penalties (Article 32). General assemblies are obliged to convene monthly, following the completion of the first phase, and benches weekly.

The *gacaca* legislation requires that all *gacaca* hearings are public except hearings in camera when requested and pronounced for reasons of public order or good morals (Article 24). Deliberation among the *gacaca* judges is secret (Article 24) but all judgments are public (Article 28) and trial details are fully documented (Article 67).

As with the 1996 Rwandese law on genocide, the Organic Law establishing the *gacaca* tribunals contains a confession and guilty-plea procedure. If the confession is verified, the accused receives a reduced sentence, with the reduction dependant on whether the defendant confesses before or after the beginning of her or his trial. Individuals who confess waive their right of appeal.

Sentencing is as follows:

Category	Guilty with no confession	Guilty plea with confession during trial	Guilty plea with confession before trial	Minors (14 to 18 years old) when offence committed
2	25 years to life imprisonment	12-15 year prison term	7 to 11 year prison term	Half of adult sentence
3	5 to 7 year prison term	3 -5 year prison term	1 to 3 year prison term	Half of adult sentence
4	Judgment and rulings will be passed over to the National Compensation Fund for Victims of the Genocide and Crimes Against Humanity that will award damages to victims of genocide.			

Individuals convicted for Category 2 and 3 offences have the option of serving half of their sentence in prison and half in community service projects located in their home areas (Articles 69 (c)(d) and 70 (b)(c)).<sup>32</sup> Committees at the sector, district, provincial and national levels, representing relevant Rwandese interest groups and governing authorities, will identify,

<sup>32</sup> The organization and implementation of these community service projects are detailed in presidential decree N°10/12/2001.

coordinate, implement and monitor these projects. Community service projects include the maintenance of public buildings and green spaces; the construction and repair of schools, hospitals, housing for the poor, roads and bridges; the installation and maintenance of equipment in public buildings and agricultural work aimed at conserving Rwanda's agricultural resources or feeding individuals who are dependent on state resources. The offender must consent to the project he or she will be working on. A contract is drawn up between the offender and the agency, which will be benefiting from the offender's services. Rwandese legislation regarding work conditions will be in force.

The *gacaca* legislation enables individuals to appeal the categorization of their offence(s) (Article 86) and their judgment (Article 83). Province-level *gacaca* tribunals hear Category 2 appeals and district-level *gacaca* tribunals hear Category 3 appeals. There is no appeal process for Category 4 offenders.

The organic law establishing the *gacaca* tribunals also stipulates that the damaged fixed by either the ordinary jurisdictions or *Gacaca* Jurisdictions be forwarded to the Compensation Fund for Victims of the Genocide and Crimes Against Humanity (Article 90).<sup>33</sup>

## **VII(2). Minimum fair trial standards**

The International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights both of which Rwanda has ratified contain specific and considerably detailed international legal obligations to guarantee minimum standards of fair trial. Amnesty International believes that any criminal justice system no matter its form would lose credibility without adherence to these minimum thresholds.<sup>34</sup> The fairness of an individual case therefore depends on the fulfilment of international minimum fair trial standards.

Specifically, the above mentioned treaties guarantee to everyone the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness.<sup>35</sup> The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. Thus, the authorities have a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits.

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<sup>33</sup> The compensation fund (*Fonds d'indemnisation*) although announced in the 1996 Organic Law is still not in existence. Proposed legislation regarding this fund is still under governmental discussion.

<sup>34</sup> Any body or institution which exercises judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner must inevitably observe minimum fair trial guarantees. See for example, Principle 5 of the Basic Principles on the Independence of the Judiciary to the effect that, tribunals or bodies that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

<sup>35</sup> See Article 14(2) of the ICCPR, and Article 7(1)(b) of the African Charter.

The fulfilment of this right also means that the prosecution has to prove an accused person's guilt. If there is reasonable doubt, the accused must not be found guilty. According to the Human Rights Committee, "[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt."<sup>36</sup>

International standards also guarantee equality in the context of the trial process in the sense of affirming the right to equal access to the courts and equal treatment by the courts. Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. Similarly, Article 14(1) states that all persons shall be equal before the courts and tribunals. Thus, the Human Rights Committee has stated that the guarantee of equality in Article 14(1) of the ICCPR requires that states "ensure the equal rights of men and women to all civil and political rights" protected by the ICCPR." The requirement of equal treatment by the courts in criminal cases demands that equality of arms must be observed throughout the trial process. It is essential that each party is afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party. In criminal trials, where the prosecution has all the machinery of the state behind it, the principle of equality of arms is an essential guarantee of the right to defend oneself. It ensures among others that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution; the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information; the right to legal counsel; the right to call and examine witnesses and the right to be present at the trial.

Another fundamental principle and prerequisite of a fair trial is that the tribunal or body charged with the responsibility of making decisions in a case must not only be established by law, but must also be competent, independent and impartial. This institutional guarantee of a fair trial requires that political institutions will not make decisions that affect the accused in criminal proceedings. The primary consideration is that justice is not only done, it also must be seen to be done.

Thus, Article 14(1) of the ICCPR provides that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The Human Rights Committee has stated that this right "is an absolute right that may suffer no exception".<sup>37</sup> In fact, the right may not be suspended even in states of emergency under the African Charter on Human and Peoples' Rights.

The guarantee of fair trial also requires the right to a public hearing which means that not only the parties in the case, but also the general public, have the right to be present. Indeed, the public has a right to know how justice is administered, and what decisions the judicial system

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<sup>36</sup> Human Rights Committee General Comment 13, para. 7.

<sup>37</sup> *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20.



or any similar body reaches. However, according to the ICCPR, the press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The ICCPR also provides that any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. The Human Rights Committee has stated that apart from these exceptional circumstances, a hearing must be open to the public in general, including members of the press, and must not, be limited only to a particular category of persons.<sup>38</sup>

Article 14(3)(g) of the ICCPR also provides that no one charged with a criminal offence may be compelled to testify against him or herself or to confess guilt. This prohibition is in line with the presumption of innocence described above as well as the prohibition against torture and other cruel, inhuman or degrading treatment. Thus, the authorities are prohibited from engaging in any form of coercion, whether direct or indirect, physical or psychological. Also implicit in the enjoyment of presumption of innocence is the right of an accused to remain silent during police questioning and at trial.

The competent authorities, including judges, must therefore promptly and impartially examine any allegations that statements have been extracted through torture or other cruel, inhuman or degrading treatment. Thus, Article 69(7) of the ICC Statute provides that evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: a) The violation casts substantial doubt on the reliability of the evidence; or b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. Similarly, the Human Rights Committee has stated that “[c]onfessions obtained under duress should be systematically excluded from judicial proceedings”.<sup>39</sup>

Amnesty International believes that whenever there is an allegation that a statement was elicited as a result of torture, cruel, inhuman or degrading treatment or duress, a separate hearing should be held *before* such evidence is admitted in the trial. At such a hearing, evidence should be taken on whether the statement in question was made voluntarily. If it is determined that the statement was not made voluntarily, the statement must be excluded from evidence in all proceedings except proceedings brought against those accused of coercing the statement.

Another requirement of fair trial is that no one may be tried or punished again in the same jurisdiction for a criminal offence if they have been finally convicted or acquitted of that

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<sup>38</sup> Human Rights Committee General Comment 13, para.6.

<sup>39</sup> Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75 at para.26 (5 May 1997).

offence. Thus, Article 14(7) of the ICCPR states that, “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” This prohibition against double jeopardy prevents a person from being tried or punished more than once in the same jurisdiction for the same crime.

However, people who have already been tried in national courts for acts which constitute serious violations of humanitarian law may be tried again before the International Tribunal for Rwanda, if: the act for which the person was tried before the national court was characterized as an ordinary crime (as opposed to a serious violation of humanitarian law); or the proceedings in the national court were not independent or impartial; or the proceedings in the national court were designed to shield the accused from international criminal responsibility; or if the case before the national court was not diligently prosecuted.

In addition, both Article 14(3)(c) of the ICCPR and Article 7(1)(d) of the African Charter require that criminal proceedings be started and completed within a reasonable time. This requirement means that, balanced against the right of the accused to adequate time and facilities to prepare the defence the proceedings must start and final judgment must be rendered after all appeals, without undue delay. This right thus obliges the authorities to ensure that all proceedings, from pre-trial stages to final appeal, are completed and judgments issued within a reasonable time. For anyone charged with a criminal offence and held in pre-trial detention, the obligation on the state to expedite trials is even more pressing.

The guarantee of prompt trial in criminal proceedings is tied to the right to liberty, the presumption of innocence and the right to defend oneself. Thus, the Human Rights Committee has stated that “[t]his guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place ‘without undue delay’. To make this right effective, a procedure must be available in order to ensure that the trial will proceed ‘without undue delay’, both in first instance and on appeal”.<sup>40</sup>

Similarly, the right to have a conviction and sentence reviewed by a higher tribunal is generally applicable to everyone convicted of any criminal offence, regardless of the seriousness of the offence. The Human Rights Committee has stated that, “the guarantee is not confined to only the most serious offences”.<sup>41</sup> In the same vein, the African Commission has held that the right to appeal was violated by a decree specifically prohibiting appeals against the decisions of special tribunals created by the decree. The tribunal had jurisdiction to sentence people to death. Sentences imposed by the tribunal were subject to confirmation or disallowance by the Governor, and no appeal was allowed against the Governor's decisions.<sup>42</sup>

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<sup>40</sup> Human Rights Committee General Comment 13, para. 10.

<sup>41</sup> Human Rights Committee General Comment 13, para.17.

<sup>42</sup> *Constitutional Rights Project (in respect of Wahab Akamu, G. Adeg and others) v. Nigeria*, (60/91), 8<sup>th</sup> Annual Activity Report of the African Commission on Human and People's Rights, 1994-1995.

It is also essential that the state adopt measures to protect the personal safety of witnesses and experts, without affecting the guarantees of due process. The rights of victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial. In balancing these rights, measures taken by courts must include providing victims and witnesses with information and assistance throughout the proceedings, closing all or part of the proceedings to the public “in the interests of justice” and allowing the presentation of evidence by electronic or other special means. Amnesty International believes that where the interests of the life, liberty or security of witnesses may be at stake, states must organize criminal proceedings so as to ensure that these interests are not unjustifiably imperilled.

**VII(2)(a). Minimum fair trial standards and the *Gacaca* Jurisdictions**

The Organic Law establishing the *Gacaca* Jurisdiction makes limited reference to fair trial standards legally binding on the Rwandese state. This contradicts existent Rwandese legislation for ordinary jurisdictions that addresses these standards even if state practice sometimes contravenes them. Subsequently, Amnesty International has a number of human rights concerns regarding the constitution of the *Gacaca* Jurisdictions and the fairness of their proceedings.

The fact that the *Gacaca* Jurisdictions are a hierarchical network of community-based judicial hearings makes them even more dependent on the human rights environment in which they are located than the ordinary jurisdictions, which are based on an established body of law and legal procedure. Amnesty International, therefore, has further concerns regarding the overall human rights situation in Rwanda.

The Rwandese government has repeatedly violated an individual’s right to be presumed innocent until guilt is proven in a court of law whose proceedings meet minimum standards of fair trial. Tens of thousands of Rwandese have been arrested and detained for prolonged periods of time with little or no judicial investigation of the accusations leading to their arrest and detention or trial in a court of law. Political apathy and obstructionism ensured the failure of the various bodies that were created to resolve the issue of prolonged detention without trial. Security forces have repeatedly undermined these programs aimed at releasing vulnerable detainees or detainees whose accusation(s) were unsubstantiated. The government, while verbally denouncing the “syndicates of denunciation,” which enable individuals to resolve personal conflicts with the political charge of *génocidaire*, has taken relatively little action against them. The fact that individuals could be arrested and unlawfully detained for years on unsubstantiated, uninvestigated allegation(s) continues to foster them. The Rwandese government further chose to abrogate legal safeguards in the Rwandese CCP that protect individuals from arbitrary arrest and unlawful detention rather than address the existent problems. The implementation of *Entraide judiciaire* also provides numerous examples of the government’s presumption of guilt for the vast majority of detainees as does continued government interference with the judiciary. When the courts acquit defendants,

they are sometimes not released or are almost immediately re-arrested on the basis of “new” facts.

The government’s claims that the aftermath of genocide and armed conflict necessitated the arrest and detention of individuals in the manner it did is only partially justifiable and only in the immediate aftermath of the genocide and armed conflict. The presumption of guilt on the part of the Rwandese authorities is as much the cause of prolonged detention without trial of tens of thousands of Rwandese as their repeated claim that it is due to the government’s lack of resources. Likewise, the lack of fair trial guarantees in the legislation establishing the *gacaca* tribunals refers as much to the government’s presumption of detainees’ guilt as it does to the lack of resources to provide a fair trial. Government action, or the lack thereof, with respect to the presumption of innocence of genocide suspects until they are convicted in a court of law that meets prescribed standards of fairness, has established a negative precedent for the effective operation of the *Gacaca* Jurisdictions. Government precedent obviously affects the public mindset regarding guilt and innocence and the character of their participation in the *gacaca* hearings.

There are few legislative safeguards guaranteeing an “equality of arms” between parties in cases before *gacaca* benches. Government authorities insist that the identity and structure of *gacaca* as a community forum ensures a procedurally equal position for both plaintiff and defendant. At the same time, they recognize that various pressure groups have evidenced their capacity to organize, mobilize and intervene to ensure the conviction of detainees. These groups’ capacity to ensure that their voice is heard played a preponderant role in some of the *Entraide judiciaire* exercises. Their intervention could similarly play a determinate role in *gacaca* hearings. The Rwandese government’s response to this issue is that detainees are organizing in like manner. This however does not address the issue. *Gacaca* tribunals were established as community fora. Their focus is on the communal investigation of genocide offences that were committed within their communities. Though they are legally established judicial bodies, they were not created to duplicate courtroom procedure wherein both parties mobilize all the resources at their disposal.

Despite government disavowals, the prosecution enjoys a number of other advantages. A majority of cases will be judged on the basis of case-files prepared and passed on to the *gacaca* benches by the Public Prosecutor’s Offices. Lay judges, with virtually no legal training, may be unwilling to challenge the information contained in them. Likewise, it will be difficult for defendants, without counsel, to effectively counter cases prepared by state authorities with infinitely more resources at their disposal. The fact that these individuals were arrested and detained for years by the government may further dispose *gacaca* participants to consider the pre-trial detainees as guilty regardless of the merits of their cases or the fact that in most cases detainees were arbitrarily arrested and unlawfully detained.

The fact that *gacaca* sessions are located in local communities and managed by community members can further advantage the prosecution. Community power wielders, or those close to them, who have engineered the arrest and detention of individuals for economic gain or

personal enmity can similarly use their power to influence who speaks and what they say during the *gacaca* hearings. Community members may be averse to going against the desires of “big men” at the local level as such actions could entail physical and economic risks.

There is no clear, definitive statement in the *gacaca* legislation that states when defendants are informed of the charges and case against them. Defendants require adequate time and facilities to prepare their defence, particularly as they are responsible for it. There is also no provision enabling the *gacaca* benches to adjourn proceedings if defendants have not been given sufficient time or the materials to prepare their case. Defendants who have pleaded guilty to genocide offence(s) are present when the cell *gacaca* organs categorize their offence(s). Detainees will be informed of the charges against them and the category within which they fall following the seventh meeting of the *gacaca* organs when the courts categorize each of the accused according to Organic Law N° 08/96 of 30 August 1996.

As with the presumption of innocence, the climate established by the Rwandese government can have a negative impact on the free and open debate, which the government insists ensures an equality of arms. The political sphere in contemporary Rwanda is both closed and exclusionary. The government is extremely intolerant of dissenters or those dissatisfied with its performance, too readily accusing such individuals of genocide or treason. Critics of the government, including members of the National Assembly, prominent members of civil society and independent journalists, have been intimidated, detained and ill treated or forced into exile. Some have “disappeared” or been killed. Given this environment, an individual’s willingness to testify for defendants who have been arrested and detained by the government is questionable. Some Rwandese fear that they would be arrested if they provide evidence in support of the defendant’s innocence or if they demonstrate too much knowledge or information about the genocide. Genocide survivors are also afraid that their potential testimony puts their lives in danger. Information may not be forthcoming at the community level, given the limited enjoyment of freedom of expression and association or toleration of dissent at the national one. The intensified polarization of Rwandese communities and the increasing politicization of local community disputes into charges of genocide or treason raises further concerns regarding both the safety of *gacaca* participants as well as the overall fairness of *gacaca* proceedings. Both the *Entraide judiciaire* exercises and the initial *gacaca* sessions provide numerous cases documenting this phenomenon.

Rwandese question the fairness of the judicial system that exists in their country. The justice meted out to Rwandese has not adhered to internationally recognized fair trial standards and it has not been non-discriminatory. The standard of trials in the ordinary jurisdictions, though improved over the years, continue to deviate from minimum fair trial standards. Government interference in the judicial system affects not only who is tried but also sometimes trial outcomes. Amnesty International has received several reports of individuals who were persecuted by the Rwandese government for refusing to testify against genocide suspects either because they had not witnessed the crime(s) committed or because they felt the accusation untrue. Some of these individuals were told that as “Tutsi,” they knew they were targeted for genocide. Refusing to give false testimony was effectively regarded as treason.

One wonders how many individuals succumbed to government pressure. Given the lack of confidence in the ordinary jurisdictions, popular confidence in the *gacaca* jurisdictions is questionable. Since the *gacaca* tribunals are completely dependent upon community participation, in ways that the ordinary jurisdictions are not, this lack of confidence will inevitably affect the fairness of their proceedings.

Some Rwandese refuse to accept responsibility for the offence(s) they are alleged to have committed, because, they claim, their country was at war, they could not have behaved differently and survived, or because of the one-sided nature of the current Rwandese judicial system. There are many other Rwandese who feel that their designation as “Hutu” has led to their persecution during eight years of RPF rule. As “Hutu,” they have faced harassment by Rwandese security forces, been arbitrarily arrested and unlawfully detained. They have been removed from or denied positions of power or authority. Opposition to their marginal social status and lack of power has led to the accusation of genocide involvement, arrest and detention. Similarly, opposition to the take over of their land or property has led to arrest and detention or forced exile. Themselves victims of innumerable human rights violations, they watch as the specialized genocide chambers, and now the *gacaca* tribunals, pass sentence on genocide offences committed under the former Hutu-led government but fail to examine the crimes committed by the RPF during the war or since coming to power.<sup>43</sup> The potential refusal of these individuals to testify, the so-called conspiracy of silence, also works against an equality of arms.

*Gacaca* courts are a legally constituted, independent body exercising judicial functions. The intervention of public prosecutors is permitted in *gacaca* legislation only when the case for the prosecution is not sufficiently established or witnesses for the prosecution do not demonstrate their case. Judicial advisors (*Conseillers juridiques*) appointed by the *Gacaca* Jurisdictions Department of the Supreme Court can assist the *Gacaca* Jurisdictions when necessary (Article 29). The *gacaca* legislation does not clearly define the nature of their intervention. The government contends that these judicial advisors will handle any malpractice occurring during the *gacaca* hearings. The position and legal acumen of these judicial advisors could enable them to exert considerable influence on lay *gacaca* benches despite their limited number with respect to the number of *Gacaca* Jurisdictions. *Gacaca* judges might find it similarly difficult to render judgments against government-prepared cases given their lack of legal training.

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<sup>43</sup> The Rwandese government continues to demarcate between human rights abuses committed under the auspices of the former government and those committed under its own authority. The Rwandese government drafted legislation establishing both the Specialized Chambers within the ordinary jurisdictions (Organic Law N° 08/96) and the legislation establishing the *Gacaca* Jurisdictions (Organic Law N° 40/2000). This legislation ensures accountability exclusively for those individuals who committed the crime of genocide and crimes against humanity under the auspices of the former government. Neither of these laws has been used to try crimes against humanity committed by the current government’s forces during the genocide and armed conflict.

Several reported events, occurring during the first phase of the *gacaca* sessions, call into question their independence. The Butare Public Prosecutor, for example, “assisted” the sixth *gacaca* session of Busoro cell (Butare Province) where community members prepared their list of genocide suspects and the charges against them. He also assisted in the transportation of a witness for the prosecution. The Public Prosecutor’s presence and assistance violates the *gacaca* tribunal’s independence and contravenes the legislation establishing them. His participation was unexpected, considering his personal assurance to Amnesty International delegates that his office would neither intervene nor interject in *gacaca* proceedings. When community members of Gihanga cell (city of Kigali) prepared their lists of genocide victims, there were questions regarding the listing of Tutsi who apparently survived the genocide but were found dead when cell residents returned to the cell after fleeing the arrival of the RPF. A *gacaca* magistrate left the Bench, joined the General Assembly and said that she had remained in Busoro and could confirm that RPF soldiers had killed the individuals in question. When the issue came up again at the next *gacaca* session, the same judge wished to speak again from the floor but was censured by the *gacaca* bench.

The *gacaca* legislation states that *gacaca* judges are excluded from cases wherein they are friends or an enemy of the defendant, the defendant’s guardian or are related to the defendant (Article 16). The legislation further stipulates a number of criteria that can lead to the replacement of any member of a *gacaca* organ upon the demand of other members of that organ (Article 12). Some of these criteria are undefined and open to interpretation and abuse by *gacaca* organ members, e.g. the pursuit of “cultural divisionism.” The woman magistrate, cited above, could well fall victim to the accusation of pursuing cultural divisionism and be removed from the bench.

Community members -- *gacaca* judges, general assembly members and those testifying -- will be subject to considerable political, social, economic and psychological pressures emanating from within polarized communities torn by the genocide and all that has preceded it. Collusion between members of *gacaca* organs could secure the removal of members they dislike or who threaten their designs and negatively affect the availability and testimony of witnesses. The impartiality of appointed *Gacaca* Jurisdiction members cannot be assured in a socio-political environment characterized by the intense politicisation of personal disputes and dissatisfaction or dissent with the current government, transforming both into a vicious cycle of accusations and counter-accusations of genocide or treason.

The competence of the *gacaca* judges is questionable. Most of them have no legal or human rights background. The highly abbreviated training they have received is grossly inadequate to the task at hand, given the range, character and complexity of crimes committed during the genocide. Their concomitant lack of legal objectivity, moreover, could make it more difficult for them to resist governmental and local interference in *gacaca* proceedings or their own subjective experience of what occurred.

The transformation of *gacaca* into the current state-mandated *Gacaca* Jurisdictions radically alters the composition of *inyangamugayo*. This bears on the intertwined issues of the *gacaca*

judges' independence, impartiality and competence. *Inyangamugayo* were traditionally community elders whose status, experience and historical knowledge of the community gave them the independence, impartiality and competence required to arbitrate local conflicts. Contemporary *gacaca* judicial arbiters, "*les intègres*" (honest or upright individuals), represent the full spectrum within Rwandese communities. While this is advantageous and commendable, the *gacaca* judges do not occupy the same community standing as these *inyangamugayo*, which also calls into question their capacity to insure fair trial proceedings.

Amnesty International appreciates the legislation's provisions regarding the mandated public dimension of *gacaca* hearings and judgments. It is vitally important that *gacaca* sessions and hearings remain completely open to not only community members but also all interested parties, particularly human rights monitors.

Amnesty International recognizes the value of the confession and guilty-plea procedure established in the organic law that set up the special genocide chambers in the ordinary jurisdictions and maintained in the law establishing the *Gacaca* Jurisdictions. At the same time, Amnesty International has received reports of genocide confessions obtained by torture or under duress. For example, Jean Kayiranga, from Sheli sector, Runda district, Gitarama province, was arrested in February 1995 accused of killing Kalisa, a Tutsi, during the genocide. During his interrogation by the IPJ in Runda, he was reportedly severely beaten into confessing the killing. At his trial, which began in Gitarama on 24 July 2001, he retracted his confession, claiming that it was extracted under torture. Several eyewitnesses testified that Jean Kayiranga was not present at the killing. On 11 February 2002, the court acquitted him. Inhumane treatment, the lack of food, sleep or communication with others including those in the outside world have also led to confessions. Detention in Rwanda's overcrowded prisons, in and of itself, may have led individuals to confess to crimes they did not commit. Amnesty International delegates have talked to several detainees who claim to have confessed to the crime of genocide simply because of their prolonged detention and limited prospects of having their cases tried in a court of law. Since they may have already served most of the sentence they would receive after confessing, they face almost immediate release.

The *gacaca* legislation does not forbid the retrial of individuals who have already been tried and acquitted by ordinary jurisdictions. Moreover, *gacaca* counsellors assisting the first phase of the *gacaca* sessions have stated that individuals acquitted by the ordinary jurisdictions can be placed on the lists of genocide suspects these sessions are preparing and retried if new facts emerge. The prohibition against double jeopardy prevents a person from being tried or punished more than once in the same jurisdiction for the same crime. The prohibition applies after a final judgment of conviction or acquittal according to the law and procedure of the state. However, subsequent trials for different offences or in different jurisdictions do not violate the prohibition against double jeopardy. Similarly, the prohibition against double jeopardy does not prevent the reopening of cases where there is been a miscarriage of justice. According to Article 14(7) of the International Covenant on Civil and Political Rights "No one shall be liable to be tried or punished again for an offence for which



he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Thus, the Human Rights Committee has stated that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given state.<sup>44</sup>

One of the promises of the *Gacaca* Jurisdictions is that they will expedite the trial of the tens of thousands of detainees awaiting trial, some of them for as long as eight years. The number of competent jurisdictions will dramatically increase from twelve to 10,662. The Rwandese government further expects that the fact of all detainees being tried within and by their community will augment the number of confessions. The *Gacaca* Jurisdictions will also facilitate the investigation and completion of detainees' case files, further accelerating the trials of detainees and those accused during *gacaca* proceedings. The judicial investigation of cases by public prosecution offices has been one of the principle bottlenecks and delays behind the lengthy pre-trial detentions.

Amnesty International is concerned that appeal to a higher *Gacaca* Jurisdiction may not adequately address an individual's rights to have his or her conviction and sentence reviewed. The fact that Category 2 offenders can receive sentences of up to life imprisonment in province-level *Gacaca* Jurisdictions heightens its concern. Essentially, all human rights organizations and numerous Rwandese government authorities have voiced the opinion that human rights concerns with the *Gacaca* Jurisdictions rise almost exponentially with the administrative move upwards from cell-level *Gacaca* Jurisdictions to provincial ones. Cell-level *Gacaca* Jurisdictions operate at an administrative level small enough to enable community debate to take place. Ministry of Justice officials repeatedly told Amnesty International delegates that truth, if it can or will be told, is known at this level. The same cannot be said for province-level *Gacaca* Jurisdictions where the conceptualization of *gacaca* as a community forum breaks down. There is also more room for intervention both from the state and various pressure groups. Since all judges have the same amount of legal training, judges at the province-level would in most cases have neither the legal background nor legal knowledge to compensate for the loss of community discussion.

Reasons have already been elucidated that document Amnesty International's concerns for the safety of all those involved in the *gacaca* sessions and hearings: the poor human rights record of the Rwandese government, the intense politicisation of personal issues and the existent polarization within Rwandese communities. It is within this context that Rwandese are asked to publicly denounce or defend genocide suspects within their communities. The fact that these public revelations will occur almost simultaneously in over 10,000 locations presents the Rwandese authorities with a seeming insoluble security problem, one in which government authorities frankly admit they have no answer.

### **VII(3). Reparations**

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<sup>44</sup> See 204/1986, 2 Sel. Dec. 67

The issue of reparation to victims has been addressed in several United Nations human rights instruments, including the Universal Declaration of Human Rights, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the revised draft Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law. The revised draft Basic Principles and Guidelines states that "reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."

The Convention against Torture also sets out in detail the right to reparation for survivors of torture.

The actual trial of an alleged perpetrator is an important form of reparation but it is not sufficient. Many victims cannot overstate the importance of holding the person responsible for the crime to account, for a court to find that what happened to them was wrong and to allow them to tell their story. Compensation is also an element of justice for the victims of gross human rights violations such as those that occurred in Rwanda and for their survivors. Compensation constitutes an official societal acknowledgment of their suffering, in addition to helping victims rebuild their lives.

The Rwandese government has accepted its obligation under international law to provide compensation and rehabilitation to the victims. In its legislation, it further holds individual perpetrators liable for paying reparations. The *Gacaca* Jurisdictions promises to evaluate individual claims through their official verification of the facts of each case and through a detailed official historical record of the abuses. Legislation must now be passed to ensure that families of victims and genocide survivors are compensated. Enforcing the obligation to pay compensation is a further deterrent to future violations.

Finally, the Human Rights Committee has stated, both in its general comments on article 6 of the ICCPR and in a number of decisions, that state parties are required to investigate all human rights violations, particularly those affecting the physical integrity of the victim; to purge and try those responsible; to pay adequate compensation to the victims or their dependants; and to prevent the recurrence of such violations.

## **VIII. CONCLUSION**

Few nations have been faced with the situation confronting the new Rwandese government in 1994 following the genocide and armed conflict. The gravity and magnitude of human rights violations, the level of civilian participation in them, the massive dislocation of Rwandese and the nearly complete destruction of the administrative infrastructure are virtually unparalleled in human history. The genocide and armed conflict, moreover, followed a 35-year history of human rights violations, the entrenchment of a culture of impunity and the polarization of the Rwandese nation.

The new Rwandese government recognized that peace and national reconciliation necessitated the resolution of the conditions that had led to the genocide and armed conflict. It had to end the prevailing culture of impunity and hold individuals accountable for the crime of genocide and crimes against humanity. The government's insistence on a program of maximal accountability received the moral backing and financial support of the international community and human rights organizations.

The magnitude, character and complexity of the crimes committed during the Rwandese genocide and armed conflict, combined with the necessary reconstruction of the Rwandese judiciary and limited human and material resources despite the commitment of considerable resources, both internal and external, to the incarceration and trial of genocide suspects, quickly led to a judicial impasse. The Rwandese government has had limited success in resolving this judicial impasse. The government has too readily used this impasse to derogate international human rights standards contained within its own codes. It has also argued that the impasse itself and the paucity of resources to resolve it forced it to abandon these standards in the arrest, detention and trial of genocide suspects. The Rwandese government has insisted on following through on its program of maximal accountability for the crime of genocide and crimes against humanity even though it could not ensure minimum international human rights standards in either its prisons or its courts.

Eight years after the genocide, 112,000 detainees languish in the state's severely overcrowded detention facilities. Approximately 103,000 of these detainees are awaiting trial by the special genocide chambers in the ordinary jurisdictions, which try an average 1,500 individuals a year. Donor fatigue has set in. Justice and national reconciliation require a resolution to this judicial impasse. This resolution, moreover, requires that minimum international human rights standards are addressed. The establishment of the *gacaca* tribunals promises to expedite both the judicial investigation and trial of tens of thousands of detainees but justice will not result if minimum international human rights standards are ignored.

From the beginning, the Rwandese government's decision to transform Rwanda's customary form of conflict resolution, *gacaca*, into a network of community-based popular tribunals raised human rights concerns regarding their fairness. The Rwandese government, in the legislation establishing the *Gacaca* Jurisdictions and related programs, addressed some human rights concerns but not all. It has consistently argued that it is unrealistic and counterproductive to impose fair trial standards on the *gacaca* tribunals. The government's argument is largely based on its lack of available resources to ensure fair trial standards in the *Gacaca* Jurisdictions. The government turned to *gacaca*, in part, because it lacked the requisite resources to expand the capacity of the ordinary jurisdictions to the extent where they could try the more than 100,000 genocide suspects in detention.

The Rwandese government also insists that *gacaca* tribunals address the spirit if not the letter of legal safeguards contained in international human rights treaties to which it is signatory. *Gacaca* is said to address the spirit of human rights standards because it is based on local,

open and public discussions between community members on the genocide offences committed in their communities and the evidence linking suspected perpetrators to these crimes.

The Rwandese government further argues that neither the ICTR nor the special genocide chambers within the country's ordinary jurisdictions are adequately addressing key goals of community involvement in establishing the truth, the creation of a public record of the genocide and the promotion of national reconciliation. The resurrection and transformation of *gacaca* provided a potentially better vehicle for achieving these ends. The government anticipated that the public's familiarity with *gacaca* would foster their interest and participation in the state-mandated *Gacaca* Jurisdictions.

Most *gacaca* analysts have commended the potential of *gacaca* to reconcile Rwandese and restore the country's social fabric, while remaining critical of the ways it compromises human rights standards. *Gacaca* sessions and hearings enable community members to assemble and together assess the loss of life and material damage suffered by their community. *Gacaca* involves community members in the adjudication process. They will listen to and provide testimony regarding the genocide offences that occurred in their community and their alleged perpetrators. Members of the community will render judgment. Those found guilty will be able to commute half of their sentences through participation in community service projects that will improve the lives of their victims and the community as a whole. The public nature of these truth-telling sessions across the country could establish broader patterns, identify deeper lessons and recommend broader reforms for the nation as a whole.

The *Gacaca* Jurisdictions are, however, dependent on the human rights environment in which they operate. The government's reliance on community involvement in the trial of suspected genocide offenders necessitates their full and honest participation. This is not likely to occur if the political environment is closed and intolerant of public dissent or dissatisfaction with the government or its programs. The government has to foster an open and tolerant political climate wherein the freedom of expression and association are respected. If individual Rwandese are to openly discuss highly political events, they must be confident that they will not be intimidated, harassed, perhaps arrested and detained for what they say. Amnesty International recognizes that in a post-conflict, post-genocide environment the Rwandese government would be cautious about ensuring the freedoms of expression and association. Amnesty International, nonetheless, maintains that public confidence and participation in the *gacaca* hearings requires an open and tolerant political climate.

The Rwandese public must also have complete confidence in the government and the fairness of the judicial system it has established. Public confidence can only be achieved if the Rwandese government respects international human rights standards in a non-discriminatory manner. The public must also be assured that all human rights violations, including those committed by government agents, are investigated and tried in a court of law that meets international fair trial standards. The Rwandese government has to further ensure that its own human rights violations during the genocide and armed conflict are investigated and tried.

The Rwandese government can argue, as it does, that its crimes do not equal the magnitude and scale of those committed by the former government. Nonetheless, all human rights violations, regardless of who committed them or whether or not they constitute the crime of genocide have to be investigated and tried in a court of law.

## **IX. RECOMMENDATIONS**

Rwandese authorities repeatedly stressed to Amnesty International delegates their willingness to change the legislation and legal procedures relating to *gacaca*. Below is a series of recommendations aimed at ensuring the fairness of *gacaca* hearings and improving the human rights environment prevailing in Rwanda. Most of these recommendations are inter-related as are the human rights concerns they address. Amnesty International has already made some of the following recommendations; others are quite new. Some of the recommendations focus on amending existing *gacaca* legislation or drafting new legislation. Other recommendations focus on the just and fair operation of *gacaca* tribunals and the establishment of an effective monitoring system that will quickly and efficaciously address human rights concerns that may arise. A final set of recommendations centers on the human rights environment in which the *gacaca* hearings will take place. The *Gacaca* Jurisdictions cannot function in an environment wherein human rights abuses are endemic. The Rwandese people must be convinced that justice prevails in Rwanda if they are to participate in the *gacaca* hearings in an open and honest manner. Most of the following recommendations are addressed to the Rwandese government; others are addressed to Rwandese civil society and the international community.

### **IX(1). Recommendations to the Rwandese government**

#### **Legal safeguards**

Amnesty International urges the Rwandese government to amend Organic Law N°40/2000 of 26 January 2001 to ensure that international minimum fair trial standards contained in the ICCPR and the African Charter on Human and Peoples' Rights are addressed in the *gacaca* legislation. The Rwandese government should also enact legislation establishing a Reparations Fund for genocide survivors. Relevant legislation regarding *gacaca* needs to ensure that:

- defendants appearing before the *gacaca* tribunals are held in conditions of detention, prior to and during their hearings, that comply with international minimum standards. *Cachots*, where most detainees will be held during their hearings, should be brought under the Ministry of Interior, which should be allocated a specific budget to ensure the acceptable upkeep of detainees in line with the UN Standard Minimum Rules for the Treatment of Prisoners.
- defendants receive immediate information of the reasons for arrest and detention and prompt information of the charges against him or her. Ideally, all defendants

should be present when *gacaca* sessions categorize their alleged offences according to provisions contained in Organic Law N° 08/96 of 30 August 1996;

- defendants and their lawyers have access to appropriate information, including documents, information and other evidence necessary to the preparation of their case;
- defendants and their lawyers should be given adequate time and facilities to prepare their defence at all stages of the proceedings. This is essential given the complexity of genocide cases and the fact that defendants will not have access to defence counsel;
- trials should be postponed if defendants have not received sufficient time or adequate materials to prepare their defence. While further delays would be regrettable, the ability of the defendant to prepare an adequate defence would outweigh the adverse effects of any delay. Every precaution must be taken to ensure that there are no miscarriages of justice;
- defendants have the opportunity to call and examine witnesses on their behalf and to examine witnesses against them;
- judicial advisors possess a clear mandate regarding their intervention in *gacaca* proceedings;
- defendants, in Categories 2 and 3, are afforded the right to appeal their conviction and sentence to a Court of Appeal;
- the families of genocide victims and those suffering bodily harm or property loss receive adequate compensation.

### **Ensuring fairness in *gacaca* proceedings**

Amnesty International urges the Rwandese Government to ensure that the conduct of *gacaca* trials meets international standards, as set out in international human rights standards including the ICCPR and the African Charter, to which Rwanda is party. In particular, it should ensure that:

- the presumption of innocence is maintained until the guilt of the of defendants has been proved beyond all reasonable doubt according to law;
- each party in a *gacaca* hearing is afforded a reasonable opportunity to present its case under conditions that do not place it at a disadvantage;
- *gacaca* tribunals operate in an independent, impartial and competent manner;

- *gacaca* judges receive additional training as needed;
- all *gacaca* sessions and hearings are open to the public, including human rights monitors, and operate in a transparent manner;
- all members of the *gacaca* organs, witnesses and defendants receive adequate protection and that any allegations of intimidation are promptly investigated;
- the *gacaca* organs have the necessary material supplies to enable their efficacious operation;
- trial proceedings are written up, per the legislation establishing the *gacaca* tribunals, publicly available and suitably stored.

### **Monitoring**

Amnesty International recommends that an effective, independent and transparent monitoring program be established to ensure that *gacaca* fulfils its potential to provide justice, a true record of what occurred during the genocide and national reconciliation. The Rwandese government needs to ensure that:

- the National Human Rights Commission has the independence and necessary resources to monitor the implementation of *gacaca*;
- NGOs, particularly independent organizations with training or background in international human rights and legal standards, obtain the necessary authorizations to monitor the *Gacaca* Jurisdictions;
- the monitoring body is given formal responsibility to report its findings on a regular and timely basis. Such reports should be made public. The reports should include full accounts of the conduct of *gacaca* tribunals and their standards of fairness, as well as details of any actions or events that impinge on the fairness of the tribunals and the human rights of those participating. The reports should also include recommendations to redress any observed shortcomings in the *gacaca* process;
- there are on-going sensitization campaigns, including media coverage, of the fair trial standards prevailing during *gacaca* proceedings. Participants in the *gacaca* sessions and hearings need to be fully aware of their rights and the rights of all other participants, including defendants, so that they can play a valuable role in the monitoring of *gacaca* proceedings;
- there is a prompt, independent and thorough investigation of any allegations of misconduct during the *gacaca* sessions and hearings. The findings of the

investigation and the specific recommendations and resulting action taken should be made public.

### **Entrenching a human rights culture in Rwanda**

Amnesty International firmly believes that the fairness of *gacaca* hearings is dependent upon the broader human rights context in which the trials will take place. The human rights record of the Rwandese government is characterized by the denial of freedom of expression and association, arbitrary arrests, unlawful detentions and other violations of human rights. The Rwandese government's disinclination to curb ongoing human rights violations, or investigate past abuses by state agents undermines the credibility of its pronouncements on the need for accountability for genocide offences. The Rwandese government needs to:

- ensure that all Rwandese can express their non-violent opinions without fear of human rights violations;
- ensure that the presumption of innocence is maintained until the guilt of an individual has been proved beyond reasonable doubt according to law;
- scrupulously observe legal safeguards contained within its Code of Criminal Procedure (CCP). This means an end to arbitrary arrests. Competent authorities that possess the legal power to arrest must carry out arrests. Individuals who are arrested must be informed at the time of their arrest, the reasons for their arrest and promptly informed of the charges against them (ICCPR, art.9 (2)). Suspects are entitled to explain to the instructing magistrate arguments that may support their defence before they are arrested (CCP, s.38 (1)). Detention can only occur when "there are serious indications of guilt." It can only be extended so long as the public interest and the requirements of the investigation require (CCP, s. 41);
- provide adequate compensation for those found to have been detained unlawfully and acquitted by either the ordinary or *Gacaca* jurisdictions;
- take measures to protect the independence of the judiciary at all levels and ensure that judicial officials are able to carry out their functions independently and without interference;
- investigate all allegations of human rights violations committed by agents of the state. Those suspected to be responsible should be brought to justice in trial which meets internationally recognized fair trials standards, but which excludes the death penalty. The methods and findings of the investigation should be made public;
- investigate impartially, independently and thoroughly all human rights abuses, including those committed by the RPF, during the periods covered by Rwanda's genocide legislation. Accountability for human rights violations cannot be one-



sided. This lack of accountability for human rights violations committed by its own forces undermines the government's words and actions regarding the need to end to the culture of impunity and to achieve national reconciliation;

- publicly denounce all allegations of human rights violations and abuses whenever they occur – including by government authorities and state security forces – to help restore faith in the government's will to respect human rights. It needs to make clear to all sectors of society, including its own state security forces, that human rights violations will not be tolerated;
- implement all international human rights treaties ratified by the Rwandese government;
- fulfil its obligation to file periodic reports to the relevant international human rights bodies established under the treaties to which it is a party;
- ratify the following United Nations human rights treaties: the First and Second Optional Protocols to the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

#### **IX(2). Recommendations to civil society**

Amnesty International recognizes the contribution that Rwandese civil society can make with respect to the fairness of the *gacaca* hearings and the overall improvement of the Rwandese human rights record. This contribution requires Rwandese to:

- participate fully and honestly in *gacaca* proceedings;
- respect the rights of all parties to express themselves and fully present their case during the *gacaca* hearings;
- promote an atmosphere of transparency, peacefulness and honesty;
- denounce and report to authorities and monitoring bodies any actions that impinge on the fairness of *gacaca* proceedings;

Amnesty International further urges local NGOs and groups within civil society to obtain official authorization to observe *gacaca* proceedings. Observations of *gacaca* hearings that fail to guarantee minimum international fair trial standards should be reported to the relevant authorities and made public.

**IX(3). Recommendations to the international community**

Amnesty International recognizes the human rights concerns of members of the international community, particularly those who are funding or otherwise supporting the operation of the *Gacaca* Jurisdictions. Amnesty International requests members of the international community to:

- use their political influence and financial resources to ensure that the *Gacaca* Jurisdictions respect international minimum fair trial standards;
- continue to assist the Rwandese judiciary through the provision of material and human resources, including legal experts at all levels to supplement existing national resources and to help improve their competence, independence and impartiality;
- examine ways of providing increased support for local human rights organizations;
- establish and maintain pressure on the Rwandese government to investigate allegations of human rights violations and to bring to justice those suspected to be responsible. It should request the Rwandese government to provide regular and up-to-date information on action taken to prevent human rights violations, details of on-going investigations and judicial proceedings against suspected perpetrators.